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Memorandum to Clients

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For incentive auctions, a great leap forward

Congress Opens Door for Spectrum Repurposing, Incentive Auctions

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After more than a year of back-and-forth, our friends on Capitol Hill have finally come to terms on a plan to encourage – through "incentive auctions" – the so-called "repurposing" of spectrum now occupied by TV broadcasters to make it available for wireless broadband services. Snuggled in the middle of the payroll tax cut extension act, the long-awaited spectrum auction authority has been enacted by Congress and signed into law by the President.

(In signature Washington style, the curiously-named "Payroll Tax" bill – formal name: the Middle Class Tax Relief and Job Creation Act of 2012 – dedicates a mere three sentences to tax issues and more than 250 to other matters, like Medicare reimbursements, unemployment benefits, federal employee retirement rules . . . and the federal spectrum policy and telecommunications funds.)

Title VI of H.R. 3630 of the Act includes the particular provisions authorizing incentive auctions of broadcast spectrum and creating an interoperable public safety network.

The good news is that most, but not all, parties with some stake in the game received at least part of what they were hoping for. Of particular interest to broadcasters: the act requires the FCC to make "all reasonable efforts" to preserve existing coverage of TV stations; prohibits the involuntary moving of broadcasters from UHF to VHF, or from high-band VHF to low-band VHF; provides for a one-time auction and a relocation fund of $1.75 billion; and requires coordination with Canada and Mexico on border concerns.

The bad news, at least for low power TV licensees: the definition of "broadcast television licensee" for the purposes of incentive auctions is limited to full-power television stations and "Class A" television stations. LPTV licensees get only a single provision stating that nothing alters their spectrum usage rights. That language will provide little comfort to some in view of the secondary nature of LPTV operations. Still, the language can be cited by LPTV interests as a Congressional directive to the FCC not to ignore the fate of LPTV stations if and when the TV broadcast spectrum is truncated.

Also of note:

- Stations that agree to forgo reimbursement for relocation costs may make flexible use of their spectrum, including non-broadcast uses, as long as they continue one free television program stream. It isn't clear how such flexible modulation schemes can be implemented consistent with maintaining one free TV program stream, unless the free stream need not be in ATSC format – that presumably is among the details the FCC will have to sort out. Note that the act speaks only of such flexible use as an alternative to relocation reimbursement costs; it says nothing about such use either by stations that do not relocate and thus can't claim relocation costs, or by LPTV stations that are not entitled to reimbursement under the act. Whether flexible spectrum use by ***all*** TV broadcasters will be a possibility remains to be seen.
- Stations that agree to share a channel retain their current cable carriage rights.
- No stations may be permitted to move from VHF to UHF unless they filed a request by May 31, 2011, so most VHF DTV stations will remain in VHF.
- Stations' rights to protest license modification under this bill, otherwise available under Section 316 of the

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Commission looks to thin the herd

First Steps Toward TV Band Clearing Start

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With the spectrum auction legislation now in effect (*see* related story on Page 1), the FCC is turning to the task of clearing TV spectrum for wireless broadband. As we all know, that will involve some shuffling, since full power and Class A television stations have rights as *primary* spectrum licensees and must therefore be accommodated somewhere on the band.

But the auction legislation specifically recites that it does ***not*** change the status of Low Power Television stations, which presumably continues their ***secondary*** status. That gives the Commission a lot more flexibility in dealing with LPTVs because it does not have to take LPTVs into account when it plays chess with full power and Class A channel assignments. While LPTVs will likely be given an opportunity to find, and file for, some alternate channel, they may need good luck to find one in the anticipated cramped condition of the post-repurposing TV band.

So, from the Commission's perspective, the chore of repacking existing stations would probably be much easier if Class A stations could be downgraded to LPTV status.

Where there's a will, there's a way: the downgrading effort has begun.

Last year, the FCC started checking its own files to see whether Class A stations had been filing their quarterly Children's TV Reports (FCC Form 398). Licensees who hadn't filed their reports received inquiry letters from the Commission in March, 2011. Follow-up inquiries to licensees who didn't respond to the March letter were sent in August. Now the FCC has proposed to revoke the Class A status of 16 stations that neither responded to the FCC letters nor filed their Children's TV Reports. (We've included on our blog – www.CommLawBlog.com – a link to one of the 16 "Orders to Show Cause" issued; the other 15 are essentially identical to that one.) If the threatened downgrades are implemented, the stations won't be shut down, but will be downgraded to LPTV status. That may or may not end up as a one-way ticket to the gallows in light of the fact, noted above, that a downgrade to LPTV status could ultimately cause the LPTV to become a station without a channel as a result of the spectrum repurposing effort.

At least some Class A stations who received the Commission's inquiries *did* respond and *did* bring their Children's TV Reports up to date. As far as we know, involuntary downgrades have ***not*** as yet been proposed in any of those situations, but the 16 stations singled out so far may just be the beginning of a larger band-clearing initiative by the Commission.

Experienced FCC licensees know that it is never a good idea to ignore an inquiry from the agency. And of course, failure to file required reports is inviting trouble. Class A stations should be careful to do their paperwork within 10 days after the end of each quarter:

- File a Children's TV Report on Form 398 on the FCC's website, with a paper copy in the station's public file.
- Place a list of significant community issues and responsive programs in the public file.
- Place in the public file records sufficient to demonstrate compliance with limits on commercial matter in children's programs.

Class A stations must also place in their public file sufficient documentation to demonstrate compliance with the requirement that they broadcast 18 hours a day (including at least three hours of locally produced programming per week), although there is no specific requirement to renew this documentation every calendar quarter.

