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Memorandum to Clients

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NEWS AND ANALYSIS OF RECENT DEVELOPMENTS IN COMMUNICATIONS LAW

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Copyright tug of war

How May "Fair Play Fair Pay" Fare?

By Kevin M. Goldberg
goldberg@fhhlaw.com
703-812-0462

Like the swallows returning to Capistrano, the debate about "performance rights" has again returned to Washington – this time signaled by the introduction of H.R. 1733, the "Fair Play Fair Pay Act" (FPFPA). While this year's version of the perennial effort to impose additional copyright obligations on broadcasters features some new twists, its passage is far from guaranteed, although no one should be surprised if it advances at least part way through the legislative process.

"Performance rights", of course, is the short-hand expression for a particular type of copyright interest, one held by recording artists. The right covers the artist's particular recorded performance. (For more detail, check out my 2009 blog post about an earlier performance rights effort.) While the "performance right" has been around since the 1990s, broadcasters have not been subject to it. That's because Congress acknowledged that recording artists and radio broadcasters enjoy a unique relationship through which each side benefits from the other: radio stations get program content from recording artists who in turn get free promotion from airplay. The classic win-win situation. Rather than disrupt that, Congress chose instead simply not to impose any performance rights obligations on broadcasters for over-the-air play. (Note: Webcasting is another story: broadcasters are liable for performance rights royalties for material that they webcast, even if that material is identical to the broadcaster's over-the-air programming.)

But for years the recording industry has been pressing Congress to eliminate that exemption. The FPFPA – which is sponsored by a bipartisan group of folks including Rep. Jerrold Nadler (D-NY), Rep. Marsha Blackburn (R-TN), Rep. John Conyers (D-MI) and Rep. Ted Deutch (D-FL) – is this year's try. It would amend the Copyright Act in several ways. You can read the entire 26 page bill if you want, but for a very good summary of all provisions, I suggest you check out this post from the Future of Music Coalition.

How would this bill affect broadcasters?

Negatively, of course. That's because, where radio stations currently pay no royalties at all for the right to broadcast sound recordings over the air, FPFPA would require stations to pay some royalties – obviously a negative as far as broadcasters are concerned. The bill also specifically incorporates the "RESPECT Act", which makes it clear that the performance right applies to pre-1972 sound recordings. (If you're a regular *MTC* reader, you should recognize that, while Congress initially declined to create a performance right for pre-1972 recordings, a body of case law in state courts is moving in the opposite direction.)

If FPFPA were to be enacted, how much would a station end up having to pay? We can't say, at least with regard to most stations. The bill simply directs the Copyright Royalty Board (CRB) to get started "as soon as practicable" to develop royalty rates and terms. In doing so, though, the CRB will be subject to at least one major constraint: Another FPFPA section specifically says that, in setting rates, the CRB must employ the same "willing buyer/willing seller" standard it uses to determine the webcasting rates.

But that doesn't necessarily mean the resulting rate for broadcast performance rights would be the same as the "per performance"-based webcasting rate. That's because the "willing buyer/willing seller" considerations in the over-the-air broadcast context are different from those in the webcasting context, even if the parties involved (*i.e.*, radio licensees and recording artists) are the same in both settings. The assertion that radio airplay helps recorded music sales would certainly come into play and could carry some

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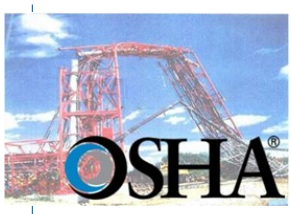

Looking to prevent fatalities

OSHA Eyeing Possible Tower Worker Safety Standards

By Anne Goodwin Crump
crump@fhhlaw.com
703-812-0426

Everyone in the communications industry must be concerned about the safety and well-being of tower workers. Tower workers, quite literally, put their lives on the line to put up or keep up the towers that make communications possible. So we should all take notice that the Occupational Safety and Health Administration (OSHA) is considering whether it can, and should, take regulatory steps aimed at preventing injuries or deaths during tower work. In a formal Request for Information, OSHA has requested input that will help it figure out "what steps, if any, it can take to prevent injuries and fatalities during tower work". OSHA's interest here is not new. As we reported last year, an OSHA official, prompted by a rash of fatal tower accidents in 2013, issued a letter reminding all "communications tower industry employers" of their "responsibility to prevent workers from being injured or killed while working on communication towers". Now it's delving deeper into the tower business, casting a regulatory eye on safe work practices, training and certification practices for communication tower workers, and "potential approaches [OSHA] might take to address the hazards associated with work on communication towers".

