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Memorandum to Clients
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FCC fine-tunes, but whether the picture is clearer remains to be seen

Rural Radio Rules Revisited (Again)

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In early 2011, the FCC shook up the radio world by adopting dramatic changes to policies governing the extent to which radio stations might be able to locate (or relocate) themselves in or near larger urban areas. In a recently-released document we'll refer to here as *Recon II* (official title: "Second Order on Reconsideration"), those revised policies have now been tweaked (a) to exempt a limited number of applications, and (b) for those still subject to the policies, to change the way certain things are handled. Depending on any proponent's particular circumstances, those changes might or might not make it harder for the proponent to get FCC clearance to change its community of license.

The revised "rural radio" policies (which appeared in a document we have referred to in previous articles as the *Second R&O*) were described in detail in the lead article in the March, 2011 *Memo to Clients*. If you haven't read that lately, you should take the time to read it now. (You can find it at http://www.fhhlaw.com/resources/Memo/2011/0311.pdf.)

In a nutshell, the 2011 changes imposed a new presumption ("the *Presumption*") that makes it considerably more difficult to modify an AM or FM station in any way that would move it into, or nearer to, an Urbanized Area. This, of course, was a disappointment to many entrepreneurs who had spent considerable time and effort designing – and often effectuating – precisely such "move-ins".
The latest tweaks aren't likely to allay that disappointment, except for a relatively small universe of applicants who, thanks to *Recon II*, are now *not* subject to the *Presumption*. You're in that universe if you are:

> an applicant to change community of license and your application was filed before April 20, 2009 (*i.e.*, the date the Notice of Proposed Rulemaking in the *Rural Radio* proceeding was released);
>
> the proponent in an FM allotment proceeding and your petition for rulemaking was filed before April 20, 2009; or
>
> an applicant for a community of license change application or a proponent in an FM allotment proceeding in which a decision on your proposal was released before March 3, 2011 (*i.e.*, the date of the *Second R&O*).

If you're in one of those categories, you're excused and need read no further.

(Note also that the Commission expressed a willingness to waive the requirements on a case-by-case basis – in particular, where equities exist that might call for an applicant to be excused from the new procedures. One example cited by the Commission: a case where the proposed modification is contingent on a modification of another facility that cannot be easily undone due to the subsequent actions of other licensees.)

As for the tweaks to the policy, here's a quick summary of the highlights from *Recon II*:

> ***Tuck* tweaks**. As we previously reported, parties looking to get out from under the *Presumption* can still submit a "*Tuck* showing". Such a showing (named after the 1988 case in which the showing made its regulatory debut) consists of an extensive laundry list of information designed to establish that the proposed community of license really does have an independent need for its own local station. In *Recon II*¸ the Commission emphasizes applicants seeking to rebut the *Presumption* with, *e.g.*, a *Tuck* showing will be given wide latitude to present whatever additional facts they deem appropriate. However, in evaluating such showings, the FCC will place particular emphasis on (a) the degree to which the pro-

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Working to squeeze more wireless microphones into ever-shrinking spectrum

Wireless Mic Users - Listen Up!

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Traditional wireless microphones – the kind you see on TV, big stage shows, and in lecture halls and churches – operate on locally vacant TV channels. But those channels are becoming scarce. The FCC has asked for comment on how to accommodate these microphones in the future.

In the old days of analog TV, there were a lot of TV channels, and the shortcomings of analog receivers meant a lot of those channels in each market could not be used for TV. That left plenty of room for wireless microphones.

The picture began to change in 2009, when the last full-power analog stations went off the air. Because digital TV stations can be packed more tightly than analog stations, the FCC was able to free up 18 channels for other uses, which left fewer empty channels for wireless microphones. Then, a year ago, the FCC approved the first operation of "white space" devices that provide Wi-Fi-like service on some of the remaining vacant TV channels. The FCC reserved two channels in every market for wireless microphones, and provided for additional channels where needed in a complicated set of regulations; but there is no getting around the fact that a lot more devices will be trying to operate in a lot less spectrum. Then, last month, the FCC proposed "incentive auctions" designed to encourage broadcasters to give up still more channels.

Despite the squeeze on spectrum for wireless microphones, we can't do without them – at least so long as we want good audio in our movies, TV, and stage shows. Even the FCC has implicitly acknowledged these devices are indispensable. For decades, it issued licenses for TV-band wireless microphones to just a few categories: broadcasters and broadcast networks, cable TV operators, and movie and TV producers. That's all. Missing from the list are Broadway shows, concert venues, college lecture halls, and your local house of worship. Operation in all such facilities was commonplace, but illegal. Of course the FCC knew about those uses – it even had a wireless microphone in its own meeting room. But even the illegal operations were well managed, causing no interference to TV stations, so the FCC wisely left things alone.

