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Memorandum to Clients
February 2013 News and Analysis of Recent Developments in Communications Law No. 13-02

It's about time . . .

The Five-Year Enforcement Shot Clock: Has the FCC Finally Begun to Acknowledge It?

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It appears that the Commission may have taken the first steps – baby steps carefully cloaked from public view, perhaps, but steps nonetheless – toward addressing its hopeless backlog of broadcast complaints. In a series of super-low-key actions in recent weeks, the Media Bureau has quietly cancelled a number of previously assessed forfeitures. The actions have been reflected in terse (and we do mean terse – we've linked to an example on our blog at www.CommLawBlog.com) letters that provide no explanation for the cancellations. But based on the answers we got to some informal inquiries, we figure that these cancellations could be the harbinger of considerably more dramatic developments on the complaints front.

It appears that the recent forfeiture cancellations have all involved the same general fact pattern. The Bureau issued a notice of apparent liability (NAL) and/or forfeiture order for violations which occurred significantly more than five years ago. The target licensee responded by arguing that, thanks to 28 U.S.C. §2462, the FCC is statutorily prevented from collecting the fines, so they should be cancelled. That argument has been initially rejected by the Bureau in some cases (again, we've linked to an example on our blog), but the licensees have pressed their argument before the Commission in applications for review.

And now, we understand that the Bureau has been directed by higher-ups in the agency to cancel the forfeitures in light of that Section 2462 argument. The Bureau's cancellation letters are, we are told, the result of that direction.

For readers not familiar with Section 2462, check out Steve Lovelady's blogpost on the topic from a couple three years ago. (It also appeared in the August, 2010 *Memo to Clients*.) Essentially, Congress has told the Department of Justice that DoJ can't initiate any lawsuit to enforce a civil fine, penalty or forfeiture later than five years after the underlying claims accrue. That's important because Congress (in 47 U.S.C. §504(a)) has also told the FCC that, if the FCC fines a licensee and the licensee declines to pay – which is an option accorded to licensees by Congress – the FCC can collect only by getting DoJ to sue the licensee to collect the fine. Perhaps more importantly for FCC licensees, Section 504(c) of the Communications Act clearly and unequivocally provides that, if a licensee has not paid the fine and no court has ordered that the fine be paid, then the fact that the Commission may have imposed a forfeiture in the first place "shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued".

Get the picture?

If the licensee doesn't pay the fine voluntarily, the only way the FCC can collect is through a lawsuit. But if the claim underlying that lawsuit arose more than five years earlier, the FCC (acting through DoJ) ***can't even start*** such a lawsuit, much less collect through it. And if the lawsuit can't get started, then, under Section 504(c), whether or not the rules may have been violated makes no difference: the mere fact that an NAL (or, presumably, forfeiture order) was issued ***cannot*** be "used . . . to the prejudice" of the supposed violator.

Truth be told, this is a pretty simple concept, made even simpler by the clarity of the two statutes in question. But historically the Commission appears to have ignored it. You can understand why.

The Commission has tended to take a leisurely approach to forfeitures. The Communications Act, after all, technically permits the Commission to issue fines for licensee misconduct that occurred at any time during a license term as long as the next license term hasn't already started. (Remember, Section 2462 relates to collecting fines, not imposing them in

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Ain't no sunshine

Introducing "The Federal Communications Commission Collaboration Act of 2013"

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[*Editor's prologue: Kevin Goldberg has a second-to-none track record when it comes to defending the First Amendment and Open Government. Named the outstanding constitutional law student in his graduating class at the George Washington University Law School, he has served as a member of the Board of Directors of the District of Columbia Open Government Coalition, a member of the Executive Committee of the Board of Directors of the National Press Foundation, a member of the Board of Directors of the Public Participation Project and the Chair of the Legislative Affairs Committee of the Media Law Resource Center. In 2006, Kevin was inducted into the National Freedom of Information Hall of Fame for his continued and superlative service in pursuit of open government. He is the youngest of the current 56 members in the Hall. When he has something to say about the public's right to know, we listen. Kevin has something to say about the proposed "Federal Communications Commission Collaboration Act of 2013".*

We expect some of our readers may disagree with Kevin's views, and we expressly invite those who do disagree to share their views with us in comments, or possibly even in a guest post, on our blog at www.CommLawBlog.com.]

Nearly 50 years ago, Congress passed the federal Freedom of Information Act (FOIA), giving all of us citizens access to the records of every executive branch agency (subject to nine very narrowly-construed exceptions). The FOIA embodies the fundamental premise that the public has a right to know how the government does the public's business.

A decade later, in the wake of the Watergate scandal, Congress passed the Government in the Sunshine Act (a/k/a the Sunshine Act), again seeking to ensure the public's right to know. (In Congress's words, "Government is and should be the servant of the people, and it should be fully accountable to them for the actions which it supposedly takes on their behalf.") The Sunshine Act gives us all access to the meetings of certain executive branch agencies, much as the FOIA give us access to those agencies' written records.

Maybe not for long, though, at least as far as the FCC is concerned.

Bills proposing the "Federal Communications Commission Collaboration Act of 2013" have been introduced in Congress – as S. 245 by Senators Amy Klobuchar (D-MN, and Dean Heller (R-NV) and H.R. 539 by Representatives Anna Eshoo (D-CA), John Shimkus (R-IL), and Mike Doyle (D-PA). Under the bills' provisions, FCC Commissioners would be allowed to engage in a significant amount of regulatory activity outside of the public's view.

The Sunshine Act requires that "[e]very portion of every meeting" of the FCC and other similar agencies be "open to public observation". In this context a "meeting" requires that (a) at least a quorum of commissioners be present and (b) "official agency business" be conducted or disposed of. One week's advance public notice of such meetings must be given. While the Act provides ten exemptions which justify exclusion of the public and the press, those exemptions are limited and are not intended to excuse wholesale closure of meetings.

For years, officials subject to the Sunshine Act – including a number of FCC commissioners – have complained that it doesn't easily allow for informal brainstorming sessions or other get-togethers involving multiple agency members. Maybe so, but I see that as at most a minor inconvenience when the goal is holding those in power accountable for their actions. Others obviously don't agree with me, because the possibility of a Sunshine Act exemption specifically for the FCC has been repeatedly advanced for nearly a decade. A version of the FCC Collaboration Act was inserted into larger FCC reform legislation last year, but that legislation didn't pass, which is why we're back here again.

The current bills would effectively exempt the Commission from the Sunshine Act by allowing three or more Commissioners to meet if:

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Once more, with filing

The Return of the Annual Employment Report?