Of course, a number of existing standards – developed both by OSHA and by other authorities – already apply generally to some aspects of the tower construction/maintenance process. (These include the "general duty to protect" workers imposed by Occupational Safety and Health Act.) But OSHA has no standards for comprehensive coverage of tower workers … not yet, at least.

A problem confronting OSHA is the complex of business relationships in the tower business. While some communications companies own their own towers and contract directly with the construction/maintenance operators to do the work, in many other cases the towers are owned by dedicated tower companies who act as landlords, leasing tower space to those who need it. When a communications company seeks to install or upgrade its facilities, it typically will contract with a construction management company (known as a "turfing vendor"), which in turn hires subcontractors to complete certain parts of the project. Those subcontractors may further contract with still other, specialized companies to perform some of the work. The existence of so many layers between the communications company and the worker who actually does the work creates challenges for setting and enforcing safety rules to protect employees. Which participants in the process should be responsible for what aspects of the process, and to what degree?

OSHA is seeking input from everybody involved in the tower business – workers, communications providers, and everybody in between in the construction/maintenance process. It poses 38 separate questions (several with subparts), some directed specifically to workers, others addressed to anyone in the contract chain. The questions include: What are the hazards faced by workers? What safety-related factors come into play in the contracting and construction process? Are there any training or certification standards in current use, and is there a need for some industry-wide standards along those lines? How (if at all) are workers covered by workers' comp and/or employer liability insurance? Could alternative tower designs improve safety? Should an OSHA standard be limited to towers used for communications purposes, or should it include towers used for other purposes? The list of questions is extensive and comprehensive.

OSHA's Request for Information developed out of a joint workshop organized by the Department of Labor, OSHA, and the FCC last fall, during which two panels explored (a) the causes and prevention of tower climber fatalities and (b) possible industry-wide solutions to reduce the risks faced by tower workers. (You can see a recording of the workshop here.) The Request for Information is the next logical step. If you participate in any way in the tower industry, now is your chance to speak up. While it's far from certain that OSHA will ultimately impose industry-wide standards, it's clear that OSHA is thinking along those lines and is looking for guidance. Comments will be due to OSHA by ***June 15, 2015***.

FLETCHER, HEALD & HILDRETH P.L.C.

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
Tel: (703) 812-0400
Fax: (703) 812-0486
E-Mail: Office@fhhlaw.com
Website: fhhlaw.com
Blog site: www.commlawblog.com

Co-Editors
Howard M. Weiss
Harry F. Cole

Assistant Editor
Steve Lovelady

Contributing Writers
Anne Goodwin Crump,
Kevin M. Goldberg, Dan Kirkpatrick,
Jon Markman, R. J. Quianzon,
Peter Tannenwald
and Laura Stefani

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Getting' down to bid-ness

Auction 98 - The Dates Are Set

By R. J. Quianzon
quianzon@fhhlaw.com
703-812-0424

You weren't planning on taking summer vacation this year, were you? Good, because the dates for Auction 98 have now been set, and it looks like they'll suck up most of the summer. So get out your calendar and mark these dates:

May 18, 2015 – 12:00 noon ET – Short-Form Application (FCC Form 175) filing window opens.

May 28, 2015 – prior to 6:00 p.m. ET – Short-Form Application (FCC Form 175) filing window deadline. The deadline for applications marks the beginning of the FCC's very strict anti-collusion period. Bidders that intend to form consortia or otherwise partner with other bidders should have reached an agreement and disclosed it to the FCC by this deadline. Auction communications between or among bidders after this date could expose bidders to disqualification and hefty fines.

June 29, 2015 – 6:00 p.m. ET – Upfront Payments (via wire transfer). Based upon the markets that a bidder has selected in its May Short-Form Application, funds must be wired to the FCC as an upfront deposit to prove that the bidder is genuinely interested in participating in the auction.

