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Memorandum to Clients

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The culling commences

Deadline for FM Translator Dismissal Lists Announced

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If you're one of the lucky folks who happens to have translator applications still pending at the Commission from the famous 2003 filing window, heads up – depending on how many applications you have and what markets they propose to serve, you could have a lot of homework to do between now and January 25. That's because the Media Bureau has announced that the window period for submitting "translator application selection" lists ("Selection Lists") and related "Caps Showings" will run from ***January 10-25, 2013***.

So much for taking any time off during the Christmas/New Year's/MLK extended holiday season.

The Bureau's public notice is not unanticipated. As indicated in the related article on Page 6, the Commission is highly motivated to wrap up the long-running face-off between FM translator applicants and would-be LPFM applicants. The culling of the herd of translator applications that have been sitting around for nearly ten years is an essential step in achieving that goal.

As those of you who have been following the LPFM/FM translator imbroglio through our coverage here in the *Memo to Clients* (and also on our blog at www.CommLawBlog.com) already know, the Commission has devised a highly complex set of technical guidelines to govern which translator applications will be processed and which will be dismissed. The applicants themselves will have the first say, but their ability to pick and choose among their pending applications is subject to the Commission's complex guidelines.

In announcing the deadline for submitting the Selection Lists, the Bureau has provided a useful summary of the technical factors that will come into play as applicants prepare their lists. We won't try to summarize those factors here – the Bureau has already done an admirable job on that front, so we'll simply refer you to the Bureau's public notice (we've included a link to that notice on our blog).

We will, however, note that the January 25, 2013 deadline appears to be absolute. In boldface text the Bureau warns that "**Selection Lists and Caps Showings may not be submitted, amended, corrected or resubmitted for further consideration after the Caps Deadline.**" So if you're going to be among those filing lists and showings during the upcoming window, be sure to double- and triple-check your work before turning it in.

And just who will be having to submit Selection Lists and Cap Showings? According to the notice, "[n]o submission is required for this filing window by any Auction 83 [FM translator] applicant that has fewer than 51 pending Applications nationally and no more than one pending Application in any of the Appendix A Markets." The term "Appendix A Markets" refers to a list of markets set out in Appendix A to the Commission's Fourth Report and Order. (We described that Report and Order in last March's *Memo to Clients*.) So you're off the hook if you have no more than 50 pending translator applications ***and*** no more than one application in any Appendix A Market.

The rest of you should get busy.

You're going to have to decide which applications you want to continue to prosecute and which you're willing to toss. No applicant will be permitted to keep more than 70 applications on file, so some of you will have to do some whacking just to get in under that limit.

And once you've made that cut, the fun will have just started.

Applicants who plan to prosecute 51-70 applications nationally will have to demonstrate, with respect to any of its appli-

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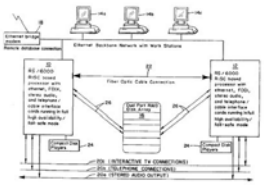

Large Lump of Coal Left in Mission Abstract Data's Stocking

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Holiday cheer came a little early for many radio broadcasters this year: Santa Claus (disguised as patent examiners at the U.S. Patent and Trademark Office (USPTO)) issued two "Detailed Actions" with respect to challenges that had been directed to the two patents held – and vigorously brandished – by Mission Abstract Data (MAD). Both of those "Detailed Actions" (one related to Patent No. 5,629,867, the other to Patent No. 5,809,246) rejected multiple claims to the patentability of MAD's technology. (We've included links to the USPTO's Detailed Actions on our blog at www.CommLawBlog.com.)

As a result, the likelihood that MAD (or its successor, Digimedia, or its licensing agent, IPMG AG) might receive a significant damage award in any patent infringement litigation which it has broadly hinted at has been reduced substantially.

Regular *Memo to Clients* readers should be familiar with the MADness that has afflicted the radio industry since 2011. (New to the subject? Get a refresher course by checking out our blog archives on the subject.)

In a nutshell, MAD, a patent troll, acquired a couple of patents that had been issued back in the 1990s with respect to using computers to store and retrieve music files for broadcast. MAD then commenced a full-court press against much, if not most, of the radio industry. It claimed (often, it seemed, without any solid factual support) that broadcasters were using gear that relied on MAD's patents. MAD generously offered to overlook any possible infringement that might have occurred . . . if, that is, the broadcaster would enter into a pricey licensing agreement with MAD.

Litigation ensued, as a number of the targeted broadcasters sued MAD in federal court in Delaware. They claimed that MAD's patents were invalid. Meanwhile, at least one equipment manufacturer pressed the USPTO, which had issued the original patents, to take another look. The USPTO agreed to do so, at which point the court in Delaware stayed further proceedings in the broadcasters' suit pending further USPTO action.

The USPTO initially appeared to rule against MAD in the fall of 2011, but MAD sought further review. Last summer MAD seemed to be claiming victory when the USPTO appeared to un-toss some of MAD's patent claims that had appeared to have been tossed in the 2011 action. With that new USPTO ruling in hand, MAD launched another round of FedEx-borne licensing offers (along with follow-up telephone sales pitches) to many radio licensees; it also asked the Delaware court to lift the stay.

Not so fast, said the broadcasters. Further USPTO proceedings were going to be sought, so let's not be acting prematurely. And sure enough, such further proceedings *were* sought. The end result (at least as of now): the USPTO's latest "Detailed Actions", which appear to reject all of MAD's claims. It seems that the patent examiners identified a number of technologies similar to MAD's that had been in existence prior to the issuance of the patents MAD holds. In the examiner's view, many aspects (possibly all) of MAD's technology were simply obvious extensions of the earlier technology, and were therefore not properly patentable.

This, of course, is what the radio industry has been arguing from Day One. Not surprisingly, MAD has disagreed, claiming in a June, 2012 blog post on its own website that its patents were valid. In that post, MAD also pooh-poohed its initial USPTO set-back (in fall, 2011), saying that such reexamination and reissuance of the patents was statistically normal and of little bearing on the patents' ultimate validity and value. (Personal note: in its blog post MAD even went out of its way to take issue with statements I had made in earlier posts on CommLawBlog; I stood by my statements then and I stand by them even more now.) Whether MAD will continue to stick with this story in the wake of the USPTO's latest action remains to be seen.

Is this the end of the line? Don't bet on that. For one thing, we understand that MAD has until January 19 to respond to the USPTO's latest decision. Following that date, the USPTO could either issue a "final action" formally rejecting MAD's patent claims, or it could once again re-issue the patents. In the latter case, though, any reissued patents

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Re-purposing the second audio stream?