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According to the February 21, 2013 Federal Register, Section 73.3612 – the rule requiring broadcasters to file annual employment reports on Form 395-B – is now in effect. We'd like to be able to tell you what that means, but we don't know.

Section 73.3612 was last amended back in 2004. It requires each AM, FM, TV, Class A TV and International Broadcast station with five or more full-time employees to file Form 395-B by September 30 every year. (Form 395-B calls for disclosure of the racial, ethnic and gender breakdown of the reporting station's full-time and part-time staff, according to job category.) Even though that rule has technically been on the books for nearly nine years already, apparently, it has not previously gone into effect. According to an "effective date note" that has been appended to the rule since 2004, "[t]his section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget." OMB approval of Form 395-B was granted in due course back in 2004, and it has been renewed periodically since then, though a condition was later attached. In any event, before the 2004 form's due date, the FCC suspended the filing requirement on a "one-time", "this year only" basis, which has now stretched over nearly nine years.

Form 395-B has sat on the shelf, gathering dust, since 2004.

That explains why you probably haven't given much thought to annual employment reports lately.

Why has the rule been on ice for nearly nine years? It's complicated.

For the last 20-30 years of the last century, the FCC had imposed an annual employment reporting obligation on broadcasters as one element of its Equal Employment Opportunity program. But in 1998, the U.S. Court of Appeals for the D.C. Circuit tossed the FCC's EEO rules on constitutional grounds. The Commission went back to the drawing board and, a couple of years later, came up with a new set of EEO rules, but they didn't make it past the D.C. Circuit either, again because of constitutional problems.

In 2003 the Commission tried again, more successfully. Following along in 2004 was a reinstitution of Form 395-B, which contemplated further revisions to be based upon a revised form (Form EEO-1 Employer Information Report) which was anticipated from the Equal Employment Opportunity Commission. But in 2002, Congress had passed the Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA), which imposes some confidentiality limits on an agency's use of information collected for statistical purposes. Concerns about confidentiality of Form 395-B data had been expressed, strongly, by broadcasters for several years before then.

Although seemingly disposed not to treat Form 395-B data as confidential, the FCC wasn't clear on whether CIPSEA might apply to those data, so it put that question out for comment in 2004. In the meantime, it held off on making any of the new rules effective until further notice. And with particular respect to Form 395-B, the Commission announced in 2004 that it would "allow, this year only, a one-time filing grace period until a date to be determined in the Commission's Order addressing the issues" that it had put out for comment.

Despite the fact that Form 395-B was not in use, the Commission revised it again in 2008, as it had been directed by OMB, to conform to changes in the corresponding EEO Form EEO-1. At that point the FCC asked again for comments on the revised form. In response, broadcasters again raised confidentiality concerns, but said little about the actual revisions to the form. Since the form had to be approved by the Office of Management and Budget (thanks to the Paperwork Reduction Act), the matter was also thrashed out before OMB.

OMB approved the form in 2008, with the following caveat:

> OMB approves this collection but FCC should not initiate using or collecting information with Form 395-A or Form 395-B until FCC decides whether the data collected from each form will be held confidential or not on an individual basis. Following such a decision, the Commission should consult with OMB prior to initiating usage of these forms to determine whether the decision regarding confidentiality results in a substantive change to the collections warranting formal review by OMB of the proposed revisions. If the Commission does not consult with OMB prior to initiating usage of these forms, OMB may request under 5 CFR 1320.10(f) for the Commission to submit these collections for formal review prior to their expiration date.

When that 2008 OMB approval expired in 2011, OMB agreed to extend its approval for another three years, but subject to the same condition.

Since the FCC has not, since first posing the question in 2004, ever resolved the confidentiality question, Form 395-B has sat on the shelf, gathering dust.

Until now . . . maybe. The February 21 Federal Register notice clearly announces the effectiveness of Section 73.3612, which in turn means that broadcasters will, at least theoretically, be required to file Form 395-B this com-

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Do we really want to entrust our social security numbers to the FCC?

GAO Report: In Wake of Successful Hack of FCC Computer Systems, $10 Million Fix Ineffective

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Did you know that, in September, 2011, the FCC was the victim of "a security breach on its agency network"?

Neither did we.

The precise nature and extent of the breach hasn't been made public (as far as we can tell), but it must have been impressive. Did you also know that, in reaction to that breach, within a couple of months the FCC had wangled out of the Office of Management and Budget a cool $10 million to undertake an immediate "Enhanced Secured Network" (ESN) Project to improve its computer security against such cyber attacks?

Neither did we.

And did you also know that the General Accountability Office (GAO), called in to assess the manner in which the FCC implemented its ESN Project, concluded that the FCC messed up? In particular, according to the GAO, the Commission "did not effectively implement or securely configure key security tools and devices to protect these users and its information against cyber attacks." And did you know that, as a result, again according to the GAO, the Commission continues to face "an unnecessary risk that individuals could gain unauthorized access to its sensitive systems and information"?

Neither did we.

This is all spelled out – circumspectly, to be sure, presumably so as not to reveal too much about the FCC's vulnerabilities – in a GAO report sent to Congress on January 25, 2013. The report was not publicly announced until early February.

The fact that the FCC's computer systems have been compromised is bad enough. The fact that the FCC, apparently acting in haste, cut a few too many corners in its effort to lock up the barn door after the horse had taken a hike is even more troublesome.

But what is especially galling – to me, at least – is the fact that, while all that has been going on, the Commission has proposed to force a large universe of individuals to trust the FCC with their social security numbers. And in so doing, the Commission hasn't bothered to mention that the computer systems on which those numbers would presumably be maintained have already been shown to be vulnerable to hackers.

As we reported in last month's *Memo to Clients*, the Commission is considering the elimination of the Special Use FRN in connection with broadcast Ownership Reports (FCC Forms 323 and 323-E). If adopted, that elimination would mean that all attributable interest holders of all full-service broadcast stations (as well as LPTV and Class A TV stations) would have to cough up their social security numbers to the Commission in order to obtain an FCC Registration Number (FRN), which would have to be included in all Ownership Reports. (Comments on that proposal were filed on February 14.)

The FCC's seeming reticence relative to the fact that it suffered an apparently successful cyber attack 18 months ago, and that its efforts to fix the problem in the meantime have apparently been less than successful, is understandable, if regrettable (and also curiously contrary to this Commission's professions of "transparency").