July 23, 2015 – Auction Begins.

At least a week before the July 23 start date, the FCC will let bidders know how many rounds of bidding will take place during the first few days. Depending upon the level of participation, it may take as little as a few days or as many as several weeks for the auction to end. The FCC's anti-collusion rules will remain in effect throughout the auction (and for some time beyond the close of the bidding – keep an eye out for an announcement of when the coast is clear). Those rules should be carefully followed.

The auction will look much the same as previous sales conducted by the FCC, at least in terms of the procedures. Unlike previous auctions, though, the FCC has not jiggered with the list of construction permits for sale – so all 131 permits listed in the Commission's initial public notice about Auction 98 last month will be up for grabs. The only change: at the request of one commenter, the Commission has reduced the minimum opening bid for the Maysville, Georgia CP by more than 50% – from the asking price of $75,000 listed in the March public notice to a far more reasonable $35,000. (The commenter may still be disappointed, though; he had asked that the opening bid be knocked down to $30K.) Here's the final list.

The permits available this time around lack some of the pizzazz of earlier auctions. Nothing in the seven figures … or six figures, for that matter. In fact, only three permits are sporting minimum opening bids of more than $50K: Columbia, Missouri (the priciest of the lot, at $75,000) and Cottonwood and Shasta Lake, California ($60,000 each). Bargain hunters may be interested in the cheapest listed permit – a paltry $500 for Memphis! Um, that's Memphis, Texas, ***not*** Tennessee. (Sanderson, Texas and Guthrie, Texas are also listed at $500.) There are plenty of others at $10K or less, including Muleshoe, Texas, which comes in at a surprisingly high $10,000. Bear in mind, too, that the 131 available permits include 18 that have been listed in previous auctions. They either got passed over then or they were sold but not built – in other words, they may not present the best of all possible permits. But we encourage you to check *all* the permits out to see if any of them look like they've got your name on them (particularly if your name happens to be "Muleshoe").

The available permits include 18 that have been listed in previous auctions.

Anyone who has any potential interest in participating in Auction 98 should review the notice in detail. While there's three months to go before the bidding starts, anyone interested in participating should take advantage of the time to perform due diligence about the channels they've got their eyes on. Remember what the Commission has said repeatedly in the past (and has said yet again in the Auction 98 Notice):

> **The FCC makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that an FCC auction represents an opportunity to become an FCC permittee in a broadcast service, subject to certain conditions and regulations. … An FCC auction does not constitute an endorsement by the FCC of any particular service, technology, or product, nor does an FCC construction permit or license constitute a guarantee of business success.**

(And yes, in keeping with tradition, the Commission itself made that ominous advisory even more ominous with the **boldface** emphasis.)

The Commission is also offering an online auction tutorial, which should be available as of May 18, 2015. (Look for an "Auction Tutorial" link on the FCC's Auction 98 webpage.) It's for newbies or folks who want to re-gain their auction chops.

STELAR redux

FCC Launches Market Mod Rulemaking

By Dan Kirkpatrick
kirkpatrick@fhhlaw.com
703-812-0432

When you think of satellite TV, with its nationwide reach, you may not immediately think of "local" service. But local service is an important element of Sat TV, and the FCC is now developing a way to tweak local TV markets for satellite carriage purposes.

Carriage of a TV station's signal, whether by terrestrial MVPD's or by satellite services (*i.e.*, DISH and DirecTV), is dependent to a significant degree on the market to which the station is assigned. A station's local market affects both its claim to mandatory carriage and the MVPD/satellite operator's ability to take advantage of the compulsory copyright license. But the market to which a station is technically assigned by Nielsen – whose DMAs are used by the FCC to define TV markets for carriage purposes – does not always reflect the station's actual audience. In order to insure the ability of stations to better serve their local communities, the Commission has long provided a process for "market modification", a process by which a station's community of license can be added to or deleted from a particular Nielsen DMA. But that process has thus far been available only with respect to cable carriage.

STELAR affords satellite operators an obvious opportunity to avoid carriage of stations

Now the FCC is proposing a market modification process for *satellite* carriage as well.