FCC Looks to Bring More Emergency Information to the Visually Impaired

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As our readers know, in the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), Congress aimed to ensure that folks with disabilities have "better access to video programming". In the two years since the CVAA was enacted, the Commission has taken multiple steps to comply with that statutory direction.

But one important component of "video programming" remains to be addressed: emergency information during non-news programs. Existing rules already provide that all pertinent emergency information ***broadcast during regular or special newscasts*** must include an aural component for visually impaired persons. But what about announcements broadcast ***outside*** of newscasts?

We all know that emergencies don't occur strictly at 6:00 p.m. or 11:00 p.m. (or even at the new trendy 4:00 or 5:00 a.m. hour), conveniently timed for scheduled newscasts. It's not unusual for broadcasters to interrupt non-news programming to air emergency information short of devastating disaster coverage – such as weather warnings or alerts about dangerous circumstances (flooding, chemical spills, wildfires, etc.). Such information is often displayed on a visual crawl or some similar visual method, without accompanying audio. In such situations, the FCC requires only that the broadcaster include an aural tone that alerts visually impaired viewers so that they can turn on a radio or ask someone else to read the screen for them.

Under current rules, the visually impaired maybe disadvantaged because emergency information may be available too late for proper responsive action.

But that might place the visually impaired at a disadvantage by making the emergency information available too late for proper responsive action. In keeping with its CVAA mandate, the FCC has issued a Notice of Proposed Rulemaking (*NPRM*) looking to expand the existing rules to require that emergency information be provided aurally using the same secondary audio stream that is now used for various purposes. (Those purposes include video description and, sometimes, Spanish or other foreign language soundtracks.) And in a related proposal, the Commission is also inviting comments on how it should implement the statutory requirement to prescribe regulations requiring receiving apparatus to have the capability to decode and make emergency information available.

Use of the secondary audio stream

The possible complications attending the proposed use of the secondary audio stream are somewhat daunting. How many TV stations and MVPDs have an activated secondary audio channel? And should those that do not be treated differently? Do cable and satellite MVPDs have bandwidth constraints that impair their ability to add audio streams; and if not, might a secondary stream carriage requirement impair DBS local-into-local service in small markets? If a station has two audio streams in addition to its primary stream, how will visually-impaired audience members know to which stream they should tune, particularly for stations providing both foreign language and video description services and given constraints on naming protocols that affect how TV remote controls access different audio streams?

Those questions involve only the current allocation scheme. What's going to happen if and when the TV band is repacked? What will be the impact on available bandwidth for TV stations that elect to share channels after the proposed reverse auction and consequent spectrum repacking?

And at the nitty-gritty station level, who's going to be providing the audio for the emergency information on the secondary audio stream? For stations without sufficient staff, should automated text-to-speech technology be permitted, even if there is an accompanying risk of errors that might distort the information? Should the aural information have to be identical to the video content, or would it be enough to provide only "critical details" about an emergency? If the same audio stream is used for both visual description *and* emergency information, how can we be sure that video description service will not be unduly interrupted? Is a change needed in the rule that prohibits emergency information from blocking video description or video description from blocking emergency information?

Who exactly should be subject to the new rules? For the time being, the FCC is planning to leave IP-based services alone, given the lack of a uniform technical standard for additional aural carriers. But the CVAA requires that "program owners" comply. The FCC's rules define video programming provider and video programming distributor, but what is a "program owner"?

Apparatus regulation

The CVAA requires that "apparatus designed to receive or play back video programming transmitted simultaneously with sound" must have certain capabilities to provide information (including particularly emergency information) to the blind and visually impaired.

The statute's goal may be clear, but it's a bit lacking in implementational details. When it comes to apparatus for

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Next Five-Year Plan adopted

Final NCE Royalty Rates Set For 2013-2017

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The Copyright Royalty Board (CRB) has announced its final determination of the rates and terms for use of copyrighted works by noncommercial educational (NCE, a/k/a "public") broadcasters for 2013-2017. This wraps up the proceeding I've kept readers up to speed on through a couple of articles (in the April and June *Memos to Clients)* over the last eight months. The new rates and terms will be in effect from January 1, 2013 through December 31, 2017.

So now all NCE broadcasters – small community stations, educational institutions and large scale public radio and television stations) – know exactly how much they'll be paying to ASCAP, BMI and SESAC for the right to use the underlying music and lyrics in all songs included in their over-the-air broadcast programming for the next five years. (As I have previously mentioned, the new rates/terms technically also cover the use of pictorial, graphic and sculptural works, but the reality is that it's all about the music.)

Important note: the CRB's determination does ***not*** relate to the use of sound recordings for ***webcasting*** purposes. The current webcasting royalties, for both commercial and NCE webcasters, were set back in 2010, as I described back in the December, 2010 *Memo to Clients*. (As to webcasting royalties, NCE stations should not forget that their annual reports, payments and (in some cases) elections will be due in January, 2013. Check back with our blog at www.CommLawBlog.com for additional reminders on that score.)

Rates for the next five years will increase over those currently in effect, but not by much.

The proceedings leading up to the adoption of the 2013-2017 royalties could not have gone more smoothly (even though it did take almost two years to reach this point).

The CRB got the ball rolling back in January, 2011, when it opened the proceeding and invited all interested parties to join in. As the Copyright Act provides, copyright owners and NCE broadcasters and entities (*e.g.*, NPR, PBS) can negotiate deals among themselves and the CRB can then rubber-stamp those deals (subject to various procedural niceties designed to protect folks who might object to some or all of the deals' terms).

Sure enough, essentially all of the relevant parties were able to get together and hammer out mutually agreeable arrangements, as I reported back in April (with respect to Non-PBS and Non-NPR stations) and June (with respect to PBS and NPR stations). The CRB has now formally accepted those deals, rejecting minimal objections from a few parties who were technically not even eligible to participate before the CRB.

As an overall matter, rates for the next five years will increase over those currently in effect – there's a surprise – but not by much. The increase in every category tends to be no more than 2% over the corresponding rate from the previous five-year period. The precise dollar figures that will apply are set out in a number of tables and rule sections in the Federal Register. Since there are close to 200 separate data points, I'm not going to lay them all out here. (You can find a link to the Federal Register notice on our blog at www.CommLawBlog.com.) I will, however, briefly summarize the factors that come into play in determining which of those figures applies to which types of NCE broadcaster.

Type of Station. First, as has historically been the case, royalty rate calculations will vary depending on the type of station in question. For these purposes there are three types of stations: (a) NPR/PBS affiliates; (b) non-NPR radio stations affiliated with educational institutions; and (c) other NCE radio stations that are neither NPR affiliates nor licensed to an educational institution.