> *According to the FCC, the notion that its oh-so-secure computer systems might be compromised was, at most, far-fetched.*

But it seems extraordinarily inappropriate for the Commission, knowing of those vulnerabilities, to then propose that a huge number of folks must provide to the FCC the crown jewels of their identity, their social security numbers. In so doing, shouldn't the Commission, at a bare minimum, have alerted us all to the fact that not only are its computers possibly vulnerable (we all know that that's an unfortunate fact of modern-day life), but that its computers had *already been successfully attacked*? Oh yeah, and mightn't it have been a good idea to spread the word that GAO had been called in to see whether the problem had been fixed? And once GAO concluded that, um, the problem hadn't been fixed, don't you think the FCC might have at least had some second thoughts about persisting in its proposed insistence on the submission of social security number-based FRNs?

Before you answer those questions, consider this. In 2009, when the FCC first proposed to require the submission of SSN-based FRNs for all attributable interest holders, a number of parties objected, pointing out (among other things) that such submission would increase the risk of identity theft. The Commission's response? We quote it verbatim:

> While identity theft is a serious matter, none of the comments identify a single instance of a security breach with respect to the Commission's CORES system. Indeed, their claims are purely speculative. The FCC has a robust security architecture in place for CORES that exceeds Federal guidelines and recom-

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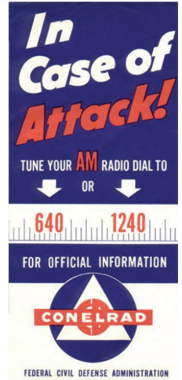
In the wake of zombie alerts (no joke!) . . .

FCC Urges Broadcasters to Secure EAS Equipment



As many of our readers probably heard, a number of broadcast stations in various parts of the country found their EAS systems hacked on February 11, the day before the President's State of the Union Speech. The result of the hacks: the stations issued EAS alerts about zombie attacks. Since the alerts appear to have utilized (probably through the miracle of Internet accessibility) the stations' own systems, those alerts sounded for all the world – and could, and should, have been accepted by the public – as the Real Deal (except for the part about the zombies).

While this may have amused some, the fact of the matter is that any compromise of the EAS system creates serious risks to the public. It's not hard to imagine faux alerts with a much more sinister effect.

With that in mind – and no doubt prompted by concern that the broadcast of the State of the Union speech could present a tempting high profile opportunity for hackers to demonstrate their skills – the FCC (according to our friends at the NAB) issued an "Urgent Advisory" late on the afternoon of February 12, outlining "immediate actions to be taken regarding CAP EAS device security".

While the Commission's goal was presumably to guard against hacks to the President's speech – a goal which appears to have been achieved – the FCC's instructions remain valid for one and all even after the speech is long gone. In particular, according to the Commission:

> **All EAS Participants are required to take immediate action to secure their CAP EAS equipment, including resetting passwords, and ensuring CAP EAS equipment is secured behind properly configured firewalls and other defensive measures.**
>
> **All CAP EAS equipment manufacturer models are included in this advisory.**
>
> **All Broadcast and Cable EAS Participants are urged to take the following actions immediately.**
>
> 1. **EAS Participants must change all passwords on their CAP EAS equipment from default factory settings, including administrator and user accounts.**
> 2. **EAS Participants are also urged to ensure that their firewalls and other solutions are properly configured and up-to-date.**
> 3. **EAS Participants are further advised to examine their CAP EAS equipment to ensure that no unauthorized alerts or messages have been set (queued) for future transmission.**
> 4. **If you are unable to reset the default passwords on your equipment, you may consider disconnecting your device's Ethernet connection until those settings have been updated.**
> 5. **EAS Participants that have questions about securing their equipment should consult their equipment manufacturer.**

Even if your EAS system was not hacked on February 11 or 12, you would be well-advised to double check to confirm that you have taken the actions recommended by the Commission. The hackers have demonstrated that EAS systems in general may be vulnerable. It's best to address any potential vulnerabilities ***before*** they can be exploited.

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> mendations and has deployed strict operational controls in compliance with NIST guidance. The servers are located in secured locations with strict access control. Logically, the databases are located behind several firewalls that protect the data from the Internet and the general FCC user population. All servers and communications are monitored both by automated tools and systems as well as operational procedures. The CORES application uses separate roles for various user classes, and administrative access is only permitted from limited set of known internal workstations. All transmission of non-public data is encrypted.

(You can find the entire FCC response on the OMB website. We've included a link on www.CommLawBlog.com.)

So, according to the FCC, the notion that its oh-so-secure computer systems might be compromised was, at most, far-fetched speculation.

Oops.

We now know that that speculation was not at all far-fetched. That being the case, the Commission may want to re-think its proposed abandonment of the Special Use FRN. And anyone who, in response to the proposal to deep-six the SUFRN, expresses concern about data security should be sure to cite to the GAO report. That way, the Commission can't claim that such concerns are merely speculative.

Changing the rules in the middle of the game?

TVStudy: Changes in TV Coverage Calculations Devised For Incentive Auctions

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The FCC's Office of Engineering and Technology (OET) wants to sharpen its pencil when it comes to predicting TV station coverage. The National Association of Broadcasters (NAB) doesn't think that that's a good idea – not just now, at least.

Who cares? You should, if you're a full-service or Class A TV licensee about to be forced into deciding whether (and if so, how) you will participate in the incentive auction process currently being devised by the Commission.

This month OET announced, pretty much out of the blue, that it has developed new software – dubbed *TVStudy* – which the Commission "plans to use in connection with" the incentive auctions. At issue is the way the FCC plans to utilize OET-69 in the implementation of the auction process.

OET-69 – real name: "OET Bulletin No. 69 Longley-Rice Methodology for Evaluating TV Coverage and Interference" – is, of course, the how-to guide developed by OET over the years for predicting, through use of the Longley-Rice propagation model, TV service coverage and the likelihood of interference. By a complex set of computerized calculations, which incorporate a detailed database of terrain variations, Longley-Rice facilitates "predictions of radio field strength at specific geographic points based on the elevation profile of terrain between the transmitter and each specific reception point." Predictions generated through Longley-Rice are generally deemed to be more accurate than those produced by the Commission's traditional methods. (Those traditional methods first relied on hand-cranked charts and tables; they later migrated to a relatively crude computerized method that produced only a statistical prediction of signal strength over a broad geographic area rather than at any individual location.)

The greater precision provided by OET-69 was central to the vast transition of the U.S. television industry from analog to digital, a process that stretched over decades and wrapped up in 2009. The currently authorized service areas of all full-service TV stations were determined, directly or otherwise, through operation of OET-69.

That's important here because, in directing the Commission to conduct incentive auctions, Congress recognized that TV licensees who opted not to turn in their licenses – and who would thus be subject to possible channel reassignment – should be assured that, when the dust settles on the auction/reassignment process, they will still be able to serve the areas and populations they had previously been authorized to serve. Also, knowing with certainty what will await them post-auction could induce some licensees to participate in the auction.