Class A licensees derive important regulatory benefits from their status – the additional measure of protection accorded them in the spectrum auction law may be the most important such benefit. It is only a matter of common sense that routine steps – including regular filing of required reports – should be taken diligently to protect those benefits.

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Super Bowl® bid re-buffed

FCC Declares Terry an Ineligible Receiver . . . For Now

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With time on the clock winding down, the FCC threw the flag on self-proclaimed presidential candidate Randall Terry. Ruling him ineligible (on a couple of counts), the Commission rejected Terry's effort to force Chicago's WMAQ-TV to sell him advertising time during its carriage of the Super Bowl®.

Terry's attempted time-buy in support of his supposed candidacy raised again an issue that has popped up in recent political campaign seasons: how are broadcasters supposed to deal with self-proclaimed candidates for federal office looking to buy advertising time during which they can address controversial content – in Terry's case, abortion – free from any editorial control by the station. In its decision released barely 48 hours before kick-off in the Big Game, the FCC provided a little guidance on this matter, and a reprieve for stations faced with a difficult decision about airing such advertising during the Super Bowl®.

The battles over controversial candidate advertising are far from over.

Disputes regarding the broadcast of controversial political advertisements arise almost every election year as a result of longstanding statutory and regulatory requirements that stations provide "reasonable access" (*i.e.*, sell advertising time) to "legally qualified candidates" for federal office. Under these rules, if a bona fide federal candidate wants to buy time on a station, the station must sell the candidate some ad time. And importantly, the broadcaster cannot edit or censor the content of the advertising that candidate chooses to air.

In the current election cycle, Terry – an anti-abortion advocate – has attempted to take advantage of these rules. Claiming that he is federal candidate, he invokes the "reasonable access" requirement in demanding time to broadcast his political advertisements, which include graphic images of aborted fetuses. Most notably, presumably to garner the maximum number of eyes, he tried to buy time during the Super Bowl®.

While a number of stations agreed to sell him spot time, WMAQ-TV, Chicago's NBC affiliate (and, therefore, the local Super Bowl® outlet this year), refused. Terry filed a complaint with the FCC on Monday, January 30. He asked the Commission to force the station to carry his advertisements. The FCC, in something approaching record time, released a decision on Friday, February 3, denying the complaint on two grounds.

First, the FCC agreed with WMAQ-TV that Terry had not made the necessary "substantial showing" that he was a legally qualified candidate. Under the FCC's rules, to take advantage of the rules requiring "reasonable access" for legally qualified candidates, the "candidate" looking for access must make a "substantial showing" that he or she is in fact a bona fide candidate. In addition to having satisfied the legal qualifications for the office he/she claims to be seeking, the "candidate" must also demonstrate that he/she has engaged in some campaign activities, such as speeches, distributing literature, etc.

In its decision, the FCC concluded that Terry failed to make this showing, either in his initial request to WMAQ-TV or in the information he provided to the FCC. According to the Commission, Terry failed to (a) show where he distributed campaign literature or (b) demonstrate that he campaigned in a substantial portion of the state of Illinois. The Commission also acknowledged a letter submitted by the Democratic National Party stating that Terry did not qualify as a bona fide candidate under Democratic Party rules, and therefore could not claim to be a candidate for the Democratic primary. The FCC's decision does ***not*** definitely state that the DNC's letter in fact prevented Terry from being a legally qualified candidate. However, the decision clearly suggests that WMAQ-TV could reasonably consider the DNC's letter as a factor undermining Terry's effort to show that he was, in fact, a bona fide candidate.

The second basis for the Commission's decision was independent of the first. The FCC concluded that even if Terry *were* a legally qualified candidate, he would not be entitled to purchase advertising time during a specific program – in this case, the Super Bowl®.

The Commission has long held that the "reasonable access" requirements do not entitle candidate to request ad placement during specific programs. At least in part, this arises from the interplay of the reasonable access mandate and the "equal opportunity" mandate, which requires that if a station sells time to one candidate, it must sell equivalent time to that candidate's opponents.

In Terry's case, the Commission recognized the obvious: the Super Bowl® occurs only once a year, it enjoys extremely high audience ratings, and there is little or no advertising availability at the last minute. Because of those factors, it would have been virtually impossible for WMAQ-TV to afford to other candidates advertising opportunities equivalent to time during the Big Game. Accordingly, the Commission concluded that WMAQ-TV's refusal to sell time to Terry was not unreasonable, regardless of his qualifications as a candidate.

We are sure that the battles over controversial candidate advertising are far from over, but at least for the 2012 Super Bowl®, the final whistle appears to have blown.

Audio Division questions translator hops . . . literally

Last Tango in Translator-Land?

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The FM Translator Tango. Always a complicated dance. Some may have figured that it was a harmless pastime, a no-lose bet with zero downside and nothing but upside.

They may have figured wrong, as a recent Audio Division letter demonstrates.

What's the Translator Tango? It's the dance in which enterprising FM translator owners hop their stations across significant distances to where they are more useful and more valuable. It's a slow, gradual dance that uses a series of rule-compliant minor modification applications. The choreography: Starting with a construction permit specifying service to Nowheresville, the licensee moves the permit to Better Market. Better Market is invariably far away, so far that, under the Commission's "major change" rules, the licensee could not ordinarily propose simply to move there in one giant leap. So the dance consists of a series of incremental steps, or hops, each moving the licensee farther away from Nowheresville and closer to Better Market.

That's the type of language the FCC uses when it's gunning for someone's license.