NPR/PBS stations. For NPR and PBS affiliates (*including* radio stations licensed to educational institutions), royalties will be based on how each individual piece of music is used. In particular, they will vary depending on whether the broadcast is (a) a network program or (b) the work of an individual affiliated station (with the latter costing less than the former), and also on whether the musical work in question appears (i) in a "featured presentation" or (ii) merely as background or theme music (again, with the latter costing less than the former). Rates for PBS and its affiliates will be greater than those for NPR and its affiliates. The same rates will apply regardless of whether the piece of music is licensed by ASCAP, BMI or SESAC.

Non-NPR radio stations affiliated with educational institutions. The most obvious change for this universe of stations is the elimination of the one-size-fits-all flat fee approach which has historically been used. Instead, 2013-2017 rates payable to ASCAP and BMI will involve a tiered system that takes into account the size of the educational institution's student body. Different rates will apply to schools with (a) fewer than 1,000 full-time students; (b) 1,000-4,999; (c) 5,000-9,999; (d) 10,000-19,999; and (e) 20,000 or more. Stations with ERP of 100 watts or less will be entitled to the lowest rate (*i.e.*, the rate for schools with fewer than 1,000 full-time students), regardless of the actual size of the school's student body.

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No such tiering will apply for SESAC music, however. Instead, this class of station will pay a flat annual fee of $140, with increases each year thereafter based on a cost of living coefficient equivalent to the greater of: (a) the change in the Department of Labor's Consumer Price Index in the prior year or (b) 2%.

Other NCE radio stations. NCE stations not fitting into either of the two classes described above will, as expected, pay flat annual rates, but the rates will vary based on: (a) the size of the population within each station's 60 dBu contour (along with any additional population provided by translators or boosters); (b) the nature of the station's programming; and (c) whether the music is licensed by ASCAP/BMI, on the one hand, or SESAC, on the other.

With respect to the first variable, there are eight separate population tiers, the lowest being fewer than 250,000 and the highest topping off at 3,000,000 or more.

As to the second, there will now be separate grids of royalty rates for (a) music stations and (b) "talk format" stations. The former category includes all stations which devote at least 20% of their programming to content in which music is the "principal focus of audience attention". The latter includes stations whose program content "primarily consists of talk shows, news programs, sports, community affairs or religious sermons (or other non-music-oriented programming)" and who don't devote at least 20% of their programming to music annually.

And finally, the royalty grids for music and talk NCE stations will be the same for ASCAP and BMI songs. SESAC content will be subject to a separate set of rates which will be lower than the ASCAP/BMI rates. The rates will all rise in gradual increments annually over the five-year term.

Recording Rights

Finally, the cost of the recording rates and terms will increase very slightly (by only a few dollars) for every type of noncommercial broadcast station.

The grids laying out all the various rates are set out in the Federal Register notice. You can use them to find the rates that will apply to your particular station. And you can always contact me if you have questions finding the rate applicable to you. That may not be necessary, though, because you can rest assured that ASCAP, BMI and/or SESAC will be contacting broadcasters sooner rather than later, asking them to put pen to paper on their new agreements, with these new rates, for 2013.

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cations outside any Appendix A Market, compliance with a number of "national caps conditions". That demonstration will include a "No Overlap Showing" and a showing that "at least one [LPFM] licensing opportunity will remain at the proposed site if the Application is granted." In the "No Overlap Showing" the applicant will have to show that the proposed 60 dBu contour of the particular translator application won't overlap with the equivalent contour of any other translator application or authorization held by the applicant as of December 4, 2012. (All contours will be determined by the standard prediction method.)

The Bureau's notice also points out that the grant of any application with a transmitter site outside of an Appendix A Market will be subject to a condition that, for the first four years of operation, the translator's 60 dBu contour must overlap the 60 dBu contour as originally granted. In other words, for the first four years a non-Appendix A Market translator won't be able to be relocated so far away that its modified 60 dBu contour does not overlap the originally granted 60 dBu contour. (Again, all contours will be determined by the standard prediction method.)

For Appendix A Market applications, there may be even more to be done. Applicants wishing to prosecute more than one translator application in a given Appendix A Market will be subject to a number of restrictions. First, an applicant may prosecute no more than three applications in any Appendix A Market. For each such application, a "No Overlap Showing" will have to be submitted. And in addition, for each of those applications the applicant will have to demonstrate that certain LPFM licensing opportunities will not be precluded.

And all of this has to be wrapped up and delivered to the FCC ***by 7:00 p.m. (ET) on January 25, 2013***. All showings will be submitted on paper – there will be no electronic filing.

As noted, once an applicant has filed its Selection List and accompanying Caps Showings, there's no changing them at all. The Bureau will then sift through them and clear its files accordingly. If an applicant that should file a Selection List and Caps Showing fails to, or if it files a "deficient" showing, the Commission will follow a particular drill for deciding which applications will stay and which will go.

Finally, a note of caution to everybody who has a vintage 2003 translator application still pending. You all are still subject to the anti-collusion rules. That means that you cannot, at any point in the caps selection process, communicate with other applicants with respect to various application-related matters. (The particular areas to avoid are spelled out in Section 1.2105(c) of the rules.)

Translate this (again)!

Final Framework for LPFM/FM Translator Resolution Adopted

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It looks like the long-running tug-of-war for spectrum between low-power FM (LPFM) advocates, on the one hand, and FM translator advocates, on the other, may be close to wrapping up, at least as far as the FCC is concerned. With a "Fifth Order on Reconsideration and Sixth Report and Order" (we'll just refer to it as the *6th R&O*), the Commission has tied up some loose ends remaining from last March's "Fourth Report and Order and Third Order on Reconsideration" (*4th R&O*) and adopted new rules and policies governing LPFM applicants.

With these changes, the Commission is positioned to move forward on two related fronts. First, it should be able to clear the logjam of 6,000 or so translator applications remaining from the 2003 FM translator window – indeed, it has already announced the first important deadline in that process. (*See* the related story on Page 1.) And second, it can establish a timeline for the first LPFM window filing opportunity in more than a decade.

The FCC has set the stage for a new LPFM window tentatively set to open on October 15, 2013.

Anyone new to the LPFM/FM translator imbroglio – or anyone who may not recall the monumental effort the Commission made earlier this year to solve that seemingly insoluble conundrum – may want to take a quick look at our coverage of that effort. You can find some relevant posts on our blog (at www.CommLawBlog.com) from last April. Having dealt with all that heavy regulatory lifting, the Commission was able to make the *6th R&O* relatively straightforward and limited in scope (although it still weighs in at a hefty 83 pages, not counting appendices and Commissioners' statements). In it, the Commission fine-tunes its approach to the translator backlog and sets the stage for a window for new LPFM applications tentatively set to open on October 15, 2013.