If the method of predicting service areas and populations changes in mid-stream, stations could end up with less than they thought they would have once the re-packing process is completed. You may recall that a fixed reduction in service area for all stations was considered by the FCC at one time as a way to pack stations closer together, but Congress nixed that idea, instead directing that:

> [i]n making any reassignments or reallocations . . ., the Commission shall make all reasonable efforts to preserve, as of the date of the enactment of this Act, the coverage area and population served of each broadcast television licensee, *as determined using the methodology described in OET Bulletin 69 of the Office of Engineering and Technology* of the Commission.

(Those are our italics, not Congress's.) Congress seemed clearly to be saying that existing licensees should be entitled to keep their existing OET-69-determined service areas and populations.

But now OET has unveiled *TVStudy* – which the Commission "plans to use in connection with" the incentive auctions. According to OET, *TVStudy*, when compared with OET-69-related software, "runs much faster, provides greater accuracy in modeling and analysis, and is easier to use and more versatile". Wow, what's not to like about that?

Maybe a lot, if you're a TV broadcaster.

Focus, please, on the notion of "greater accuracy in modeling and analysis". That suggests that, by using *TVStudy*, the Commission could come up with service areas/populations different from – and possibly smaller than – those generated by the long-accepted OET-69 software. Smaller areas/pops calculations could diminish broadcasters' expectations, whether they plan to (a) stay in the business (in which case their service areas might be reduced) or (b) participate in the auction (in which case the auction payment they could expect to receive might be reduced).

Suspicious folks may be wary of back-door, fine-print devices by which the FCC might be planning, on the QT, to disadvantage broadcasters in the auction process by achieving the reduced service areas that Congress rejected. Such folks might view the development and anticipated implementation of *TVStudy* with some skepticism. After all, when Congress mandated the use of OET-69, wouldn't you think that they had a specific method in mind and not just the title of a program that the FCC could then change however it wanted?

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That is not to say that OET is completely off-base in thinking that OET-69 might need some spiffing up. Some of the software underlying the current OET-69 process was developed three decades ago, which alone suggests that some updating might be useful. Moreover, as detailed in OET's request for comments on *TVStudy*, other intervening developments – the availability of a more recent census and more accurate terrain data, determinations of errors in the existing software, to name a few – may also justify an updating effort. We can all stipulate that, in a perfect world, the Commission could probably improve on its existing OET-69 software, at least by updating the underlying data used in the calculations, and *TVStudy* might do just that in all the right ways.

But consider the timing. OET's notice and request for comments about *TVStudy* was issued ten days *after* the deadline for comments on the overall incentive auction plan. Comments in response aren't due to be filed until a couple of weeks after reply comments are due in the incentive auction proceeding. How can anyone reasonably be expected to comment on the incentive auction plan when an important element of that plan – *i.e.*, the method to be used to calculate services areas and populations – is still up in the air?

How can anyone be expected to comment on the incentive auction plan when an important element of that plan is still up in the air?

And bear in mind, too, that OET-69 methodology in its current form was good enough to use in the DTV transition completed in 2009. (OET-69 has been around in one form or another since 1977. The current version of OET-69 is dated 2004.) If the underlying software is now unreliably old and flawed, how come the Commission didn't update it for the DTV transition?

If the Commission plans to use *TVStudy* instead of its standard OET-69 approach when the auction rolls around, why didn't the FCC include *TVStudy* as a component of the incentive auction *NPRM*? And while, with all due respect, we doubt that anyone on the Eighth Floor would ordinarily be capable of producing anything as technically complex as *TVStudy* – that's why, after all, the Commission has an OET in the first place – why aren't the details of *TVStudy* and its anticipated implementation being overseen by the full Commission (as opposed to OET) as part of the run-up to the incentive auctions?

There may be perfectly rational, arguably credible, answers to these questions, but it's hard to see what they might be. The Commission has known since the passage of the Spectrum Act that OET-69 calculations would be central to the auction process. And don't forget that, three years ago, in connection with the National Broadband Plan, the agency described an "Allotment Optimization Model" (AOM) it was then working to develop. Since the AOM (which was never released to the public) did not incorporate OET-69, it can't be used for incentive auction purposes thanks to Congress's specific insistence on OET-69 methodology.

We're guessing that the Commission has been looking at alternatives to the AOM, including the *TVStudy* idea, for a considerable time, probably since well before the issuance of the incentive auction *NPRM*. The fact that we're only hearing about *TVStudy* now, and from OET rather than the Commission itself, raises legitimate concerns about what exactly the FCC's game plan here might be.

The NAB has already weighed in, at least preliminarily. In response to OET's request for comments, the NAB has argued that now is not the time to patch together a quick fix to OET-69 methodology. The NAB acknowledges that OET-69 might be improved on . . . just not now, with so many other loose ends still to be tied down relative to the incentive auctions.

Back in the day, accuracy in signal prediction was often a function of the sharpness of the pencil being used to draw contour lines on a paper map. The pencil was sharpened some when the first computerized contour calculations were introduced, although those used crude terrain data limited to a 2-10 mile donut shaped circle. OET-69 sharpened the pencil further by introducing more detailed data over a wider area. *TVStudy* may be just a modern-day means of sharpening the pencil even more.

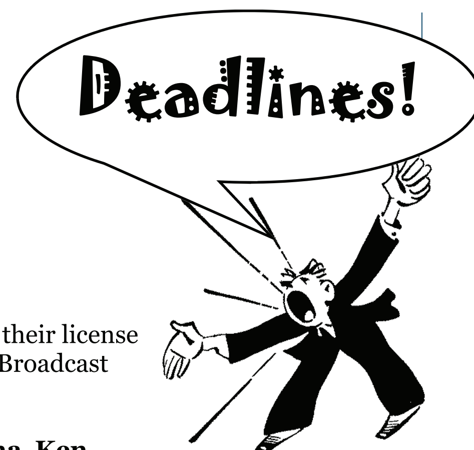
While, as a general rule, greater accuracy is the preferred course in most situations, there are times when the desirability of some arguably greater accuracy may be outweighed by other factors. Here, the Commission is apparently committed to conducting incentive auctions at the earliest possible time with maximum participation from broadcasters. Introducing uncertainty relative to an essential aspect of that participation – *i.e.*, the calculation of relevant service areas and populations – could result in delay of the auctions and/or significantly reduced broadcaster participation. Further, Congress itself specified use of OET-69 without indicating any concern about possible inaccuracies. And finally, let's not lose sight of the fact that we are talking about *predictions* of signal coverage. Neither OET-69 nor *TVStudy* will guarantee absolute precision in any event.