The advent of white space devices, though, brought the need for better control over who uses microphones, and where. Bringing regulation into line with reality, the FCC considered broadening the list of eligible licensees. It also took the unusual step of proposing to legalize previously illegal operation by allowing lower-power wireless microphones to operate as unlicensed devices, under the same basic rules as Wi-Fi and cordless telephones. The power limit would be lower than for licensed wireless microphones, but higher than for most other unlicensed devices, and should suffice for good sound in most halls and churches. That proposed relaxation has not yet been adopted.

Now the FCC is hoping technological advances will solve the spectrum problem. After all, digital TV stations can fit four channels into one analog TV channel; digital cell phones carry twenty times the traffic in the same spectrum as the old analog cell phones. Why shouldn't digital wireless microphones show similar improvement?

But there is a catch. The increased spectrum efficiency in digital TV and digital cell phones comes not from digitizing the signal, but from compressing the signal once it is digitized. And compression adds delay. (To hear the delay, call your cell phone from your wireline phone, put one to each ear, and talk.) A performer using a wireless microphone can tolerate delay of only a few thousandths of a second, which limits the possible compression.

Still, digitizing can help. Analog microphones on the same TV channel have to be spaced well apart, allowing only about six to eight per channel, or else they interact to create unwanted signals. Digital microphones each take up about as much spectrum, but they can be squeezed closer together, so a TV channel can accommodate a dozen or so.

Before it moves further on these matters, the FCC wants to hear from wireless microphone manufacturers, installers, and users. We've included a link to the request for information on our blog (www.CommLawBlog.com.) Comments are due by November 21,

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Calling all communications providers in 150+ counties across 10 states (and D.C.)

DIRS Activated as Hurricane Sandy Makes Landfall

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As Hurricane Sandy barreled ashore, the FCC activated its Disaster Information Reporting System (DIRS) to enable it to monitor damage to broadcast and telecommunications facilities in the wake of the storm. (Note that the activation occurred even though the FCC itself was shut down because of the storm – major props to the folks in the FCC's Public Safety and Homeland Security Bureau for stepping up to shoulder this important responsibility.)

The DIRS is a voluntary, web-based system that communications providers – a universe that includes wireless, wireline, broadcast, cable and Voice over Internet Protocol providers – can use to report "communications infrastructure status and situational awareness information during times of crisis." ***The FCC asked that providers submit their reports starting 10:00 a.m. on Tuesday, October 30, 2012, and every day after that by 10:00 a.m. until DIRS is deactivated.***

Major props to the folks in the FCC's Public Safety and Homeland Security Bureau for stepping up to shoulder this important responsibility.

In particular, the Commission wants to know, among other things, the status of communications equipment, restoration efforts, power (*i.e.,* whether providers are using commercial power, generator or battery), and access to fuel, if they provide service to certain affected areas.

What are those areas? Given the enormous size of Sandy, there are a lot of them. Take a deep breath. Here are the areas the FCC has identified:

Connecticut: Fairfield, Hartford, Litchfield, Middlesex, New Haven, New London, Tolland, Windham

District of Columbia

Delaware: Kent, New Castle, Sussex

Maryland: Allegany, Anne Arundel, Baltimore, Baltimore City, Calvert, Caroline, Carroll, Cecil, Charles, Dorchester, Frederick, Garrett, Harford, Howard, Kent, Montgomery, Prince George's, Queen Anne's, Somerset, St. Mary's, Talbot, Washington, Wicomico, Worcester

Massachusetts: Barnstable, Bristol, Dukes, Plymouth

New Jersey: Atlantic, Bergen, Burlington, Camden, Cape May, Cumberland, Essex, Gloucester, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Salem, Somerset, Sussex, Union, Warren

New York: Bronx, Kings, Nassau, New York, Queens, Richmond, Suffolk, Westchester

Pennsylvania: Adams, Bedford, Berks, Blair, Bucks, Cameron, Carbon, Centre, Chester, Clearfield, Clinton, Columbia, Cumberland, Dauphin, Delaware, Elk, Frannklin, Fulton, Huntingdon, Juniata, Lancaster, Lebanon, Lehigh, Luzerne, Lycoming, Mifflin, Monroe, Montgomery, Montour, Northampton, Northumberland, Perry, Philadelphia, Potter, Schuylkill, Snyder, Tioga, Union, York

Rhode Island: Bristol, Kent, Newport, Providence, Washington

Virginia: Accomack, Alexandria City, Arlington, Caroline, Charles City, Chesapeake City, Clarke, Essex, Fairfax, Fairfax City, Falls Church City, Fauquier, Gloucester, Hampton City, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Manassas City, Manassas Park City, Mathews, Middlesex, New Kent, Newport News City, Norfolk City, Northampton, Northumberland, Portsmouth City, Poquoson City, Prince William, Richmond, Spotsylvania, Stafford, Suffolk City, Surry, Virginia Beach City, Westmoreland, Williamsburg City, York

West Virginia: Berkeley, Jefferson, Morgan

If you're a communications provider in any of those areas, you can submit your update by accessing DIRS at https://www.fcc.gov/nors/disaster/. (You can also look for the e-filing link on the Commission's main webpage (www.fcc.gov) or PSHSB webpage (www.fcc.gov/pshs), but the direct DIRS link is easiest.) If you haven't already signed up as a DIRS participant, you'll be required to provide contact information and obtain a User ID in order to access DIRS.