Here are the highlights:

Clearing the translator backlog

First things first. Before the Commission can open an LPFM window, the remaining 6,000 or so translator applications filed back in 2003 have got to be cleared out. To hasten that, the FCC has revised the cap limits (*i.e.*, the number of translator applications any single applicant can continue to prosecute) and settled on a process to deal with those applications that survive the cap-limit culling.

Application caps – Originally, the Commission had settled on a 50-application cap. But now that has been relaxed somewhat, in some limited circumstances. In the *6th R&O*, the Commission has revised the cap upward to 70 applications nationally, with a limit of 50 in the largest U.S. markets.

Additionally, translator applicants are now faced with a cap of three applications in the 156 largest markets – as opposed to the one-per-market cap announced last March. However, the relaxed per-market cap is subject to a number of considerations. For example, submarkets in the largest cities will be considered separate markets for purposes of applying the three-application local limit. No 60 dBu overlap will be permitted with another commonly-owned application. (And with respect to demonstrations of no-overlap, the Commission will ***not*** accept alternate contour prediction – *e.g.*, Longley-Rice – showings.) Additionally, applicants will need to submit studies showing that their proposed translators will not preclude LPFMs in either the market "grid" or at the translator's proposed site.

Thinning the herd – With those new caps (and related limitations) in place, here's how the Commission plans to deal with the translator backlog.

The first step is a public notice requiring compliance with the new national and local caps. As described elsewhere in this issue, applicants have until January 25, 2013, to elect their top-70 (and top-50 in major markets) applications. Applicants with more than three applications in the so-called Appendix A Markets have to make similar elections. Thousands of FM translator applications should be eliminated from the database, thereby – the theory goes – making room for LPFM stations.

Next, or simultaneously, the FCC will begin processing "singleton" translator applications in non-"spectrum limited" markets (those where opportunities theoretically remain for new LPFM stations. (Check out our blog post from last April for more details on "spectrum limited" markets.). Applicants in this category will be invited to file "long form" applications to supplement the abbreviated Forms 349 they filed in the 2003 translator window.

At the same time, applicants in "spectrum limited" markets will be afforded an opportunity to file long-form applications which include, where possible, showings that the grant of their applications will not preclude opportunities for future LPFM stations.

The FCC will then open a settlement window allowing tech-

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nical settlements or limited buy-outs (for expenses only) among mutually-exclusive applicants for ***non***-"spectrum limited" markets.

Singleton applicants in "spectrum limited" markets which can demonstrate no preclusion of LPFM opportunities will then be processed and granted. A settlement window will then be opened to allow the sorting out of non-preclusive mutually exclusive applicants in "spectrum limited" markets.

Any remaining singletons will then be processed and granted.

After these steps are completed, some groups of mutually-exclusive translator applications are still likely to remain. The FCC will conduct an auction among remaining applicants for commercial translator licenses; remaining noncommercial (NCE) translator applications will be chosen under the Commission's noncommercial comparative points system. In hybrid groups of NCE and commercial MX applications, it's likely the NCE applicants will be afforded an opportunity to amend to specify commercial operations, thereby avoiding dismissal.

The Commission thinks it can wrap up the translator backlog in the next nine months. We wish them luck.

Timing – As noted, the deadline for notifying the FCC about which applications are to be dismissed and which are to be prosecuted has been set for January 25. Since all translator applicants have long been on notice that they would be having to make some such election (even if the precise application has been somewhat up in the air until now), the FCC is not likely to extend that relatively abbreviated filing period, absent extreme circumstances.

But the follow-up processes of settlements, singleton processing, resolution of MX groups, etc. could take considerably longer.

How long? According to the Commission, "to maximize LPFM filing opportunities it is critical for the Media Bureau to complete substantially all of its processing of the pending FM translator applications prior to the opening of the LPFM window." So you might figure that no LPFM window will be opened until the translator backlog has been cleared. Perhaps, but as noted above, the Commission has tentatively set October 15, 2013 as the target date for the next LPFM window. That suggests that the Commission thinks it can wrap up the translator backlog in the next nine months. We wish them luck with that. (Perhaps recognizing the potential for delay along the way, in the *6th R&O* the Commission authorizes the Media Bureau to "adjust" the October, 2013 date "in the event that future developments affect window timing".)

The next LPFM window

When the LPFM window does open, LPFM applicants will be subject to a number of new rules and policies. They include:

- New second-adjacent channel short-spacing waiver criteria for LPFM applicants vis-à-vis FM, FM translator and LPFM stations. The new criteria will permit use of the undesired/desired signal strength ratio methodology to evaluate potential interference. (Up to now, such methodology has been available only to translator applicants.) The criteria will also permit the use of directional antennas, alternate antenna polarization and lower ERP in waiver requests.
- Interference complaint procedures for third-adjacent channel LPFMs vis-à-vis FM, FM translator, or FM booster stations. (Third-adjacent channel spacing requirements for LPFM applications were repealed by Congress in 2010, but actual interference is still a cognizable issue under the rules.)
- Modified selection criteria for mutually-exclusive LPFM applicants. The new criteria will make available additional comparative "points" to those proposing to establish local studios and for applications by Native Americans to serve their tribal lands.
- Expanded ownership limits which will permit, subject to certain restrictions, ownership of up to two FM translators by an LPFM station.
- Elimination of the plan adopted in 2000 to license LP10 (10 Watt) LPFM stations.
- Elimination of IF protection requirements applicable to LPFM.

What you see is what you get.

So the FCC has finally resolved a proceeding that had its origins in the 2003 FM translator window. As to LPFM/full-power interference issues and the imposition of FM translator application caps, the FCC (with significant input from Congress) has spoken. Some mass filers will lose the bulk of their remaining translator applications, as will applicants who concentrated in just a few markets, but the adjustments to the caps may help some. LPFMs will have new spectrum rights vis-à-vis full-power FM and other FM services, new opportunities to own translators, and new limitations on the facilities they can hold. It's safe to say that nobody is likely to be 100% happy with 100% of the Commission's resolution of the LPFM/FM translator conundrum. But a decade of uncertainty is over, unless either the FCC re-thinks things or a court of appeals (at the request of one or another disgruntled party) finds some flaw in the Commission's actions – neither of which possibilities is likely, in this writer's view. If all goes as planned, the FCC's new rules will become effective January 10, 2013 – since the FCC hustled the *6th R&O* into the Federal Register a scant week after its release.

More tips on the uploading process

Online TV Public Inspection File Deadline Looms

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As we roll into the New Year, it's important that full-power TV and Class A TV licensees (we'll refer to them collectively as "TV licensees" here) keep their eye on February 4. That's the date by which all TV licensees must have uploaded their public inspection files to the FCC-maintained online site. If you haven't already done so, now's the time to inventory your public file, determine what documents have to be uploaded, and start the upload process *inmediatamente*.