Those factors being the case, perhaps the Commission should stick with the pencil as it is.

Comments on *TVStudy* are currently due to be filed by ***March 21, 2013***; reply comments are due by ***April 5, 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.



April 1, 2013

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

Radio Post-Filing Announcements - *Radio* stations located in **Texas** must begin their post-filing announcements with regard to their license renewal applications on April 1. These announcements then must continue on April 16, May 1, May 16, June 1, and June 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 **Indiana**, **Kentucky**, and **Tennessee** must begin their post-filing announcements with regard to their license renewal applications on April 1 . These announcements then must continue on April 16, May 1, May 16, June 1, and June 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 **Arizona**, **Idaho**, **New Mexico**, **Nevada**, and **Wyoming** must begin their pre-filing announcements with regard to their applications for renewal of licenses on April 1. These announcements then must be continued on April 16, May 1, and May 16.

Television License Renewal Pre-filing Announcements - *Television* and *Class A television* stations located in **Ohio** and **Michigan** must begin their pre-filing announcements with regard to their applications for renewal of license on April 1. These announcements then must be continued on April 16, May 1, and May 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 **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** 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 **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, and **Tennessee** 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 **Texas** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

April 10, 2013

***Children's Television Programming Reports* -** For all *commercial television* and *Class A television* stations, the first quarter 2013 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 either the preparation or filing of the reports. We suggest that you have that information at hand before you start the process.

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Texas Hold 'Em or Texas Hold Up?

Mission Abstract Data: Shut Up and Deal!

By Kevin M. Goldberg
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Like that gambler who just doesn't know when to quit, always looking for the big score, our friends at Mission Abstract Data (MAD) – through their latter-day identity, DigiMedia – are back at the table. On February 14, DigiMedia filed lawsuits against four radio companies with stations in Texas, arguing that the companies have engaged in patent infringement. (You can find links to the complaints, sans attachments, posted on our blog at www.CommLawBlog.com.) The allegations are essentially identical to those advanced by MAD in federal court in Delaware against seven large radio companies back in March 2011. The fact that the new lawsuits aren't markedly different from those earlier, still pending, suits actually raises some questions.

Also, a few days after it launched those lawsuits, MAD was back before the U.S. Patent and Trademark Office (USPTO), seeking to shore up its claims there.

We've been dutifully following and reporting on the Mission Abstract Data a/k/a DigiMedia patent saga for nearly two years. (Standard disclaimer: we are **NOT** patent attorneys, and make no claim to special familiarity with patent law in general or as it might apply to MAD's arguments.) As of late December it looked like the saga was nearing its end. That's when the USPTO – for the second time – reexamined the patents underlying MAD's claim and appeared to narrow the scope of those patents dramatically.

Despite that apparent setback, MAD has now come roaring back, suing four separate licensees with FM stations in Tyler, Greenville, Denison and Palestine, all in Texas.

The complaints are rather simple, sparse even. They identify each respective defendant, describe MAD's two patents, and note that, in July, 2012, the USPTO issued a "Reexamination Certificate" confirming the validity of certain claims made in each patent. According to each complaint, the defendant is infringing the patents and, despite DigiMedia's repeated attempts (by mail, phone and email) to resolve the infringement, none of the defendants has " taken a license to the '867 and '246 patents [or] provided adequate information detailing why no license is required". DigiMedia seeks the usual damages, with a request for "trebled" (damages multiplied by three) if appropriate, as well as an injunction preventing the defendants from utilizing the allegedly infringing technology.

You may be asking the same question we are. Why are these cases being filed against these defendants just now? As we said, we're not patent attorneys, so we're hoping that some actual patent attorneys might offer up their thoughts.

To the non-expert eye, DigiMedia's timing is curious.

To the non-expert eye, DigiMedia's timing is curious. When the USPTO issued its second reexamination order regarding the two patents in December, it looked like the end of the line for DigiMedia. Then they moved – again – to lift the stay that has stalled their Delaware lawsuit for more than a year, and the court there scheduled a hearing on that motion for March. Could it be that there's still some life in DigiMedia's claims?

Or is there a reason that these defendants were singled out from all possible candidates around the country that have also refused to sign the licensing agreements that MAD and its cohorts have been pushing? One theory: might these stations have been chosen because they are all located in an area under the jurisdiction of a federal court reportedly known for fast-track processing of patent cases. (That would be the U.S. District Court for the Eastern District of Texas, Marshall Division.) Is this simply a last roll of the

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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.

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- The meeting is bipartisan;
- No votes or formal agency actions are taken at the meeting;
- Everyone attending the meeting is either an FCC Commissioner, a Commission employee, the member of a federal-state joint board or on the staff of such a joint board;
- An attorney from the Commission's Office of General Counsel is also present; and
- No later than two days after the meeting concludes, the Commission publishes on its website a disclosure listing those who attended and providing a summary of matters discussed.

So why do the bills' sponsors believe that the FCC deserves this exemption? According to the bills' "Findings" section:

> FCC Commissioners past and present have complained that the Sunshine Act has "hindered the ability of the Commission to have a substantive exchange of ideas and hold collective deliberations on issues pending before the Commission."
>
> One of the main reasons for having agencies in the first place is to "obtain the benefits of collegial decisionmaking by the members of the agency, who bring to the decisionmaking process different philosophical perspectives, experiences, and areas of expertise."
>
> To avoid the procedural requirements of the Sunshine Act, Commissioners have resorted to "an inefficient combination of written messages, communications among staff, and a series of meetings restricted to two Commissioners [*i.e.*, less than a quorum, thus not triggering the Act] at each such meeting to discuss complex telecommunications matters pending before the Commission."
>
> "Extensive use of such methods of communication has harmed collegiality and cooperation at the Commission."
>
> The FCC is facing a years-long backlog of "[n]umerous regulatory matters . . . continued inaction on [which] has the potential to hinder innovation and private investment in the domestic communications industry."
>
> The Commission must be able to work "more collaboratively and efficiently than in the past to meet the current challenge of expanding broadband Internet access to the extent necessary to serve the business, educational, health, and cultural needs of all people in the United States."

For some reason, the pesky procedural niceties the Sunshine Act shouldn't apply to the FCC.

So the FCC Commissioners don't like the Sunshine Act because compliance somehow makes it a little harder for them to be collegial and cooperative and collaborative with one another? And that's why there are backlogs at the agency? Seriously?