Communications providers are reminded that Network Outage Reporting System obligations are suspended for the duration of the DIRS activation in the counties where DIRS has been activated.

If you lose internet access, several FCC staff members involved in disaster preparedness have published their

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Seeking judicial supervision à la ASCAP/BMI

SESAC in RMLC's Litigation Sights

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The Radio Music License Committee (RMLC) has sued SESAC in an effort to bring SESAC within the same general judicial constraints as the other two major performance rights organizations (PROs), ASCAP and BMI. According to the RMLC, SESAC (initially founded as the "Society of European Stage Authors and Composers", but since officially shortened to just "SESAC") is violating a number of antitrust laws.

The case pits two somewhat misunderstood organizations against each other.

SESAC, of course, is a PRO, ***i.e.***, an organization which represents song composers and to which broadcasters must pay royalties for the right to perform – over the air and online – the musical works of SESAC-affiliated composers. (Unlike ASCAP and BMI, which are not-for-profit entities, SESAC is a for-profit PRO). Comments I've received about SESAC from a number of broadcasters have tended to be negative, if not flat-out vitriolic. That may be because of significant royalty rate hikes in recent years, or possibly SESAC's perceived reluctance to negotiate or otherwise deal with broadcasters when problems arise. Or maybe it's the fact that SESAC requires radio broadcasters to get a separate license when engaged in webcasting (ASCAP and BMI incorporate webcasting into the existing radio license).

RMLC's claims are strong and inflammatory, but some numbers seem to support them.

The RMLC, on the other hand, seems to suffer from a lack of familiarity about its work among those it seeks to help. The RMLC represents radio broadcasters' interests time and again in major copyright fights in court and before the Copyright Royalty Board, and its does it in the face of some confusion and even criticism as to its activities. But I am still the recipient of not-infrequent calls from clients asking why they are being billed for RMLC services when they're not even RMLC members. (Answer: it's required by law that RMLC gets a cut of the royalties the entire broadcasting industry ultimately pays after it negotiates on the industry's behalf.)

(Author aside: As far as general perceptions of both SESAC and RMLC go, stick with the basic principle that you should not believe everything you hear – as well as the journalistic corollary that, if your mother says she loves you, check it out. A healthy dose of skepticism is always a good thing, even (especially) when the general consensus runs one way. For example, I've had several good experiences with individuals at SESAC, especially when working with me on new media issues. And as for RMLC, I've spoken favorably about Bill Velez and his crew on several occasions and I still can't say enough good things about them. And you can't argue with the RMLC's results, which – at least in their recent negotiations with ASCAP and BMI – garners radio stations savings far in excess of the miniscule amount they're required to pay to RMLC. And any of you who have met Bill Velez know that he is one of the nicest people you'll ever meet in broadcasting or any other industry, always quick to return a call or help you out when you're in a jam.)

Whatever the public impression of the players, we're now looking at ***RMLC v. SESAC***, a court fight initiated by RMLC earlier this month in the U.S. District Court for the Eastern District of Pennsylvania (located in Philadelphia).

The lawsuit alleges multiple violations by SESAC of Sections 1 and 2 of the Sherman Antitrust Act, including horizontal price fixing, a group boycott/refusal to deal, and monopolization. RMLC is asking for a judicial declaration that SESAC's activities violate the Sherman Act. RMLC is also looking for the court to impose on SESAC the same court-overseen-and-approved ratemaking process that has applied to ASCAP and BMI for more than 70 years. (Historical background: ASCAP and BMI were hauled into court in 1941 by the Department of Justice, which claimed that their operations violated the Sherman Act. ASCAP and BMI both entered into consent decrees subjecting them to significant restrictions in their activities and ongoing oversight by the courts. Those consent decrees remain in effect today. SESAC, which was rather small potatoes at the time and thus not considered much of an antitrust threat, was not sued, and has operated free of those restrictions – that's what RMLC is looking to change.)

The RMLC is also asking that (a) SESAC be enjoined from entering ***de facto*** exclusive contracts with copyright owners; (b) SESAC be required to make available economically viable alternatives to its license; and (c) the RMLC be awarded legal and other fees.