As we have been explaining since last spring when the new online public inspection file requirements were first adopted, TV licensees must move most (but not all) of the materials in their existing public files to the online system. Earlier this month the Commission officially announced that the deadline for completing that project is ***February 4, 2013***.

What has to be uploaded? Everything in the file, ***EXCEPT***: (a) political broadcasting files created prior to August 2, 2012 and (b) letters/emails from the public.

(First Important Note: commercial stations ***not*** affiliated with one of the top four national networks in any of the Top 50 TV DMAs *still* don't have to upload political files to the online site until July 1, 2014, although they may if they want to. Top 50 market network affiliates, on the other hand were required to upload all political documents created on or after August 2.)

(Second Important Note: The Commission has made clear that communications from the public about the station that are posted on social media are ***not*** required to be placed in the paper public file, much less the online public file.)

Of course, the FCC has taken care of a large chunk of the uploading job by automatically importing into the online file all applications and reports filed electronically through other FCC systems, including applications filed through CDBS and Children's TV Reports. So as you sift through your paper public file, don't worry about having to manually upload those types of materials (although you should probably double check your online file to confirm that all the applications/reports that are supposed to be in the online file are, in fact, there).

While the contents of station files will vary from station to station, for most stations it's likely that the biggest uploading chores will involve: (a) quarterly issues/programs lists and (b) contracts and other ownership/organization-related materials. We already covered the process of uploading documents – including particularly issues/programs lists – in the September, 2012 *Memo to Clients*. Check back there (or on our blog at www.CommLawBlog.com) for general tips on accessing and uploading to your online public file. Of course, back then we were primarily concerned with walking our readers through the process of uploading their October, 2012 issues/programs list, *i.e.*, the first new document that *all* TV licensees had to upload. Now's the time to go back through all the old issues/programs lists that have accumulated since the last renewal grant and upload those to the site.

And it's also the time to tackle contracts and ownership-related materials, if you haven't already done so.

First, what documents are we talking about?

The rules regarding the public availability of contracts and ownership/organization documents are spread over several different sections of the FCC's regs. While those rules do not necessarily provide completely consistent direction, the bottom line, as best we can figure, is the following.

The FCC has taken care of a large chunk of the uploading job by automatically importing many items.

The public inspection file rules (Section 73.3526 for commercial stations, Section 73.3527 for noncommercial stations) require TV station owners to upload copies of the following agreements to the online file:

- Citizen agreements, which are written agreements between the licensee and one or more citizens or citizen groups entered into primarily for noncommercial purposes. These generally involve "goals or proposed practices directly or indirectly affecting station operations in the public interest, in areas such as – but not limited to – programming and employment".
- Time brokerage agreements involving brokerage of the licensee's station, and agreements in which the licensee is brokering another station, whether in the same market or different markets.
- Joint Sales Agreements involving joint sale of advertising time on the station and on one or more other stations, regardless of whether or not the stations are in the same market.

The FCC has created separate folders for each of these types of agreements. You can find links to access those folders in the left-hand column of the public file upload screen.

But over and above such items, your paper public file may include a number of other contracts or ownership/organizational documents. That's because the public file rules require that the file contain "ownership reports *and related materials*". The "related materials" referred to – which are required to be filed with the Commission pursuant to Sections 73.3613 and 73.3615 – include a wide range of items, including:

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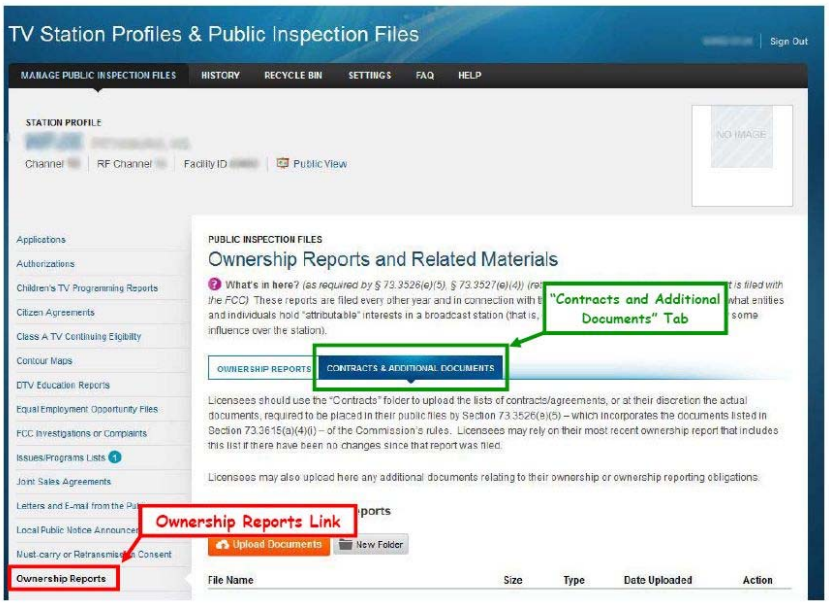
- Contracts, instruments or documents relating to the ownership or control of the licensee or its stock, or relating to changes in the ownership or control of the licensee. For example: articles of incorporation, bylaws, stock voting agreements, options, mortgages or loan agreements that limit the licensee's freedom to operate as it pleases. (These materials must be in the file not only for the TV licensee itself, but also for entities with majority interests in or otherwise exercising control in fact over the licensee.)
- Management or consultant agreements with persons other than officers, directors or regular employees of the licensee.
- All agreements with anyone that provide for sharing of both profits and losses.
- Time Brokerage/ Local Marketing Agreements where the licensee of the station is brokering time on another station in the same market and more than 15% of the time on the other station is provided by that licensee.
- Network affiliation agreements with a national network (*i.e.*, a network with 15 or more hours per week delivered to at least 25 affiliates in 10 or more states).



So don't be surprised if you find such materials in your paper public file. The good news is that the rules provide that full copies of those documents need ***not*** be placed in the online file (or the paper file, for that matter) ***as long as an up-to-date list of such materials IS included in the file***. If your most recent ownership report (FCC Form 323 or Form 323-E) contains such a listing (as it should in most instances), you should be off the hook for uploading any of these materials.

And even if the listing in your most recent ownership report is not up-to-date – for instance, you may have entered into a reportable contract since your last ownership report was filed – you can upload a separate, current list of documents (being sure to include not only the parties to any listed agreement, but also the execution and expiration dates as well).

Where to put such a list? First, sign onto your station's online public file upload screen. Once you're there, click on the "Ownership Reports" link in the left-hand column (marked in red in the illustration below), and when the "Ownership Reports" page comes up, click on the "Contracts and Additional Documents" tab (marked in green below). Then click on the orange "Upload Documents" button and follow the standard upload routine. (If you want to upload full copies of any documents – rather than a mere listing of them – and you can't find any other appropriate tab for them in the left column of the upload screen, you can put them here.)