Sure, the FCC Collaboration Act – and Commissioners past and present – may pay lip service to the idea of the Sunshine Act and its goal of governmental accountability, but they plainly don't think that that notion necessarily applies to the FCC. For some reason, the FCC is supposedly special and thus shouldn't be hog-tied with the pesky procedural niceties the Sunshine Act requires.

At this point I'm reminded of the opening statement of one Vincent LaGuardia Gambini in the fictitional trial of *Alabama v. Gambini*. Mr. Gambini (known familiarly as "Vinny") tersely but emphatically expressed incredulity at the claims advanced by the government in that case. Ditto here.

The FCC isn't special and it doesn't deserve a special Sunshine Act exemption any more than, say, the Securities and Exchange Commission does. And the SEC doesn't deserve such an exemption any more than the Postal Rate Commission does. They're all agencies that are making decisions which affect billion-dollar companies and industries, as well as the lives of millions of Americans, every day. They all deal in complex, often rapid-moving, issues, just like the dozens of other agencies subject to the law.

But nobody would dare propose repeal of the Sunshine Act in its entirety. It's too important to our freedom from government corruption. That's why the Act was passed in the first place: to push back against excessive government secrecy. In my view, the law's real flaw – and that of the FOIA – is that they don't do enough to truly hold government agencies accountable. To some degree the Sunshine Act and FOIA have almost become paper tigers. Indeed, the "findings" set out in the FCC Collaboration Act make clear that agencies have identified, and implemented, multiple ways of circumventing the Sunshine Act – communicating through intermediaries, or by memo, or in serial meetings none of which includes a quorum.

Maybe compliance with the Sunshine Act is less convenient than it might be. But note that the central impetus for the FCC Collaboration Act appears to be ***not*** inconvenience, but rather the odd notion that Commissioners are somehow less likely to be "collegial" or "cooperative" or "collaborative" with one another if they have to communicate in writing, or through aides, or by serial conversations. And because of that supposed lack of "collegiality", "cooperation" and "collaboration", we should simply abandon the Sunshine Act for the FCC.

Let me get this straight. Commissioners find it hard to be collegial or cooperative or collaborative with one another if they're required to do their business in public, but if we let them have at each other behind closed doors, collegiality, cooperation and collaboration will reign and backlogs will melt away? Uh huh.

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dice, a double down, an "all in" at the best table it could find? Is MAD trying to get a quick win to revive its flagging campaign before they have nothing left in their wad?

It does appear that they're trying to move fast. The choice of the Eastern District of Texas, with its reputed "rocket docket", is one clue. Additionally, it looks like DigiMedia didn't spent a lot of time on putting these complaints together. As we said, they're all pretty bare bones and identical to each other – so identical, in fact that the complaint filed against one defendant referred to that defendant with an abbreviation used for one of the other defendants, which suggests that the complaints may have been just a bunch of cut and paste jobs.

What's peculiar about the complaints is that they don't mention the USPTO's December, 2012 further reexamination of MAD's patents. MAD clearly is aware of that reexamination – they responded to just days after filing their complaints in Texas – so why DigiMedia would rely in its complaints on the USPTO's reexamination action from last July but ***not*** say diddly about the more recent reexamination in December is something of a mystery. (Of course, the fact that the December action arguably gutted MAD's claims might be one serious disincentive, but still, does DigiMedia really think that the court isn't going to find out about that action sooner or later?)

With respect to MAD's latest filings with the USPTO, we won't try to divine the precise meaning of those materials – we're not patent lawyers, after all. But in the interest of putting those materials out there for everyone to take a gander at, we have posted on our blog (www.CommLawBlog.com) copies of MAD's submissions, taken from the USPTO's website.

We won't try to speculate on the relationship of the USPTO filings and the Texas lawsuits and the pending Delaware litigation. Whether the latest flurry of MAD activity is anything more than a bluff remains to be seen. We may know more on that score when we get the answers to a few more questions, such as:

> Will MAD sue anywhere outside the Marshall Division of the U.S. District Court in the Eastern District of Texas?
>
> How will the USPTO react to the recently submitted materials?
>
> Will the United States District Court for the District of Delaware lift the stay in the first lawsuit and, if so, what will it then do?

At a minimum, DigiMedia's suits have gotten the defendants' attention, and our attention, and probably the attention of other similarly situated, small- to mid-sized radio stations. Check back on our blog for updates.

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Back in the 1960s, when the FOIA was enacted, my former boss and mentor, Richard M. ("Dick") Schmidt, was General Counsel for the United States Information Agency (USIA). Dick was a political appointee who spent much of his time before his government service (and all of his time afterward) advocating for open government and the First Amendment. He preceded me as the Legal Counsel to the American Society of News Editors.

As Dick told the story, a longtime USIA staffer came into Dick's office complaining of the supposedly adverse impact the FOIA would have on the USIA's operations. As the complainant saw it, "everything we do will be public. The [people out there will] know what we're up to. They'll know everything!"

To which Dick replied: "Those people out there pay our salaries. We work for them. They deserve to know what we're up to. They deserve to know everything."

The Sunshine Act doesn't guarantee us that we'll ever know everything, but it's at least a long step in the right direction. The FCC Collaboration Act, on the other hand, would constitute a sad retreat, a concession that closed doors and backroom deals are the preferred SOP in government.

An important irony here is that the current FCC is seeking to expand its reach into all kinds of new areas that directly impact individual citizens, from Internet governance to net neutrality to cyber security. In the face of such expansion, is it really wise to allow the Commission to cloister itself further away from the public who will feel the brunt of its decisions?

[*Editor's epilogue: Here's a thought. Let's say, for the sake of argument, that the inconvenience of providing seven days' notice before a "meeting" can be held, and the requirement of opening those meetings to the public, really are stifling collegiality, etc. So why not simply allow Commissioners to meet and do as much business as they like, whenever they like,* ***provided that*** *all such meetings are recorded in toto – video would be nice, but a clean audio recording would probably do the trick – and made available on the FCC's website within 24-48 hours of the meeting? It might be useful to have an independent person – maybe an attorney from the General Counsel's office, or maybe the Inspector General – attend any such meeting and certify that the recording in fact reflects the entirety of the session. The Commission's meeting room is equipped for such recording – and we're guessing that Commissioners' offices could be set up for such recording as well, if they're not already.*

Since the ability to meet on short notice, without an intrusive audience, would supposedly lead to increased collegiality, cooperation and collaboration – not to mention increased productivity and reduced backlogs – it's hard to imagine that any Commissioners, newly liberated from the oppressive restraints of the Sunshine Act, would object to the immediate availability of such recordings.]