The RMLC alleges the following:

> ***SESAC has handpicked the composers it will represent so that radio stations must obtain a SESAC license***. One relatively unknown aspect of the licensing process is that any individual copyright owner can license use of that work. So, if multiple songwriters own the copyright to a particular composition and one decides to be represented by ASCAP, another by BMI and another by SESAC, a radio station would need only a license from ASCAP, or BMI, or SESAC to play that song. According to the RMLC, SESAC goes out of its way to represent copyright owners whose works don't run across multiple PROs – thereby forcing a radio station to get a SESAC license to play that particular song.

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Dueling bills could level the royalty playing field among music media

Congressional Resolution to Copyright Disparities Sometime Soon?

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Most people don't think about how copyright royalties are calculated – they just think that whatever they're paying (or receiving) is too high (or too low). That's true regardless of who you are or what you pay.

The recording industry thinks that recording artists don't get enough compensation for their copyrighted works – especially from broadcasters who have always enjoyed a full exemption from paying royalties for over-the-air performance of sound recordings (*i.e.*, the version of a song you're actually hearing at that particular moment).

Each of the various services that provide recorded music to the public – broadcasters, stand-alone Internet radio operators and even Sirius XM – seems to believe that it's getting a raw deal compared to the way the other such services are treated. For instance, Sirius XM doesn't like that it has to pay performance royalties for all its transmissions – both via satellite and the Internet – while broadcasters get that over-the-air exemption. Broadcasters think the per-performance rate for online streaming is too high, especially given online advertising hasn't increased at a similar rate, which means that increased listenership increases costs but not revenues. And Pandora feels as though it's at a disadvantage to both, because it, too, pays a rate higher than Sirius XM and doesn't enjoy any exemption as broadcasters do.

While the 801(b) standard could bring broadcasters' webcasting rates down, there's no guarantee.

The disparity in the royalties each of the services gets tapped for is the fault of Congress, which has established distinct approaches to royalty calculation for each.

So it should be no surprise that one major player – Pandora – has chosen to attack the problem at its root cause.

The result? The Internet Radio Fairness Act, introduced last month simultaneously in the House as HR 6480 by Rep. Jason Chaffetz (R-UT) and Rep. Jared Polis (R-CO) and the Senate as S 3609 by Sen. Ron Wyden (D-OR).

The good news is that Pandora's push for fundamental legislative change on the copyright front could have a positive effect on broadcasters, whose webcasting royalty rates could be reduced as a result. But don't crack the champagne yet, because a counter-measure, championed by Rep. Jerrold Nadler (D-NY), could force compromise on the key issue of performance rights for over-the-air sound recordings.

So exactly why is there a disparity, how big is it and what would the two bills do about it?

As noted above, the disparity is Congress's fault. It has instructed the Copyright Royalty Board (CRB), which is ultimately responsible for establishing the royalty rate for performance of copyrighted works, to set the royalty rate for the performance of copyrighted works differently according to the type of media involved.

Historically, copyright royalties for most non-Internet-related uses have been calculated using four criteria set out in Section 801(b) of the Copyright Act. The resulting royalties apply to satellite services like Sirius XM, cable music services (the music-only channels available on your cable system) and even broadcasters' payments to ASCAP, BMI and SESAC for performance of the underlying musical works (the music and lyrics or composition) in each song. The four criteria set out by Congress in Section 801(b) are:

- A need to maximize the availability of creative works to the public;
- A desire to insure a fair return for copyright owners and fair income for copyright users;
- A reflection of the relative roles of capital investment, cost, and risk; and
- A need to minimize the disruptive impact on the industries involved.

But webcasting – which includes broadcasters simulcasting one or more signals over the Internet – is subject to a different standard enacted as part of the Digital Millennium Copyright Act (DMCA) in 1998: the "willing buyer/willing seller" standard. Despite its name, this standard is more theoretical than practical, as it doesn't even allow the CRB to consider the real world effort of the final royalty rate; instead, it relies on theoretical market rates.

Why the difference? There are plenty of reasons but the easiest explanation (and I acknowledge that some will quibble with this) is that the recording industry was the loudest voice at the table in 1998, when the DMCA was put together. Back then, the broadcasting industry didn't seem to appreciate yet just how big this whole webcasting thing would get, and the stand-alone Internet radio industry wasn't really a thing. The recording industry stepped up to the plate, took a big swing, made contact and hit a home run.

The effect? Looking simply at Pandora vs. Sirius XM, it's pretty big. Pandora (using rates set by the CRB under the willing buyer/willing seller standard, with certain adjustments) claims it paid approximately 50% of its gross revenues in royalties last year and could pay up to 70% in the

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first quarter of fiscal year 2013. That's a boatload more than the percentage paid by Sirius XM (*i.e.*, 6% in 2008, 7% in 2010 and 8% in 2012). While Sirius XM is very concerned that its rates will sharply increase to 13% or more as a result of the CRB proceeding now in process, that would still put its royalties well under Pandora's.