Each incremental step involves a number of gyrations. The licensee has to file an application for a new construction permit specifying modified facilities. The Commission has to grant that permit. The licensee then has to construct the modified facilities and file a license to cover them. Then it's supposed to go on the air from that location. The FCC follows by granting the license. Then the process starts again. Repeat as necessary to get to Better Market.

We described this process in less terpsichorean terms in the September, 2011 *Memo to Clients*. As we reported then, the FCC staff had signaled its great displeasure with the process of moving translators through a series of minor modification applications. You think? In a September 2, 2011 letter, the Audio Division put it about bluntly: "We believe the filing of serial modification applications [for FM translators] represents an abuse of process."

Harsh, but perhaps not totally daunting to the die-hard hopper.

That's because the September, 2011 ruling technically didn't involve a serial hopper. Rather, it involved a translator applicant's request for waiver of the "major change" rule to allow it to make one big leap to its desired location. That waiver was granted because, among other factors, the applicant did not have a history of filing multiple minor modification applications.

But the Division's most recent letter *does* involve a minor "mod" frequent filer. The target of the letter has filed a series of six applications, the overall arc of which suggests an intent to move its FM translator from Beloit, Wisconsin to the Milwaukee market. The letter uses tough language: the Media Bureau is "investigating potential statutory and rule violations and related instances of potential misrepresentation and/or lack of candor". That's the type of language the Commission uses when it's gunning for someone's license, rather than gently correcting a wayward licensee's ways.

The letter directs the target to provide within 30 days a whole lot of information regarding its series of six modification applications – five of which had been granted previously.

For ***each*** *hop*, the target must state whether it had "reasonable assurance" of the availability of the transmitter site specified, and it must provide documentation backing up any claim of availability. Then it has to report, with respect to each location:

- How long the translator actually was on the air;
- What primary station was being rebroadcast and whether the primary station's licensee had granted permission to rebroadcast; and
- The precise period of time the translator was silent for 30 days or longer at each location, the reason for that silence and an explanation for any failure to notify the Commission of the translator's silence.

The Division's letter also calls on the target to identify the location it ultimately intends the translator to serve and the primary station that would be broadcast. All correspondence, engineering studies and other documents regarding relocation of the translator from Beloit to that target location (or any other community) must be handed over.

Rumors abound that similar investigatory letters are in the works for other licensees who have evidenced "serial hopping" tendencies. Whether any of this sleuthing leads the Media Bureau to designate one or more translator licenses for revocation hearings remains to be seen. But the mere possibility of such a fate may have been enough to cause a number of translators applicants to leave the dance floor *tout de suite*: a quick look at CDBS indicates about a dozen FM translator applications have been dismissed since the date of the Division's latest letter. Coincidence? You make the call.

Stay tuned to see if the dance continues or if the dancers call it a night.

The June 30, 2012 deadline still looms

FCC Addresses CAP-to-SAME Conversion, Other EAS Issues

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In January, the Commission released its Fifth Report and Order (*5th R&O*) in the proceeding designed to drag the Emergency Alert System (EAS) into the digital era. With the June 30, 2012 deadline for CAP-compliance (more on that below) fast approaching, the Commission's action came none too soon.

The *5th R&O* is the latest in a series of decisions stretching back five years. As we have described in earlier posts, the goal is a digital emergency alert system that can operate across virtually all electronic communications media, including broadcast, cable, wireless devices and the Internet. The new system has been dubbed the Integrated Public Alert and Warning System (IPAWS).

A keystone of IPAWS is the Common Alerting Protocol (CAP). That's "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." In the old days, the public safety folks had to rely on the broadcast EAS system to get emergency warnings out to the public in harm's way. 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.

Radical change does not come easily, especially true when you have two federal agencies working on the project.

Welcome to Next Generation EAS.

Such radical change does not come easily. That's especially true when you have not one, but two federal agencies working on the project. IPAWS is being established by the Federal Emergency Management Agency (FEMA), which is responsible for setting many, if not most, of the relevant technical standards. But while FEMA may be setting the standards, those standards have to be implemented and enforced by the FCC, which regulates most of the facilities which will actually deliver the alerts to the public.

FEMA announced the CAP standards in September, 2010. The FCC had previously decided that, once the CAP standards were on the books, EAS participants would have 180 days in which to assure themselves the capability of receiving and converting CAP-formatted alerts. That initial deadline was extended a couple of times; it's now ***June 30, 2012***.

The *5th R&O* resolves a raft of practical questions raised in the Third Further Notice of Proposed Rulemaking issued last May. A central focus: how to overlay the CAP-receiving/converting requirement onto the "legacy" EAS system? Recognizing that the tried-and-true EAS system has worked reasonably well for decades and affords important redundancy to the IP-based CAP approach, the Commission opted ***not*** to scrap EAS. Instead, the Commission is requiring that EAS participants be able to receive CAP-formatted messages, convert the essential information to traditional EAS protocol (known as SAME – Specific Area Message Encoding), and transmit that information promptly to the public through the EAS "daisy-chain" system.

But CAP and SAME are two completely different animals. SAME is the analog system historically used by the National Weather Service for storm alerts. CAP is a far more sophisticated digital system which permits the transmission of information in various forms – audio, video, Internet links, etc. To convert from CAP to SAME, EAS participants will have to conform to the procedures set out in the Implementation Guide developed by the EAS-CAP Industry Group (ECIG). (The only exception: text-to-speech conversion. The FCC is concerned about the accuracy of that technology. Accordingly, no such conversion capacity is required.)