Note that, even if you choose to upload a list of documents, rather than the documents themselves, you are still required to provide copies of any of the listed documents to anyone requesting them. Such copies must be provided within seven days of the request.

Careful readers may have observed that the various categories of reportable documents overlap in some respects, but not necessarily consistently. For example, one rule section indicates that time brokerage agreements can merely be listed, while another section indicates that full copies of such agreements must be uploaded. Similarly, TV joint sales agreements do not need to be listed in ownership reports (or provided on paper to the FCC's headquarters), but full copies of such agreements must be uploaded to the online public file system.

If an agreement isn't included in the categories we've listed above, you don't have to upload it to your station's public inspection file. The FCC has helpfully listed a few documents that do NOT need to be kept in the file: Trust agreements (unless the FCC asks for them); employment agreements with stations managers or sales personnel, professional services agreements with attorneys, consultants or engineers, and contracts with performer, sales reps, and labor unions.

Additionally, while agreements for the sale of assets or transfer of control as exhibits to license assignment or transfer of control applications are clearly reportable, they normally don't need to be uploaded separately. That's because complete copies of such documents are usually filed as part of the Form 314, 315 and 316 seeking FCC consent

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Incognito ergo sum?

Incognito Incentive Auction Input Encouraged

By Harry F. Cole
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In an effort to coax otherwise reticent TV broadcasters to join in the public discussion about the FCC's plans for incentive auctions, the Media Bureau has issued an unusual public notice providing "additional guidance" relative to the fine art of filing comments anonymously. (Exactly when the Bureau had previously provided any such guidance isn't clear – we certainly don't remember any – but they're claiming that this new guidance is "additional" to something, and who are we to say them nay?)

The notice reflects the Bureau's recognition that some, perhaps many, broadcasters might be reluctant to chime in on the auction proposals because public disclosure of auction-related sensitivities now might be disadvantageous come auction time. It's always wise to keep your cards close to your vest, so individual TV folks might logically prefer not to reveal questions or concerns that might signal their ultimate auction strategy if and when the auction actually happens. (Even Congress, in mandating the incentive auction process in the first place, provided for confidentiality relative to some information submitted by reverse auction participants.)

Logical though that close-to-the-vest approach may be, it's contrary to the Commission's effort to assemble the most comprehensive record possible. As the Commission sees it, the more information it can gather relative to the interests of broadcasters now, the more likely the Commission will eventually be able to design incentive auctions that will attract maximum broadcaster participation. And the more broadcasters that participate in the auction, the greater the likelihood that the auction process will free up maximum spectrum for the Great God Mobile Broadband.

So the Bureau is making clear not only that you can file anonymously, but also *how* to file anonymously.

It's actually simpler than you might imagine. If you're filing comments the old-fashioned way (*i.e.*, on paper, through the office of the FCC Secretary), you just don't bother to tell the FCC who you are. (Alternatively, you could presumably use a pseudonym – John Doe, f'rinstance, or maybe Publius, or a personal favorite, L'Angelo Misterioso.)

Things are a bit trickier if you want to file electronically. The FCC's rules require that electronic filers identify themselves *unless they are represented by counsel*. If you've lawyered up (and, as card-carrying members of the Federal Communications Bar Association, we certainly encourage you to do so), no ID is required – although the lawyers will have to identify themselves.

Lawyer-less electronic commenters are not entirely out of luck. Under the rules, they're supposed to include their names and mailing addresses, but the Bureau's public notice observes that folks in that position can still request a waiver of the ID requirement – although the notice doesn't explain exactly how you can file a waiver request anonymously.

The Bureau encourages anonymous filers to provide "sufficient basic information" to let the Commission and the public "understand and evaluate the positions" spelled out in their comments. Particular items of interest mentioned by the Bureau: the commenter's market tier, and whether it's a network affiliate or independent.

Whether the Bureau's invitation to anonymous commenters will indeed lead to a "robust" record, as the Bureau hopes, or an arguably unreliable record (after all, how can the FCC rely on input whose source is unknown?) is not clear. But the Bureau has put the word out, so we thought we'd pass it along. Remember, comments in the incentive auction proceeding are currently due to be filed by ***January 25, 2013***, and reply comments by ***March 12***.

(Continued from page 9)

to the transaction reflected in the underlying agreement. If the form containing a copy of the agreement has been filed through CDBS, then the agreement itself is already contained in the online public file.

The rules specifically allow stations to redact confidential or proprietary information from Time Brokerage Agreements and Joint Sales Agreements uploaded to the public file, with the caveat that the redacted information must be disclosed to the FCC on the FCC's request.

Now that you've got the lay of the land, it's time to get cracking. All TV licensee must have their complete public inspection files uploaded to the FCC's online site by ***February 4, 2013***. Again, the upload process will require each station to inventory its existing paper file to determine what needs to be uploaded. That process may also reveal that some documents that should be in the file are missing. It's wise to allow yourself some extra time, just in case the inventory and upload processes raise questions that need to be resolved.

The requirement that TV public files be posted online substantially increases the need for diligence in the maintenance of those files, which will now be accessible 24 hours a day to every gadfly, critic, community activist and competitor. In the 21st Century online world, a station's file can be visited by anyone at any time – and those visits can't be monitored like the rare visits to the dusty old paper filing system used to be. That being the case, it's a good idea to take the time to be sure that the online public file is complete and that, as much as possible, its contents reflect favorably on the station's operation.

Coming soon to the Right Coast – Wi-Fi on 'roids

"White Space" Devices OK'd in Eastern U.S.

By Mitchell Lazarus
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Fully four years after adopting rules for unlicensed TV Band Devices (TVBDs), also called "white space" systems, the FCC has authorized roll-out beyond the two small test areas previously approved. Touted by advocates as "Wi-Fi on steroids," TVBDs can now boot up in New York, New Jersey, Pennsylvania, Delaware, Maryland, Washington DC, Virginia, and North Carolina.
The FCC expects to extend authorization nationwide by mid-January.

TVBDs are required to avoid causing interference to multiple services: broadcast TV; fixed broadcast auxiliary service links; receive sites for TV translators, low power TVs, Class A TVs, and multichannel video programming distributors; public safety and private land mobile; offshore radio telephone; radio astronomy; and "low power auxiliary service," which includes licensed (and some unlicensed) wireless microphones.

The complexity of the TVBD rules results from the need to ensure that all of these services can operate unharmed. In many metropolitan areas having multiple TV channels and heavy use of wireless microphones, vacant spectrum for TVBDs is already scarce. The FCC's ongoing plans to consolidate TV broadcasters onto fewer channels, so as to free up more spectrum for wireless use, will only make things worse.