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the first place.) In order to preserve its ability to issue fines, then, the FCC has imposed the dreaded "enforcement hold" on pending renewal applications, meaning that it has simply declined to grant renewal applications when the possibility of some violation might exist. By doing this, the FCC has been able to (a) avoid the commencement of a new license term and, thus, (b) keep open the option of maybe someday getting around to considering whether a fine may or may not be appropriate.

(Relevant illustrative factoid: According to CDBS, there are more than 300 TV renewal applications still pending from the 2004-2007 application season. Our guess is that most, if not all, of those have been hung up on "enforcement holds" – but since the Commission doesn't generally disclose why any renewal has been held up, your guess is as good as ours.)

By invoking such "holds", the Commission has been able to avoid resolving, or even addressing, vast numbers of complaints and violations (admitted or otherwise) that have piled up for a decade or more. And since many of those complaints involve issues like indecency, the Commission has also been able to avoid the difficult political and legal considerations attendant to such controversial topics.

The Commission's reticence is not encouraging, but to some degree understandable.

Think of all those distasteful chores that you put off by relegating them to the basement, or a closet, or the garage, always with the promise that you really will get around to them someday, but also always with the tacit understanding that that "someday" probably won't be anytime soon, particularly as the basement/closet/garage gets more and more jam-packed with chores. That's essentially what the "enforcement hold" has let the FCC do with hundreds of thousands, possibly millions, of complaints.

The five-year shot clock imposed by Section 2462 obviously messes that up big time. If that statute of limitations on collection actions really means what it says, then any complaint filed with the Commission more than five years ago, and any forfeiture proceeding initiated more than five years ago, is at a dead end if the case hasn't already resulted in payment of a forfeiture or the filing of a collection suit. Logically and legally, the only available course for the Commission would appear to be to summarily toss any such complaint or forfeiture proceeding.

Which is just what the Media Bureau has done with the dozen or so forfeitures which it recently cancelled. And that's why those mysterious, unexplained cancellations could portend an important shift in the FCC's handling of old complaints.

Bear in mind that the Bureau had already considered, and rejected, the Section 2462 argument in at least some, if not all, of those cases, insisting instead that the FCC could reach back almost indefinitely to penalize misconduct. But that's not what 28 U.S.C. §2462 and 47 U.S.C. §504 provide. And we understand that at least some folks (maybe in the General Counsel's office, maybe in the Bureau) may now recognize and accept that limitation – and that the Bureau's recent forfeiture cancellations are a result of that recognition and acceptance.

That's the good news: Some fines have been cancelled for reasons which should lead to further cancellations of previously issued fines or previously-initiated-but-still-pending inquiries.

The bad news is that the Commission may still be reluctant to follow up with those other cancellations.

The Commission appears still to be loath to state conclusively that Section 2462 imposes a five-year shot clock on the FCC collection process. We understand from conversations with folks involved in the Bureau's recent cancellations that Section 2462 was the reason for those cancellations, but you won't find any reference to that section in any of the cancellation letters. And to avoid even having to refer to the arguments that had been presented concerning Section 2462, when it issued its cancellation letters the Bureau called on the various beneficiaries of those letters to request withdrawal of their respective, still-pending pleadings in which those arguments had been advanced.

What's up with that? As best we can figure, the thinking in the agency was that, if the Commission had to dispose of those arguments on their merits, it would have to publicly acknowledge that Section 2462 does indeed impose a five-year shot clock. But if the Bureau instead offered to simply cancel the fines without explanation, it could call upon the affected licensees to withdraw their pleadings, thus obviating the need to address their arguments. And those licensees could be expected to comply happily – they are, after all, getting off the hook for the fines they had been assessed, so why should they care whether or not the FCC formally acknowledges the reason for that?

The Commission's reticence is not encouraging, but to some degree understandable. Formal acceptance of the five-year shot clock would affect the Commission both retrospectively and prospectively.

Looking back, the Commission would be required to sort through its various enforcement files, searching for any complaints, inquiries, etc., that involve potential misconduct that occurred more than five years ago and as to which no collection lawsuit has yet been filed. All such complaints, inquiries, etc. would then have to be summarily dismissed, no questions asked. Back the dump trucks up to the Portals and start tossing files out the window. We're probably talking about hundreds of thousands, maybe millions, of complaints or other potential violations. Problems involving indecency, sponsorship ID, kidvid reports, public files, etc., etc., etc. Kiss them good-bye and color them gone.

That's a lot of work in and of itself. And if the Commission were to do that, the result would likely be a public relations nightmare. Various self-appointed guardians of the public

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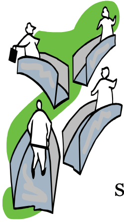

FHH - On the Job, On the Go

If you're heading to the Annual Convention and Exposition of the National Religious Broadcasters (March 2-5, Gaylord Opryland Hotel, Nashville), keep an eye out for **Peter Tannenwald** and **Harry Martin**. **Peter** will be participating in a program being presented by the Advanced Television Broadcasting Alliance on March 3. (The Alliance is dedicated to promoting advanced uses of TV spectrum.) **Harry** is scheduled to appear on an "FCC Super Session" panel on March 4.

Frank Montero, along with **Frank Jazzo, Matt McCormick, Howard Weiss** and **Scott Johnson**, will all be attending the NAB's annual State Leadership Conference in Washington, D.C. from March 4-6.

From March 18-21, **Frank J, Michelle McClure, Raymond Quianzon** and **Cheng Liu** will be attending the Satellite 2013 conference in Washington, D.C. **Michelle** and **Frank** plan on attending the Society of Satellite Professionals International (SSPI) Gala on March 19, at the Renaissance Hotel in Washington, D.C.

And coming in April, get set for the NAB in Las Vegas. If you're going, keep an eye out for **Frank J**, **Michelle**, **Peter**, **Kathleen Victory**, **Howard**, **Dan Kirkpatrick** and **Kevin Goldberg**. They're all planning on attending. In fact, if you happen to be there on Sunday, April 7 (for the ABA/NAB/FCBA "Representing Your Local Broadcaster" Seminar), you can catch both **Kevin** (on a panel about "Copyright and the Internet: Giving Broadcasters the Cold Shoulder?") and **Frank** (moderating a panel on employment issues).

Willkommen, Bienvenu, Welcome!

New Faces at FHH

Fletcher, Heald & Hildreth is pleased to announce the addition of two new lawyers to its slate of telecom practitioners: **James Troup** and **Tony Lee**. They come to us most recently from the Venable law firm in Washington, where they practiced together as partners in the communications section for six years. This represents something of a homecoming for Jamie, since he actually began his career at FHH in the mid-'80s.