Before you can convert CAP to SAME, though, you first have to receive the CAP-formatted alerts. EAS participants will be required to monitor the FEMA IPAWS system for ***federal*** CAP-formatted alert messages. They can use RSS, ATOM or whatever other interface technology may be adopted by FEMA to interface with IPAWS. (While the integrated alert system is designed to allow for state-issued emergency alerts, current technical issues have prompted the FCC to relieve EAS participants – for now, at least – from having to monitor CAP-formatted alerts initiated by state governors.) Once the monitor receives an alert, it must convert it to a SAME-format message and get it transmitted down the line.

To do that, EAS participants will need the right gear, which happens to be an important element of the *5th R&O*.

EAS participants have some choices on the equipment front. They can toss their old-fashioned EAS equipment

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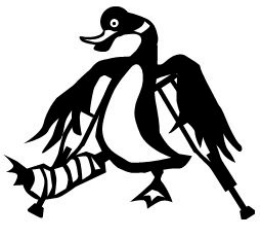

New tower rules, for the birds

Revised Registration Regimen Ready (But Not Yet In Effect)

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It looks like new bird-friendly procedures for proposed tower construction could be with us by summer. If you're thinking about building a tower 200 feet tall (or taller) – and especially if you're planning to build something taller than 450 feet – you might want to get that proposal on file sooner rather than later. The longer you wait, the more likely it is that you'll end up subject to considerably more burdensome processes.

The new procedures have been years in the making. (We previewed them in last April's *Memo to Clients*, shortly after the Wireless Bureau solicited comments on a preliminary version.) They arise from concerns raised by a number of conservation groups (*e.g.*, the American Bird Conservancy, the National Audubon Society) who urged that the Commission should afford more opportunity for public comment about proposed tower construction. According to the conservation groups, towers pose risks to birds (particularly migratory birds).

Accordingly, the groups (with a boost from a 2008 decision of the U.S. Court of Appeals for the D.C. Circuit) have pressed the Commission to modify its Antenna Structure Registration (ASR) program. Those chickens will soon be coming home to roost.

Anticipated *tower construction subject to the ASR program must be brought to the Commission's attention before any application is filed.*

Under new rules adopted last December (but which – as explained below – have not yet taken effect), anticipated tower construction subject to the ASR program must be brought to the Commission's attention *before* any application is filed. That is, before formally applying for an ASR (much less for the particular RF facilities to be installed on the to-be-built structure), prospective applicants must first submit a partially completed Form 854 (the standard ASR application form). That will include information regarding the type of tower proposed and the lighting that will be used. The prospective applicant must also provide local notice of the filing in a newspaper or through "other appropriate means."

Once filed, that partial Form 854 will be available for public review and comment for at least 30 days on the FCC's ASR website. Commenters may request that the tower proposal be subject to additional environmental review. (The tower proponent is entitled to respond to any such request.) The Commission will then evaluate the filings. If the Commission concludes that no additional review is necessary, the tower proponent will be allowed to submit a complete Form 854. But if additional review is found to be warranted, the proponent will have to submit an Environmental Assessment (EA) showing in detail why the proposed tower will not have a significant environmental impact.

If an EA is required, it, too, will be posted on the Commission's ASR website and subject to public comment, although no second local notice will be required. (If a tower proponent determines on its own, prior to filing the partially completed 854, that an EA is required, that EA is to be submitted with the partially completed Form 854 at the beginning of the process.)

The process outlined above will cover *any* applications for new towers that require ASRs. Administrative modifications to ASRs (*e.g.*, changes in ownership or contact information) will *not* be subject to the new provisions. Also exempted will be replacement of any existing tower with a tower which (a) has identical physical characteristics and (b) is located within one second of latitude and longitude from the original tower.

In addition to new towers, the partial Form 854 approach will be required for some, but not all, modifications to existing towers (including collocation of new antennas on existing towers). Generally, if a modification does not involve a "substantial" increase in the size of the tower or any new construction or excavation more than 30 feet beyond the existing tower, the new provisions will *not* apply. As used in the new processing rules, the concept of "substantial" changes will be defined as it is in the Commission's Nationwide Programmatic Agreement for Review of Effects on Historic Properties (NPA). For readers who haven't brushed up on their NPA definitions recently, "substantial" changes include (but aren't necessarily limited to) height increases of greater than 10 percent, and increases in the width of a tower by more than 20 feet.

Changes in the lighting used on an existing tower may also be subject to the new process. In its Order, the Commission has adopted a three-tiered system of "preferred" lighting styles, running from "most preferred" (*i.e.*, no lights at all) to "least preferred" (*i.e.*, red steady lights),

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FHH - On the Job, On the Go

Frank Montero, fresh from attending the Broadcasters Foundation of America's Golden Mike Awards dinner at the Plaza in New York on February 27, will be moderating the "Legal Lowdown" panel at the Radio Ink Hispanic Radio Conference in San Diego on March 22.

Frank Jazzo, **Michelle McClure** and **Christine Goepp** will be attending Satellite 2012 in Washington, D.C., March 12-14. And at the same time, **Frank J** (how does he do it?), along with **Frank M** and **Scott Johnson**, will be attending the NAB's State Leadership Conference March 12-14 in Washington, D.C.

Kevin Goldberg will present a webinar on "Legal Issues Affecting Newsgathering" for the National Press Foundation at noon on March 20. (Kevin asks us to point out that admission is free to anyone who wants to register via www.nationalpress.org.)

Scott will conduct a Television License Renewal Seminar for the Alabama Broadcasters Association on March 24 from 9:00 a.m. – 12 Noon at the Cahaba Grand Conference Center in Birmingham. The seminar is the first of a day full of events culminating in the sixth annual ABBY Awards Dinner.