Enter the Chaffetz/Polis/Wyden Internet Radio Fairness Act, which would remove the distinction between the services. Everyone, including Pandora and broadcasters webcasting online, would have their rates set through CRB proceedings subject to the Section 801(b) standard.

This can only be a good thing for broadcasters, right? Well, probably but not definitely.

While the 801(b) standard could bring broadcasters' webcasting rates down, there's no guarantee. The CRB, even applying the 801(b) standard, could produce a royalty rate that is markedly different in calculation or amount than broadcasters "enjoy" now. SoundExchange, representing the recording industry, has basically had its way in these CRB proceedings – would that necessarily change?

And then there's the proposed Nadler bill. Like the Internet Radio Fairness Act, Nadler's Interim FIRST Act would not address the broadcasters' traditional exemption from paying over-the-air royalties as it standardizes the way in which the rates are set. But it is essentially the opposite of the Internet Radio Fairness Act in virtually every other way. The biggest difference is that the Nadler proposal would apply the "willing buyer/willing seller" standard across the board (so everyone can be upset about everything?).

Moreover, the Interim FIRST Act would take a direct shot at broadcasters. Nadler feels that the broadcasters' exemption from paying for over-the-air performances is unfair. His proposal would address this supposed unfairness ***not*** by removing the exemption (because we know the NAB would rise up against that), but by directing the CRB to take the value of those over-the-air performances into account when applying the willing buyer/willing seller standard. The result, according to some reports, could be a doubling or even tripling of the webcasting royalty rates that most broadcasters already feel are too high.

And even if Nadler's proposal doesn't pass, it could still adversely affect broadcasters. With two competing copyright bills on the table – *i.e.*, Nadler's Interim FIRST Act and the Internet Radio Fairness Act – it's not hard to imagine the sponsors of each coming up with some compromise measure. One such compromise might, for instance, impose the 801(b) standard for royalty calculation across the board, but also require that broadcasters start paying royalties for over-the-air performances of sound recordings under that standard. (Alternatively, a compromise could include Nadler's suggestion that over-the-air performance be factored into webcasting royalties.) That would obviously muddy the waters.

Though Congress will probably not take up either bill until early 2013 (addressing this in the post-election "Lame Duck" session is possible but unlikely), interested parties are already throwing their support behind the Internet Radio Fairness Act. Those parties include Pandora (obviously), the Consumer Electronics Association, the Computer and Communications Industry Association (with members including Google, Microsoft, Yahoo!, EBay and Pandora) and the Digital Media Association (DiMa). The Radio and Internet Newsletter (RAIN) reports that the NAB, along with broadcast companies Salem and Clear Channel, also supports the bill.

Broadcasters are in a position to take advantage of the devil they know, i.e., the current system.

The last of those – Clear Channel – comes as no surprise and should give broadcasters food for thought. Under the existing system, Clear Channel has already reached a direct licensing agreement with one major record label (Big Machine) under which Clear Channel will voluntarily pay royalties for over-the-air performance of sound recordings by Big Machine recording artists in exchange for a set (presumably lower) rate for their webcasting of those same sound recordings. In some regard, given that webcasting listenership – and therefore royalties – are only going to grow in coming years, it makes sense to focus on making sure those royalties are as low as possible.

The Clear Channel example reflects that broadcasters are in a position to take advantage of the devil they know, *i.e.*, the current system. It's far from clear whether the same would be true in a system forged from some compromise involving the Nadler proposal.

Broadcasters, therefore, might want to think about throwing their full support behind the Internet Radio Fairness Act in the hopes that it is quickly enacted. That would, ideally, keep the Nadler Interim FIRST Act from gaining any momentum that could force a compromise, thereby making the devil they don't know a devil they really don't want to know.

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2012, and reply comments by December 12. Comments and reply comments on the proposed incentive auction rules, including rules applicable to wireless microphones, are due on December 21 and February 19, respectively.

In the meantime, the FCC has released a public notice on how wireless microphone users can register for protection from white space devices in certain east coast states. The details are complex. We've included a link to that notice on our blog as well.

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SESAC intentionally obfuscates ownership information on its own site to create a sense of paranoia among radio broadcasters who, absent clear confirmation that a song they are playing is *not* part of the SESAC repertoire, feel compelled to get a SESAC license just to be safe. [Pop quiz: who holds the rights to "Silent Night"? "Joy to the World"? "Grandma Got Run Over By a Reindeer"? You may be surprised to learn that, in a 2002 lawsuit, a couple of radio stations were held liable to SESAC for more than $1 million for the unlicensed broadcast of those and a number of other, non-seasonal songs controlled by SESAC.]

SESAC ups the pressure on radio stations by actively and aggressively threatening stations with hefty copyright infringement fines for broadcasting SESAC-represented works without a SESAC license.