Jamie and Tony's primary focus has been on the matrix of issues affecting independent local exchange carriers, including federal regulatory issues, wireless offerings, tariffs, access charges, ancillary service offerings, transactions, and related litigation. They currently work with a large network of ILECs in Iowa and other states. They are also experienced in handling large enterprise telecommunications contracts and complex mergers.

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interest would almost certainly rise up on their hind legs and complain vigorously about the impropriety of allowing scofflaws – including pornographers! – to avoid any penalty for their supposedly vile misdeeds. And some members of Congress might respond to such complaints by asking pointed questions of the Commission: how, after all, did the FCC get itself into this mess? A preference to avoid this scenario is understandable.

And looking forward, the Commission would be acknowledging that it is in fact subject to a five-year shot clock. That would mean that the Commission would have to veer sharply away from its decades-long lackadaisical approach to enforcement. Instead, it would have to commit staff and resources sufficient to process complaints and related matters on a super fast-track. Suffice it to say that the FCC has seldom demonstrated the inclination or ability to do much of anything on a super fast-track, particularly in the enforcement area.

Remember, Section 2462 requires that the collection lawsuit be initiated within five years. So the Commission would have to investigate potential misconduct, issue an NAL, consider the licensee's response, issue a Forfeiture Order, maybe address any petition for reconsideration, determine that the licensee wasn't going to pay, and then convince DoJ to free up attorneys to file the suit, all within five years. A preference to avoid this scenario is likewise understandable.

Such preferences may be understandable, but they are also unrealistic and just plain silly. After all, the law says what the law says, and it's said it for years. If the recent forfeiture cancellations do in fact reflect an acknowledgement by senior agency officials that the constraints of Section 2462 apply, we can see no valid distinction between those proceedings the myriad other long-pending complaints, investigations, etc., that have been gathering dust at the Commission for more than five years.

It would be nice if the Commission, in the much-vaunted spirit of transparency, were to issue a public notice or some other statement explaining the recent cancellations, acknowledging the impact of Section 2462 on its enforcement activities, and committing to prompt steps consistent with those statutory obligations. It would also be nice if the Commission were simply to start taking such steps, fanfare or no. Whether it will do so obviously remains to be seen. Let's all keep our fingers crossed.

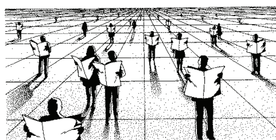
SPECIAL FM TRANSLATOR REPORT!

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

Updates On The News

That loud flushing noise you may have heard on February 5 was the sound of about 3,000 FM translator applications heading down the tubes. Having analyzed the various Selection Lists and Caps Showings submitted by translator applicants late in January, the Media Bureau announced that it had now tossed "approximately 3,000" vintage 2003 translator applications. In the same public notice, the Bureau also announced the "release" – and we use that term loosely – of all of the underlying Selection Lists and Caps Showings submitted during the recently closed Selection Filing Window.

The Bureau's one and only public notice on the subject didn't include a list of the dismissed applicants, or applications, or file numbers, or any of the other conventional data you might expect. No problem, though. At least one enterprising engineering consultant managed to produce searchable lists of the dismissed and non-dismissed applications. (We've posted links to those lists on www.CommLawBlog.com.) Precise identification of the universe of still-pending applications remained something of a moving target, though, as the Bureau then released a list of about 40 more applications that were being tossed.



On February 26, the Bureau released a public notice listing 713 FM translator applications that are, as far as the Bureau can tell, "singletons" which can theoretically be granted. The notice set a ***March 28, 2013*** deadline for those applicants to file their long-form Form 349 applications.

The public notice announcing the singleton list also included guidelines relative to what you can and can't do in the long-form application. Attention should be paid to those details, because a failure to comply could result in dismissal.

In particular, the long-form application may specify facilities (including, *e.g.*, transmitter site, power, height, directional pattern, channel) different from those specified in the original 2003 "tech box" showing ***as long as they constitute "minor" changes***. If the proposed changes would result in a site (a) within the 39 km buffer of ***any*** defined Market Grid and/or (b) at an out-of-grid location within a Top-50 Spectrum Limited Market, the applicant will also have to file a preclusion showing relative to the amended proposal. (If the facilities specified in the long-form Form 349 application are identical to those specified in the "tech box" filed back in 2003, no preclusion study is necessary.)

The Bureau also released a separate set of guidelines describing in considerable detail the required preclusion showing. The Bureau emphasized that preclusion studies must be complete and sufficient and, most importantly, they may ***not*** be "amended, corrected, completed or resubmitted" after March 28.

Once the March 28 deadline has come and gone, the Bureau will review the amendments, dismiss any applications that fail to satisfy the terms set out in the public notice, and the rest will be put out on a public notice which will trigger a 15-day petition to deny period. Of course, any of the 713 applicants who fail to file a Form 349 by the deadline will also be dismissed.

The Media Bureau is to be applauded for digging through the Selection Lists/Caps Showings submitted just last month, weeding out thousands of ten-year-old applications that were clogging up the system, and then identifying a relatively small handful enjoying singleton status. The Bureau is, of course, under the gun to tee up an LPFM auction – as early as next October, if the Chairman has his way – so there was pressure to get this job done sooner rather than later, but it's still impressive that the staff managed to handle it as quickly as it did.

(Continued from page 3)
ing September.

But a couple of factors suggest that that might not really be the case.

First, the February 21 notice cites OMB approval issued in 2004. While it's true that OMB did approve the form in 2004, that approval expired years ago.

Second and more importantly, the current OMB approval was issued in 2011, and is subject to the OMB-imposed condition noted above. But the FCC, also as noted above, has not to date resolved the pesky confidentiality question, so it's far from clear that the Commission could claim that Form 395-B can properly be used just yet. (While the "grace period" commenced back in 2004 might also arguably still be in effect for the same reason, the problem there is that, in announcing that "grace period", the Commission clearly indicated that the grace period would be a "one-time" matter for "this year [*i.e.*, 2004] only". Absent some clarification by the Commission, it would be tricky to interpret a "one-time" grace period "for this year only" to really mean an indefinite grace period covering eight years or more.)

To try to get to the bottom of this conundrum, we called an FCC official who would ordinarily be expected to know about things like this. He indicated that he had not heard anything about any impending effectiveness of Form 395-B or other related developments and seemed surprised when told about the Federal Register notice. His surprise arose in particular from the fact that the issue of the confidentiality of the Form 395-B data has yet to be resolved and his acute awareness of the condition on use of the form.

So there you have it. The Federal Register is telling us one thing while the totality of the public record seems to be telling us another. Stay tuned for further developments.