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with anything else falling in the middle. Changes from a more preferred style to a less preferred style will be subject to the partial Form 854 process, while "improvements" (*i.e.*, changes that would result in a more preferred lighting arrangement) will not.

Also exempt from the new processing rules are towers located on federal land, as long as the agency responsible for the land will assess the proposed tower's environmental impact.

Finally, the Commission cautions that ***any*** application – even one that does not require an ASR and thus does *not* involve construction subject to the new processes – can be challenged based on claimed environmental impact.

In a separate but related change adopted in the same order, the FCC concluded that all proposals for towers over 450 feet must be accompanied by an EA to be submitted with the partially completed Form 854 at the beginning of the process. Public notice of the filing of the EA must be provided.

When do the new procedures kick in? It's hard to say. Because they involve "information collections", they must first be approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act. The process for securing that approval has begun, but the initial phase of that process won't wrap up before early March, and the second phase will likely stretch into April, maybe even May. Until OMB blesses the new rules, they can't take effect.

Pending applications for ASRs or service-specific applications will not need to be amended to address the new requirements.

And while we don't want to confuse things even more than they may already be, we are constrained to point out that the new procedures described above will – even once they take effect – be essentially non-permanent, interim measures. That's because the Commission has not yet completed its full assessment of the environmental impact of its own ASR program (the Programmatic Environmental Assessment, or PEA). Depending on the outcome of the PEA, the Commission may need to prepare a further Environmental Impact Statement, and may adopt new processing rules based on the results of the PEA and/or the EIS.

But the completion of the PEA and/or EIS and the adoption of permanent rules are not likely to occur in the near term. (Frame of reference: the Commission initiated its review of the impact of the ASR process on migratory birds not quite a decade ago, and it was ordered by the D.C. Circuit to proceed "with dispatch" in wrapping that proceeding up four years ago. Time, it would seem, is not of the essence here.) In the meantime, the procedures adopted last December and outlined above will have to be satisfied, once they become effective.

When the new processing rules do become effective, they will be applied only prospectively. Any pending applications for ASRs or service-specific applications will not need to be amended to address the new requirements. Since the new ASR procedures, once they take effect, will probably add significant delay to the FCC's processing of applications, folks planning to build a tower subject to the ASR rules might want to get their applications filed as quickly as possible, to avoid that additional delay.

(Continued from page 1)

Communications Act, are suspended.

- Nothing in the bill is intended to "prevent" the FCC from implementing "white space" rules, but nothing requires "white space" rules either. The new law does provide for unlicensed use in the 5350-5470 MHz band, but only if (a) it is determined that licensed users will be "protected by technical solutions", and (b) the "primary mission" of federal spectrum users in that band won't be "compromised". An NTIA study of the impact of unlicensed use in the 5.4 and 5.9 GHz ranges will be conducted. Also, unlicensed use will be permitted in "guard bands [that] shall be no larger than is technically reasonable." What the FCC determines is "technically reasonable" will be interesting to assess when it gets around to implementing this section.

- Public safety operators using TV Channels 14-20 in the top 10 markets will have to give those frequencies back after 11 years.

- No mention is made of the 1755-1780 MHz band, the portion of the spectrum now occupied by government users and among the most coveted by prospective mobile broadband operators.

One major question left unanswered is precisely how much money is likely to be paid to any TV licensee opting to make its spectrum available for repurposing.

At least three different repurposing scenarios are possible. A TV licensee could simply turn in its spectrum, essentially bowing out of the over-the-air TV business. Or it could agree to move to a different channel. Or it could choose to buddy-up with another licensee, sharing a common channel. To determine what the pay-out will be, the Commission will have to conduct a "reverse auction" in which any licensee interested in repurposing may "submit bids stating the amount it would accept for voluntarily relinquishing some or all of its broadcast television spectrum usage rights".

Meanwhile, the Commission will also conduct a "forward auction" to sell off the spectrum made available by the repurposing. The proceeds from that auction will provide the pot from which payments will be made; the amount to be paid to participants will be based on the results of the reverse auction, although it's not clear from the act how much of any participant's reverse auction bid will be paid out to that participant. To avoid potential embarrassment, the reverse auction may not be held unless there are at least two participants; additionally, the pay-out to TV broadcasters may not exceed the proceeds of the forward auction.

So while the outlines of the auction processes have been set in very general terms, there remain a ton of nitty-gritty details that will have to be resolved before any of this becomes reality.

On the non-broadcast side, Congress decided the FCC may not exclude participants from the "forward auction", which means that the Big Guys (*i.e.*, AT&T and Verizon) will be permitted to bid. However, the FCC may implement policies to promote competition, presumably authorizing limits on spectrum holdings (either nationally or on an individual market basis) by any one entity. This reflects the outcome of a battle between those (mostly Democrats) who sought to provide the FCC latitude in formulating auction rules and others (mostly Republicans) who were less sanguine about the impact of such policy leeway for the Commission.

In addition to authorizing the voluntary auctions, the act reallocates the 700 MHz D-block to public safety and creates a Public Safety Trust Fund of up to $7 billion to construct a national public safety network. While this comes more than a decade after the September 11 attacks, this is a case of better late than never. The new network will be managed by a First Responder Network Authority, created within the National Telecommunications and Information Administration – a compromise arrangement that was not specifically proposed by any interested party.

Estimates range from four, to five, to six years, possibly, before any actual availability of spectrum.

So after much anticipation, incentive auctions have now been authorized – but what does it all mean?