SESAC limits the types of licenses it offers. For instance, ASCAP and BMI offer stations that play only a minimal amount of music a more accurate, and economically advantageous, "per program" license as an alternative to the "blanket" license. By contrast, SESAC doesn't offer that choice. To the contrary, SESAC requires an entirely separate license for webcasting (and for every separate HD side channel). This problem becomes even more significant when one notices that SESAC has, on several occasions, raised the price of each of these licenses by between five and ten percent.

The RMLC complaint helpfully summarizes its take on SESAC's strategy:

> SESAC ensures that it has exclusive rights to a critical mass of "must have" works so that entities like RMLC's members cannot avoid taking a SESAC license, but SESAC carefully restricts its choices to those affiliates who will generate the highest profits for the company.

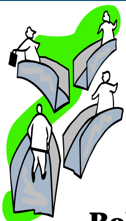
As the RMLC sees it, the fact that SESAC has raised its rates significantly works to reinforce the illegal activities: with increased revenues squeezed out of broadcasters, SESAC can entice more copyright owners to switch from ASCAP or BMI to SESAC (or at least not leave SESAC for ASCAP or BMI) by offering those copyright owners more royalty revenue.

In the RMLC's words:

> SESAC is a cartel that has illegally monopolized an essential repertory of copyrighted music, that has quashed all competition with and among its 23,000 copyright holding affiliates, and that uses its monopoly to coerce the U.S. radio industry and other consumers into paying SESAC supracompetitive prices.

That's a pretty strong and inflammatory accusation. But some numbers seem to support the RMLC's claims. In just ten years prior to March 31, 2012 the number of composers represented by SESAC has increased from 8,000 to 23,000, and SESAC's adjusted revenue has almost tripled, from $49 million to $144 million.

Is this growth due to simple good business practices or illegal business practices? Remember that the complaint puts forth the plaintiff's absolutely best case argument. We will continue to follow this and will report back as developments warrant.



FHH - On the Job, On the Go

Frank Jazzo will be providing a legislative and regulatory update along with the NAB's **Jane Mago** at the annual convention of the Alaska Broadcasters Association in Anchorage on November 8. On November 9, **Frank J** will conduct a license renewal preparation session for convention attendees.

Rob Schill and **Frank Montero** will be attending the National Hispanic Media Coalition 's Impact Awards Reception at the NAB's Washington, D.C. headquarters on November 14, 2012. (This year's awards will honor Senator Robert Menendez (D-NJ) and Congressman José Serrano (D-NY).)

On October 27, **Kevin Goldberg** appeared on a panel (Title: "The Devil's in the Contract") dealing with key provisions in freelance writing contracts. The panel was part of ScienceWriters2012, the conference of the National Association of Science Writers in Raleigh, North Carolina. And coming up, **Kevin** will speak on a legal panel focusing on various issues relating to the use of photos and videos. That panel will be presented at the Association of Alternative Newsmedia's Workshop for Writers and Designers in Washington, D.C. on November 17.

Politics365, which bills itself as the premier digital destination for politics and policy related to communities of color, has formally dubbed **Frank M** a "Game Changer". What's a "Game Changer"? The website doesn't provide a specific definition, but check this out. Other "Game Changers" have included Colin Powell, Magic Johnson, Oprah Winfrey, Jennifer Lopez and Eva Longoria. Where does **Frank** fit along that particular continuum? You're on your own to make that call, but for us, it's clear: he's our *Media Darling of the Month*.

December 1, 2012

Radio Post-Filing Announcements - *Radio* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** must begin their post-filing announcements with regard to their license renewal applications on December 1. These announcements then must continue on December 16, January 1, January 16, February 1, and February 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be placed in the public file within seven days.

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

Radio License Renewal Pre-Filing Announcements - *Radio* stations located in **Kansas**, **Nebraska**, and **Oklahoma** must begin their pre-filing announcements with regard to their applications for renewal of licenses on December 1. These announcements then must be continued on December 16, January 1, and January 16.

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

December 3, 2012

Digital Ancillary/Supplementary Services Report - Each *licensee* of a (1) *digital commercial or noncommercial educational full power television broadcast station*; (2) *digital low power television broadcast station*; (3) *digital translator television broadcast station*; or (4) *digital Class A television broadcast station* must file a Digital Ancillary/Supplementary Services Report on FCC Form 317 by December 1 of each year to report whether it provided any such services during the past fiscal year, ending September 30, 2012. If so, the licensee must remit an appropriate fee, together with FCC Form 159.

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

Television License Renewal Applications - *Television* stations located in **Alabama** and **Georgia** 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.