Simultaneously with the spread of TVBDs into the Middle Atlantic states, the FCC expanded its registration program for wireless microphones from those same states out to the rest of the country, keeping the wireless mic registrations a step ahead of the TVBD roll-out. (*See* the related story on this page.)

Above: Artist's conceptual depiction of "white space"

FCC Launches Nationwide Registration of Wireless Mics

By Mitchell Lazarus
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The FCC has expanded its registration program for wireless microphones from the Middle Atlantic states to the rest of the country. Registration helps to protect qualifying wireless microphones that operate in vacant TV channels from interference caused by TV Band Devices (TVBDs), also called "white space" systems, that likewise use vacant TV slots.

When the FCC established rules for TVBDs, it required those devices to avoid interfering not only with TV stations, but also with several other categories of equipment operating on TV frequencies. The most populous of those, by far, are the wireless microphones that are ubiquitous in TV, stage, and film production.

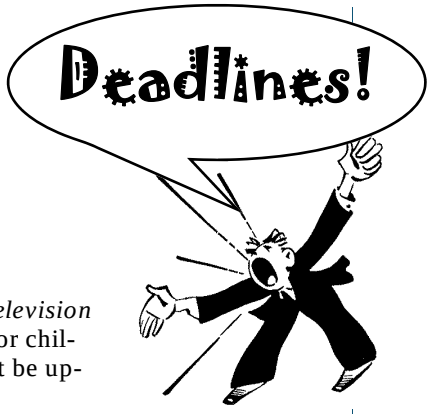
Most wireless microphones used in TV and films are licensed by the FCC. Most others – including those used in stage shows, churches, and the FCC meeting room – operated illegally until January 2010, when the FCC authorized low-power models on an unlicensed basis by waiver. (As it considers whether to make those rules permanent, the FCC recently sought to update the record on wireless microphone issues generally.)

Two TV channels in every market are closed to TVBDs, so as to leave room for wireless microphones. ***Licensed*** wireless microphones needing additional channels are entitled to interference protection from TVBDs. So are ***unlicensed*** microphones on other channels, but only if used for major sporting events, live theatrical productions and shows, and similar occasions that require more microphones than the set-aside channels can accommodate.

To implement protection, qualified events must register in the database that controls which frequencies TVBDs can use at each location. The FCC has authorized the operation of TVBDs in New York, New Jersey, Pennsylvania, Delaware, Maryland, Washington DC, Virginia, and North Carolina, and expects nationwide authorization by mid-January. (*See* the related story on this page.) Those who distribute or use wireless microphones should make sure any needed registrations are in place before TVBDs are deployed in their vicinity.

A link to the FCC's notice providing details of the registration process is available on our blog. The conditions and procedures are complex; and the FCC cautions that most uses of unlicensed wireless microphone do not qualify for registration. We recommend planning ahead.

Above: Artist's conceptual depiction of "white space" (side view)



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 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 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.

January 25, 2013

Television Spectrum Incentive Auction – Comments are due in the proceeding seeking to re-allot 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.

February 1, 2013

Radio License Renewal Applications – *Radio* stations located in **Kansas**, **Nebraska**, and **Oklahoma** 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 **Arkansas**, **Louisiana**, and **Mississippi** 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.

Radio Post-Filing Announcements – *Radio* stations located in **Kansas**, **Nebraska**, and **Oklahoma** must begin their post-filing announcements with regard to their license renewal applications on February 1. These announcements then must continue on February 16, March 1, March 16, April 1, and April 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 **Arkansas**, **Louisiana**, and **Mississippi** must begin their post-filing announcements with regard to their license renewal applications on February 1 . These announcements then must continue on February 16, March 1, March 16, April 1, and April 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 **Texas** must begin their pre-filing announcements with regard to their applications for renewal of licenses on February 1. These announcements then must be continued on February 16, March 1, and March 16.

Television License Renewal Pre-filing Announcements – *Television* and *Class A television* stations located in **Indiana**, **Kentucky**, and **Tennessee** must begin their pre-filing announcements with regard to their applications for

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renewal of license on February 1. These announcements then must be continued on February 16, March 1, and March 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.

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Arkansas**, **Kansas**, **Louisiana**, **Mississippi**, **Oklahoma**, **Nebraska**, **New Jersey**, and **New York** 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 **Arkansas**, **Louisiana**, **Mississippi**, **New Jersey**, and **New York** 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 **Kansas**, **Oklahoma**, and **Nebraska** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

February 4, 2013

Uploading of Public Files – As previously reported (*see* related article on Page 8), all *television* and *Class A 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 by February 4, 2013.

March 12, 2013

Television Spectrum Incentive Auction – Reply Comments are due in the proceeding seeking to re-allot 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.

Happy New Year!

We wish all of our clients and friends a very happy, safe and prosperous 2013.

Fletcher, Heald & Hildreth

FCC Reports go Hollywood

Commissioner Pai: The Dude Abides

By Harry F. Cole
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703-812-0483

Sometimes Commissioners aren't content to just vote on the orders the FCC issues. Instead, they feel the need to issue their own "separate statements", explaining, justifying, hedging, etc., etc. their votes.

We read a lot of those statements – it's an occupational hazard. As far as we can tell, such statements usually don't add much to the Greater Good. After all, the FCC's decision is the FCC's decision, and the individual musings of one or another Commissioner may be marginally interesting, but they don't affect the decision. They often seem intended primarily to bestow kudos on Commission staffmembers, members of Congress, various other notables, while articulating observations that, apparently, couldn't garner a majority of the Commission (otherwise, presumably, they would have been included in the actual order, obviating the need for a separate statement).

We suspect that the Commissioner is the kind of guy who doesn't roll on Shabbos.

Which brings us to a separate statement of a different stripe. In late November, the Commission voted to close up a quasi-loophole in the Telephone Consumer Protection Act, a loophole that some members of the bar (other lawyers might refer to them as "brethren" but, frankly, we'd rather not) have apparently used to justify class action suits of dubious validity. And Commissioner Ajit Pai issued a separate statement in connection with the decision.

We salute Commissioner Pai's statement and commend it to our readers' attention.

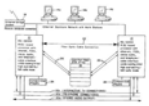
It is a model of concision and directness. Opening with an unarguable, but seldom stated, notion – "In regulation, as in sports, it is good to have clear rules" – it explains the Commissioner's position, appropriately castigates those who would try to take advantage of the faux loophole, and encourages those who have acted – and will, theoretically, now act – appropriately regardless of that faux loophole. It avoids the expressions that seem mandatory in such separate statements: nothing is referred to as "vibrant" (by the way, what exactly does that mean, anyway?); there are no "ecosystems"; there are none of the paradoxical references to the simultaneous "unleashing" and "harnessing" of anything.