The FCC now must develop the rules for the auction. With the number of practical loose ends left unresolved in the act, that poses a major chore for the Commission. And once that's done, we'll have to see who among the broadcasters actually chooses to participate. Then who will bid? Time will tell. And time is a key consideration: estimates range from four, to five, to six years, possibly, before any actual availability of spectrum. Indeed, the bill recognizes how long all this will take: under the act, auction proceeds are not required to be deposited into the Treasury until 2022.

Beyond those administrative questions, there are others. What are the chances that efforts will be made to challenge one or more aspects of the auction process in court? For example, what if broadcasters find, after the repacking has been completed, that the FCC did not make "all reasonable efforts" to preserve their coverage area and populations? Or will LPTV players seek judicial remedies for the likely loss of much of their spectrum?

Time, again, will tell.

States' rights? What states' rights?

Congress Requires State/Local Rubber Stamp Approval of Some Wireless Tower Modifications

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In a little noticed section of the landmark Middle Class Tax Relief and Job Creation Act, Congress has thrown the wireless industry – or, more specifically, the folks who build towers for the wireless industry – a small measure of relief in the on-going struggle to get tower modifications approved and constructed. Buried in a collection of odds and ends dumped, seemingly as afterthoughts, at the end of the law, Section 6409 ***requires*** state and local governments to approve modifications of wireless towers and base stations as long as those modifications don't substantially change the dimensions of the existing structures.

The wireless industry has long complained that local authorities hold up approval of *new* tower construction either out of either misplaced concern for interference issues or simply as a revenue-generating mechanism. That problem has increasingly spread to tower modifications as well.

A maze of different federal agencies have been imposing a farrago of widely varying tower siting application requirements on hapless applicants.

The streamlining of needed approvals is a big inducement to licensees to collocate on existing structures, saving considerable time and money in getting a station up and operating. Most federal rules properly treat minor modifications of existing structures as non-events that require little or nothing in the way of prior approvals. Local authorities, by contrast, have come to see such collocation applications as an additional opportunity to interpose themselves into the process, usually not to the financial or operational benefit of the carriers.

Congress moved to correct this abuse. In Section 6409 it simply pre-empts states and local authorities from being able to deny eligible facilities requests, *i.e.*, requests involving:

- the collocation of new transmission equipment;
- the removal of transmission equipment; or
- the replacement of transmission equipment.

Once the President signs the act into law, these seemingly innocuous alterations of existing structures will be safe from state and local meddling. (The law does leave all applicable environmental rules with respect to such towers in effect.)

At least two questions remain.

First, the legislative history is largely silent as to any basis for the law's pre-emptive action. Normally, Congress is reluctant to pre-empt traditional local prerogatives without having built a strong rationale for the action. Since zoning laws have traditionally fallen within the province of cities and counties, Congress appears to be taking a large step into murky, and potentially dangerous, jurisdictional waters.

Second, this section of the Act applies to "wireless towers and base stations". Neither term is defined here or anywhere else in the Communications Act. Do "wireless towers" include broadcast towers, which of course transmit their content wirelessly? If so, this would add a large set of towers to the protected mix. Some broadcast towers, of course, simultaneously serve, or can serve, as towers for wireless communications carriers. The legislative history suggests that Congress had in mind "cellular towers" when it referred to "wireless towers", but the law itself includes no such limitation. The scriptural exegesis of this point will no doubt put many a lawyer's offspring through private school in the years ahead.

Section 6409 also extends another apparent helping hand to the tower industry. It provides that agencies of the federal government "may" grant an easement or right-of-way to applicants seeking to install wireless service antenna structures on federal property. While the thought here was nice, the absence of a mandate to permit the easement (*i.e.*, the critical use of "may" rather than "shall") pretty much leaves such things where they were: in the hands of sometimes quixotic bureaucrats.

The law recognizes that a maze of different federal agencies have been imposing a farrago of widely varying tower siting application requirements on hapless applicants. To rationalize the process, Congress has now mandated the development of a single government-wide form for siting applications and a standard contract for facilities sited on federal property. This seemingly small step could simplify enormously the process of securing rights to construct towers on federal properties.

These modest measures, together with the recent upholding of the FCC's "shot clock" rules, should put at least a small smile on the faces of tower constructors.

(Continued from page 5)

and replace it with a state-of-the-art integrated CAP-capable EAS device. Such new-fangled gear does it all: monitors IPAWS, converts incoming alerts and transmits them in SAME, while also performing all the functions of traditional SAME-based units. But that approach can be pricey and wasteful, particularly if the equipment that would be tossed is still in reasonably good shape.

An alternative that many broadcasters have already embraced is the use of one or another "intermediary" device. These are items that independently monitor IPAWS, convert alerts, and then feed them into existing EAS units for transmission to the public. They generally come in one of two flavors: "universal" intermediate devices that, theoretically, work with virtually all legacy EAS decoders; and "component" intermediate devices that are designed to work only with specific legacy EAS gear. In the *5th R&O* the FCC approves the use of such intermediary devices as a potentially cost-saving approach.

But heads up – there are a couple of catches.

First, the Commission is requiring that EAS participants utilize the enhanced text in a CAP message to provide a visual display (check out Section 3.6 of the ECIG Implementation Guide if you have questions about this). Universal intermediary devices can't perform that function; neither can some (but not all) component devices. The Commission is giving everybody until ***June 30, 2015*** to make sure that their intermediary devices are capable of meeting this requirement. That means that anyone who has opted for a universal device is looking at a mandatory upgrade in the next three years.

New CAP functions (and consequent changes to EAS codes) can be expected.