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. TV stations must upload the reports to the online public file. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Noncommercial Television Ownership Reports - All *noncommercial television* stations located in **Alabama**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** 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 **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

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cellphone numbers:

John Healy (202) 391-2486, (215) 847-8094, or john.healy@fcc.gov

Jeff Goldthorp (202) 418-1096, (202) 253-1595 (cell), jeffery.goldthorp@fcc.gov

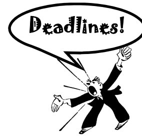
Julia Tu (202) 418-0731, 202-321-4399, julia.tu@fcc.gov

Michael Caiafa (202) 418-1311, (202) 277-5690 (cell), michael.caiafa@fcc.gov

David Ahn (571) 232-8487 (cell), (202) 418-0853, david.ahn@fcc.gov

If you were in the path of the hurricane but are not in any of the counties listed above, check the FCC's home page, www.fcc.gov, for further additions to the list of reporting areas.

In similar emergency situations in the past, the FCC has advised that satellite earth station operators needing to operate emergency facilities may apply electronically at http://licensing.fcc.gov/myibfs; or if they cannot access that system, they may apply by letter, e-mail, and even by telephone. All requests should provide the technical parameters of the proposed operation and a contact point. Requests not made through myibfs should be re-filed through that system as soon as possible. Thus far we have not seen a formal advisory from the FCC confirming that this procedure is in effect for Sandy, but we figure it's a good bet that it is.



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December 21, 2012

Television Spectrum Incentive Auction - Comments are due in the proceeding seeking to reallot certain spectrum now in the television band for broadband use and to develop rules and procedures for auctioning certain portions of this spectrum to new users.

January 10, 2013

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

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

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

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

February 4, 2013

Uploading of Public Files – As previously reported, all *television* stations will have to have completed the uploading of their local public inspection file materials to the FCC-maintained online public inspection file system within six months of the effective date of the new system. That effective date was August 2. While the Commission has not yet formally announced a specific date by which the upload process must be completed, six months after August 2 will be February 2, 2013. Until the Commission provides a specific deadline, it would be prudent to assume that Saturday, February 2 (or the next business day, Monday, February 4) is the tentative target date.

(Continued from page 1)

posed station will provide coverage to the Urbanized Area and (b) the size and proximity of the proposed community of license relative to the central city of the Urbanized Area. Oh yeah, the Commission has now concluded that, because the "ubiquity of ZIP codes gives the presence of a dedicated ZIP code little probative significance", the fact that a proposed community of license may have its own ZIP code will be given "little weight".

An applicant seeking to change its community of license will *not* be required to submit a *Tuck* showing in some limited cases. Specifically, no such showing will be necessary where: (a) both the current and proposed communities are in the same Urbanized Area or the current and proposed facilities cover, or could be modified to cover, 50% or more of the same Urbanized Area; and (b) the applicant is not relying on a first local service preference. If the applicant is relying on such a preference, the *Presumption* would apply and the applicant would have to make a *Tuck* showing to rebut it.

Gain/Loss Calculations. Under the policies as revised in 2011, the relative sizes of gain and loss areas assumed a considerably greater importance than had previously been the case. In *Recon II*, the Commission has made adjustments in how those areas are to be calculated.

The Commission has made adjustments in how the relevant gain and loss areas are to be calculated.

For an application proposing a change in an FM station's community of license, in order to determine the number of reception services in the gain/loss areas, the actual and proposed contours must now be calculated using the transmitter site coordinates of the present facility and of the proposed new facility. (Traditionally, the allotment site coordinates had been used.) Moreover, those service contours are to be calculated based on the station's authorized and proposed effective radiated power, height above average terrain and the actual terrain (using the prediction methodology in Section 73.313 of the Commission's rules, *not* any alternative predictive methods, like Longley-Rice). Previously, such calculations were based on the maximum class facilities for all stations except full Class C and NCE stations and on the bizarre presumption that all the terrain in question was uniform.

Also, when an applicant seeking to change its community of license needs to calculate the area and population an AM station serves, the predicted or measured daytime 2.0 mV/m groundwave contour is to be used. Those calculations must be made for both the applicant's current and proposed transmitter site coordinates. In this particular context, the Commission is choosing to disregard the fact that the "primary service contour" for communities with populations under 2,500 is defined elsewhere in the rules as the 0.5 mV/m daytime groundwave contour. Note, however, that applicants for *new* AM stations are to continue to count populations served by using the primary contours set forth in Section 73.182(d) of the FCC's rules (0.5 mV/m for communities under 2,500 and 2.0 mV/m for communities over 2,500).

For purposes of gain and loss area calculations under Priority 4 (the catch-all public interest category for Section 307(b) determinations), applicants are to count all full-service AM (including daytime-only AM), FM and NCE FM stations, including all granted but unbuilt construction permits. However, vacant FM allotments are not to be considered. The Commission, looking at the results of the last couple of FM allotment auctions, wisely concluded there is no guarantee any particular vacant allotment ever will be filled.