Instead there is elegance (the order "ends the legal lacuna and the courtroom arbitrage it has inspired"), reference to the actual record before the FCC, and avoidance of the obvious cliché: where others might have fallen back on the tired "win-win" expression, Commissioner Pai says simply that the FCC's order is "a win for consumers and for innovative companies alike." Yes, it's a small thing, but some of us readers appreciate it.

And then there's the citation. Remember that opening statement? It's accompanied by a footnote, which references a quote from *The Big Lebowski* (note to some readers: that's a classic film from the Coen brothers). And it's a righteous, on-the-money quote. Separate Commissioners' statements don't often rely on such sources. But, for what it's worth, the *Memo to Clients* editorial staff supports reliance on *any* source that assists in accurately communicating the author's point to the audience. (And yo, Commissioner Pai, you've got a standing invitation to contribute to the *Memo to Clients* anytime you want.)

We hope that Commissioner Pai's citation to the words of Walter Sobchak doesn't get him into hot water with his colleagues. But we suspect that the Commissioner is the kind of guy who doesn't roll on Shabbos and doesn't need our, um, sympathy. In fact, we understand that, in response to a Facebook shout out about his statement, the Commissioner himself responded, "Thank you, sir. The agency abides."

Maybe, but in our view, it's Commissioner Pai who abides.



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would likely be narrower in scope than they are today (which – and this is disputed by MAD in its blog post – are narrower than the original patents). No matter what, the reexamination procedure is likely to go on for some time – this is something no one disputes. (Another thing that no one disputes – we here at FHH are ***not*** patent lawyers. We strongly encourage any radio broadcaster to consult with competent patent counsel before doing anything based on the USPTO's latest actions.)

Still, there's no doubt that the latest development at the USPTO favors the broadcasters more than MAD. The passage of time and likely narrowing of the MAD patents will limit any eventual damage recovery MAD might get via court order or licensing agreement. So while the saga may not yet have come to its final end point, broadcasters can and should enjoy the end-of-2012 holiday season thanks to the early treat left under everyone's tree by the USPTO – everyone, that is, except MAD.

Wilkommen, Bienvenu, 欢迎

Cheng-Yi Liu Joins FHH

Fletcher, Heald & Hildreth is pleased to announce that Cheng-Yi Liu will be joining our team as an associate attorney effective January 2, 2013. Cheng is a 2006 graduate from the Maurer School of Law at Indiana University, where he received a Merit Scholarship and Dean's Honors and, most strikingly, co-founded the University's Chinese Yo-Yo Club. He got his undergraduate degree (a B.A., with a minor in electrical engineering) from the University of Texas. He's spent the last five years advising clients on a wide range of telecom and regulatory matters, including VoIP, wireless licensing, carrier service/resale arrangements and the like. We're pleased to report that, in addition to his obvious familiarity with telecom law (and his interest in Chinese Yo-Yo), Cheng also lists recreational lock-picking among his hobbies. Cheng resides with his wife, Sarah (and, of course, their cat, Mrs. Huggins) in Arlington, Virginia.

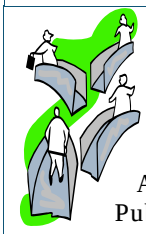
(Continued from page 3)

displaying programs, just what types of gear should be included? The statute covers picture screens of any size, no matter how small. The FCC tentatively proposes to include DVD and Blu-Ray players, but only to the extent that they receive, play back, or record TV broadcast or MVPD services. But what about DBS set-top boxes, recording devices, and other devices that may process signals differently from how a TV receiver processes them? Should there be any minimum performance standards? Is there a way to insert the main channel audio on the secondary stream when no emergency information is being provided, so that the secondary stream is not silent, misleading users into thinking that the stream is not working?

Oh, yes – the statute allows the FCC to grant waivers to equipment manufacturers for devices that may be able to receive and play back video programming but are designed primarily for another purpose. One basis for waiver: whether the purposes of the VCAA are "achievable" with the particular apparatus. That's all well and good, but how is the FCC supposed to figure out what's "achievable"? The statute provides some general guidance on that issue – considerations include the nature and cost of steps that would be necessary to meet the statutory requirements, the technical and economic impact on the manufacturer, the "type of operations" of the manufacturer and the extent of its product line. But it's now up to the FCC to develop some more concrete guidelines.

And finally, the FCC asks, if all of the above ideas fall into hopeless confusion or impracticality, is there some other way to achieve compliance with the CVAA? Are there "alternate means" of fulfilling the statutory purpose; and if so, what standards should be applied to requests to use alternate means?

The questions posed in the *NPRM* are many and complicated, particularly with respect to the logistics of implementation. So it's something of a surprise that the Commission allowed only 20 days for comments and half that for reply comments (and note that Christmas Day fell right in the middle of the reply comment period). Comments were due ***December 18, 2012***. The Reply Comment deadline, originally set for December 28, has been extended to ***January 7***. Interestingly, the Media Bureau appears to have recognized that the brief commenting periods may not afford everyone enough time to say their piece on the subject. Accordingly, it has announced that staff members from the Media and Consumer and Governmental Affairs Bureaus will be "available" for meetings with interested parties to discuss issues related to the comments and reply comments. Those meetings are set for January 14, 16 and 17. We're guessing it's first-come-first-served. Anyone wishing to schedule a meeting should contact Diana Sokolow, Diana.Sokolow@fcc.gov, or Maria Mullarkey, Maria.Mullarkey@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.



FHH - On the Job, On the Go

Scott Johnson will attend the Winter Conference of the South Carolina Broadcasters Association at the Columbia Metropolitan Convention Center (a new location!) on January 24-25. **Scott** will be presenting a program there on regulatory and legislative matters relating to broadcasters.

Also on January 25, **Kevin Goldberg** will be speaking at the Association of Alternative Newsmedia Digital Publishing Conference in San Francisco.

On February 7-9, **Matt McCormick** will attend the Annual Conference of the ABA Forum on Communications Law in Dana Point, California.

Here come da judge! **Frank Montero** has accepted an invitation to serve as a judge for the 2012 Americas Regional Round of the Price Media Law Moot Court Competition. The preliminary rounds will be held on January 24-25 at the Benjamin N. Cardozo School of Law in New York City; the final round will be January 27. The invitation was extended by the Cardozo School of Law Moot Court Honor Society, in association with the University of Oxford's Programme in Comparative Media Law and Policy and the University of Pennsylvania's Annenberg Center for Global Communication Studies. The Price Media Law Moot Court Programme originated at Oxford University to foster an interest in international law governing freedom of expression issues.