Second, intermediary devices are subject to certification requirements. Since those requirements are established (in considerable detail) in the *5th R&O*, it's safe to say that devices acquired prior to January, 2012, had not been certified in compliance with the newly-adopted rules. Anyone using such a device should be sure to confirm that it has since been certified.

Third, the Commission emphasizes that reliance on legacy systems (with intermediary devices) may not be as cost-effective as you might think. If the legacy equipment fails and needs to be replaced, the intermediary device may become extraneous. More importantly, the FCC notes that the CAP-based EAS system is still developing, and new CAP functions (and consequent changes to EAS codes) can be expected. Such changes could be incompatible with legacy equipment and related intermediary devices, requiring acquisition of still more gear. By contrast, integrated CAP-capable EAS devices are likely to be more adaptable to such changes, in some instances requiring only a software upgrade to achieve compliance with revised regulations. As the Commission cautions, "there is no guarantee that intermediary or legacy EAS devices will not have to be replaced earlier than integrated CAP-capable EAS devices."

In addition to imposing CAP-compliant EAS equipment and certification requirements, the sprawling *5th R&O* (which clocks in at 96 pages, not counting another 34 pages of appendices) lays out procedures for implementation of the new requirements, and streamlines and clarifies several provisions of Part 11. Some highlights:

No Blanket Waivers: The Commission rejects calls for blanket exceptions to the CAP compliance requirements for small broadcast stations, rural cable systems and the like. But the FCC did adopt a presumption in favor of *individual* waivers for EAS participants located where broadband Internet access is physically unavailable. Any such waiver, though, will be limited to a period of six months (with extensions only if circumstances regarding physical broadband Internet access do not change). The FCC left open the possibility that waivers might be granted where the EAS participant can demonstrate that broadband Internet access is possible but prohibitively expensive.

Streamlining and elimination of outdated and/or unnecessary rules: The Order eliminates several rules regarding the Emergency Action Termination (EAT) event code and Non-Participating National (NN) status, and streamlines the rules governing the processing of Emergency Action Notifications (EAN).

NCE broadcast "satellite stations": Noncommercial radio broadcasters with stations acting as "satellites", rebroadcasting of primary stations, will be deemed CAP-compliant if the authorized main studio of the primary station is compliant.

EAS Operating Handbook: While acknowledging that the current EAS Operating Handbook is, in many ways, irrelevant in the CAP era, the FCC declines for now to relieve EAS participants of the requirement to maintain a copy of the handbook at their facilities while data from the National EAS Test is evaluated. But Sections 11.54(a), (b)(2), and (5)-(8), which relate to the previously eliminated National Emergency Condition, are now deleted from the handbook.

The *5th R&O* covers a lot of EAS ground. While it makes for difficult reading – and the 829 (count 'em, 829!) footnotes don't help in that regard – EAS participants should review it carefully to familiarize themselves with the new and revised rules. The new rules will become effective 30 days after the *5th R&O* is published in the Federal Register, although the requirement of CAP-compliant equipment will kick in on June 30, 2012.

Hey, it's another Memo to Clients Clip 'n' Save Sidebar!

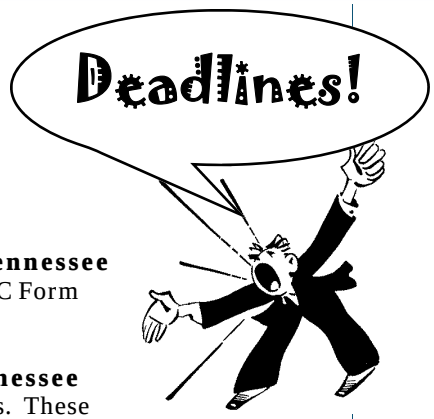
OMG!! 40+ abbrvs?!? YGTBK . . .

If you're an EAS participant, you really ought to read the *5th R&O* described in the article on Page 5. It contains a lot of information that you should be familiar with.

Yes, yes, it's 96 pages long, and it's got another 34 pages of appendices, and it's got 800+ footnotes. We can't do anything about any of that. But we ***can*** provide you with an alphabetical glossary of the abbreviations/acronyms sprinkled liberally throughout the item. We counted more than 40 of them, and that doesn't include the names of commenting parties referred to in the item (*e.g.*, "NAB"). You're on your own when the Commission starts to mash abbreviations together (as in "CAP v1.2 IPAWS USA Profile v1.0"), but our glossary may still simplify your reading experience. Just print it out and keep it handy as you peruse the *5th R&O*.

Brought to you as a public service by the *Memo to Clients*.

AFSK	Audio frequency-shift keying
ANSI	American National Standards Institute
ATOM	Atom Syndication Format
Bureau	Public Safety and Homeland Security Bureau
BWWG	Broadcast Warning Working Group
CAP	Common Alerting Protocol
CMAS	Commercial Mobile Alert System
CSRIC	Communications Security, Reliability, and Interoperability Council
EAN	Emergency Action Notification
EAS	Emergency Alert System
EAT	Emergency Action Termination
EBS	Emergency Broadcasting System
ECIG	EAS-CAP Industry Group
EOM	End of message
FEMA	Federal Emergency Management Agency
FIPS	Federal Information Processing Standards
FSK	Frequency-shift keying
IPAWS	Integrated Public Alert and Warning System
LECCs	Local Emergency Communications Committees
LP1	Local Primary One
LP2	Local Primary Two
LPFM	Low Power FM
LPTV	Low Power TV
Next Generation EAS	next-generation national EAS
NIAC	National Industry Advisory Committee
NIC	National Information Center
NIMS	National Incident Management System
NN	Non-Participating National
NOAA	National Oceanic and Atmospheric Administration
NWS	National Weather Service
OASIS	Organization for the Advancement of Structured Information Standards
PEP	Primary Entry Point
PLAN	Personal Localized Alerting Network
PN	Participating National
RERC-TA	Rehabilitation Engineering Research Center on Telecommunications Access
RMT	Required Monthly Test
RSS	Really Simple Syndication
RWT	Required Weekly Test
SAME	Specific Area Messaging Encoding
SDOC (or SDoC)	Suppliers Declaration of Conformity
SECCs	State Emergency Communications Committees
STEP	Supporting Technology Evaluation Project



March 5, 2012

Quadrennial Review of FCC Ownership Rules - Comments are due in this proceeding (MB Docket 09-182).