Applications filed after October 12, 2012 (*i.e.*, the release date of *Recon II*) must use these revised standards. Those with pending applications can elect to amend their proposals to use the new standards or stick with their already-filed technical showings.

In *Recon II* the Commission rejects a variety of proposals. The most noteworthy: William B. Clay's assertion that the *Second R&O* didn't go far enough and that the new procedures should be applied to *all* community of license change applications where the proposed facility will primarily serve communities and populations other than the proposed community of license. Clay would have had the Commission implement "a universal policy that directly links grant of any 'local service' preference to the community or collection of communities *most likely to benefit* from the transmission service provided by a facility proposed in *any* geographic area".

The FCC wasn't buying what Clay was selling. In the Commission's view, his proposal "would take the choice of community of license – at least where first transmission service is being claimed – away from the applicant", and instead have the Commission designate that community. The Commission was unwilling to go that far if a station isn't in or near an Urbanized Area.

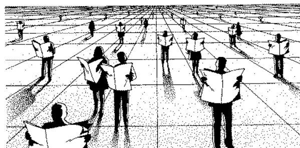
At least it isn't for the time being. Let's not forget that the Commission and the Courts of Appeals have struggled for decades with how to apply Section 307(b). It's a near certainty that *Recon II* will not be the last word on the subject.

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

Updates On The News

So long, SUFRN? – Word on the street in Washington is that the FCC is planning to issue a Notice of Proposed Rulemaking (NPRM) in the near future aimed at eliminating the "Special Use FRN" option from commercial broadcast Ownership Reports (FCC Form 323). The NPRM may also propose that the FRN requirement, first included – without prior notice – in Form 323 in 2009, be carried over to Form 323-E, the Ownership Report form for noncommercial broadcast licensees.

Faithful readers of the *Memo to Clients* and www.CommLawBlog.com will recall the kerfuffle that dragged on from 2009 into 2011 concerning the FCC's effort to require that ***every*** "attributable" interest holder in a commercial broadcast licensee provide his/her/its FCC Registration Number (FRN) in that licensee's Ownership Report. (If you want to brush up on the history of all this, which is pretty extensive, go to www.CommLawBlog.com, click on the "Archives" button, scroll down to the link to "Form 323", click and start reading.) The upshot was that the FCC ultimately backed off the requirement. It did so by permitting anyone who chose not to provide a social security number-based (SSN-based) FRN to generate his or her own "Special Use FRN" (or SUFRN) for Ownership Report purposes.



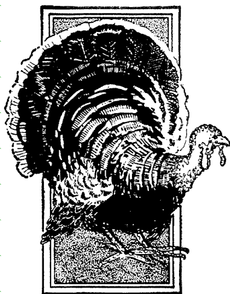
As we reported extensively on our blog, the genesis of the SUFRN was not without its twists and turns, possibly because the FCC was making stuff up as it went along. The Commission initially established the SUFRN option, but specified that anyone relying on an SUFRN would still have to submit an actual SSN-based FRN eventually. When Fletcher Heald and a number of state broadcast associations complained to the U.S. Court of Appeals for the D.C. Circuit (in June, 2010) about all this, the Commission made some quick behind-the-scenes changes and then advised the Court that filers would not be required to submit SSN-based FRN's "if they object to the submission of their Social Security Numbers." The Court interpreted this to mean 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, biennial filing deadline or for any imminent non-biennial filing of Form 323."

And that's essentially where things have stood since then (although interested readers should be sure to read the item we posted on our blog on September 30, 2011 – which includes a screen grab of a bizarre hand-written revision to Form 323 that the FCC filed with OMB).

But now, we hear, the Commission is gearing up to make another run at imposing the SSN-based FRN requirement – with the added tweak that that requirement would also be imposed on attributable interest holders in ***non***commercial licensees as well.

Of course, we haven't seen the NPRM yet, so we can't say for sure what it says. But if the Commission really is looking to deep-six the SUFRN, all broadcast licensees should pay close attention. The original 2009 version of the FRN requirement called for ***all*** attributable interest holders to provide an SSN-based FRN. That would include folks holding as little as 5% of a licensee's voting equity, not to mention all officers down to the Assistant Secretary and Assistant Treasurer.

Many people may, justifiably, object to having to give the FCC their social security numbers simply because they happen to own some trivial interest in a broadcast station. That's especially true when the FCC has yet to explain why, exactly, the provision of SSN-based FRNs is absolutely essential to any legitimate regulatory goal. Perhaps in the NPRM, if and when it is released, the Commission will attempt such an explanation. After all, the FCC has now had three years to think the problem through.



Holiday Schedule Reminder

**Fletcher, Heald & Hildreth, P.L.C.
will be officially closed on
November 22-23 (Thanksgiving weekend),
December 24-25 and January 1.
We will be open on Monday, November 12
(the federal holiday in honor of Veterans' Day).**