April 1, 2012

License Renewal Applications - *Radio* stations located in **Indiana**, **Kentucky**, and **Tennessee** 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 **Indiana**, **Kentucky**, and **Tennessee** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on April 16, May 1, May 16, June 1, and June 16.

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

Television License Renewal Pre-filing Announcements - *Television* stations located in **Maryland**, the **District of Columbia**, **Virginia**, and **West Virginia** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on April 16, May 1, and May 16.

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** 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 **Texas** 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 **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, and **Tennessee** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

April 3, 2012

Quadrennial Review of FCC Ownership Rules - Reply Comments are due in this proceeding (MB Docket 09-182).

April 10, 2012

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the first 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 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.

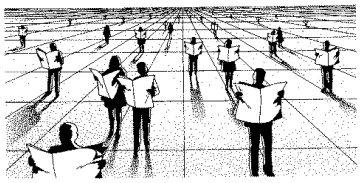
Stuff you may have read about before is back again . . .

Updates On The News

Second "White Space" Database Completes Test – "White space" wireless operation on locally vacant TV channels requires that devices consult a database of users entitled to protection, including broadcast TV stations and some wireless microphones. As we have previously reported, the FCC has authorized ten companies to provide and operate those databases. The second such company, Telcordia Technologies Inc., recently completed a 45-day test that began in December. The FCC is currently considering comments filed in response to the test results.

In the meantime, white space operations began in late January in Wilmington, NC, using a database provided by Telcordia's competitor, Spectrum Bridge, the first to complete testing.

There are still eight database providers to go. We'll keep track so you don't have to.



The first test of Section 73.2090 – Back in 2007, in its wide-ranging Diversity Order, the Commission established Section 73.2090, which bans discrimination on the basis of race, color, religion, national origin or sex in the sale of commercial broadcast stations. Since then, that rule has not come into play in any reported decisions – until now. It's probably safe to say that the case in which it arose was not exactly what the Commission had in mind.

At issue was not a full-service radio or TV station, but rather an FM translator station. Section 73.2090 does not on its face appear to apply to translators, but what the heck – presumably the Commission figured that allegations of improper discrimination in the sale of *any* licensed facility should be checked out. The allegations were, however, less than flimsy. According to a petitioner (who described himself as a minority individual), he had submitted the "highest competitive offer" to the translator licensee, only to learn that the licensee had instead agreed to sell the station to a non-minority buyer for $25,000, half the petitioner's offer. This, according to the petitioner, demonstrated just the kind of racially discriminatory "predisposition bias" that Section 73.2090 prohibits.

Not so fast, said the Audio Division. As it turns out, the licensee was able to prove that it had entered into its $25,000 deal three weeks *before* the petitioner made his offer. Since the licensee had thus accepted its deal without even knowing about the petitioner's offer, it's hard to say that that acceptance was discriminatory. And, having accepted the earlier deal, the licensee was also not in a position to renege on that deal in favor of the petitioner's late-arriving offer (unless, of course, the licensee felt like getting sued by the jilted first buyer).

There was more. Reviewing the petitioner's offer, the Commission noticed that the petitioner had *not* proposed a straight-up $50,000 purchase of the license. Rather, he had merely proposed a "programming agreement" which would have allowed him (at $1,200/month) to use the translator to rebroadcast another station. As part of that programming agreement, the petitioner would have had an option to acquire the translator after one year for $50,000. The Commission correctly recognized that an option is not the same as an offer to purchase.

Under these circumstances, the Commission declined to look any further. Future petitioners seeking to raise discrimination claims will have to present considerably more than this particular petitioner did but, given the gaping holes in the case he presented, that's not a particularly high hurdle.

In Memoriam: Nai Tam – We are saddened to report the loss of another member of the FCC family. We have learned that Nai Tam, long-time engineer at the Commission, lost his two-year-plus battle with brain cancer on January 23. Nai is familiar to communications professionals in most regulatory areas, as he served in the Media Bureau, the Enforcement Bureau, the Office of Engineering and Technology and the International Bureau. He started at the Commission's Norfolk Field Office in 1974, but soon moved to the then-Broadcast Bureau, processing AM and FM applications in the Aural Facilities – New and Changed Branch. Most recently he worked in the Media Bureau's Video Division, helping the TV industry through the 2009 digital transition.

Nai had a firm grasp of all details, obvious and subtle, of the Commission's technical rules and processes. More importantly, he was able to explain those details to us non-engineers who needed more than a little tutoring in engineering esoterica. He offered those explanations patiently and graciously. If something more than an explanation was necessary to help resolve issues, he took care of things without fail and without delay, often coming up with creative solutions in the process.

Nai served both the agency and the communications industry well, with efficiency, good humor and personality. We extend our condolences to his family. We will miss him.

Donations in his memory may be sent to the Neuro-Oncology Research fund for the Memorial Sloan-Kettering Center. An account has been created in memory of Nai Yum Tam.