This development doesn't come as a surprise. Late in 2014 (as we reported), Congress passed the STELA Reauthorization Act of 2014 (STELAR), in which Congress spelled out how changes to local stations' markets should be determined for satellite carriage. Congress ordered the Commission to adopt rules implementing Congress's specifications. The FCC's proposal would do just that.

The rules that Congress devised and the Commission has now proposed would treat market modifications in the satellite context largely as such modification have been treated in the cable context. Under current cable market modification rules, the Commission considers four factors in assessing a market mod request:

⇒ Whether the station, or other stations in the same area, have been historically carried on the cable and/or satellite systems serving the community;

⇒ Whether the station provides local service to the community;

⇒ Whether any other station eligible to be carried by the cable or satellite system covers local news and events of interest to the community; and

⇒ Evidence of over-the-air viewership in the community.

While the proposed satellite rules include these four factors, the proposal also incorporates a few significant changes, some affecting both cable and satellite market modification requests, and some applicable only to satellite market modifications.

First, a fifth factor would be included in ***both*** cable ***and*** satellite market modification proceedings. That new factor would require the Commission to determine whether the proposed modification would "promote consumers' access to television broadcast station signals that originate in their State of residence". In its Notice of Proposed Rulemaking (*NPRM*) the Commission tentatively concludes that this establishes a preference for market modifications to add communities where doing so would increase access to in-state programming. The Commission further tentatively concludes that no negative inference should be drawn in cases where the modification would not increase in-state access; in such instances this factor would simply be inapplicable.

Second, STELAR provided that satellite market modifications would not affect any subscribers' ability to receive distant signals. Following that direction, the Commission proposes that viewers previously deemed to be "unserved" for purposes of the distant signal rules would continue to be treated as "unserved" even if a market modification allows those viewers to receive a new "local" signal. In other words, a viewer would still be able to receive the signal of a distant affiliate of the same network of a station added to that subscriber's "local" market by modification.

Third, and potentially most importantly, STELAR provided that, regardless of other factors, a satellite provider would not be required to carry a station if it was "not technically and economically feasible" to do so using its existing satellites. That provision affords satellite operators an obvious opportunity to avoid carriage of stations regardless of any market modifications. Perhaps recognizing that this exception could, if not applied carefully, swallow the entire rule, the Commission proposes a number of conditions that would

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(in theory) protect broadcasters' ability to enforce market modifications.

In particular, the Commission proposes that the "feasibility" defense will be available ***only*** in the context of a market modification proceeding – it could not otherwise be raised to deny carriage requests. Also, the satellite operator will bear the burden of demonstrating that implementing a modification would not be feasible. (In the *NPRM* the Commission requests comment on what types of evidence should be required to meet that burden.) Further, recognizing that the validity of a "feasibility" claim may be eliminated by eventual technical developments, the Commission requests comment on whether a satellite operator who obtains a "feasibility" exemption should be required to periodically report to the Commission, or the broadcast station, as to whether carriage of the station (pursuant to the market modification) in fact remains infeasible.

Should satellite market modification requests be required to be served on local franchising authorities?

In analyzing the four (soon to be five) statutory factors applicable to market modification requests, the Commission has developed a standardized approach, specifying particular evidence that parties requesting (or opposing) modifications must present. The Commission largely proposes to use the same standardized evidence requirements with respect to satellite market modifications, with a couple of modifications. In light of the new fifth statutory factor favoring delivery of in-state programming, the Commission requests comment on whether there is any factual information which would be particularly applicable to that analysis (and which, therefore, proponents should be required to tender).

In what should be a non-controversial proposal, the Commission also proposes to update Section 76.69 (the market modification rule) to refer to the noise-limited service contour (NLSC), rather than the "Grade B" contour. The term "Grade B" contour defines the service area of an *analog* TV station. For digital stations, the NLSC is the relevant contour. The inclusion of "NLSC" in the rule is thus a housekeeping matter designed to keep the rule current. (Because the concept of "Grade B" contour remains relevant to some LPTV stations, that term will remain in the rule.)

Historically, only two types of parties have been entitled to file market modification proposals on the cable side: the broadcasters and cable operators who would be affected by the mod. The FCC is inclined to keep it that way for satellite proceedings as well, although comments disagreeing with that approach are invited. The Commission does contemplate that local governments, franchising authorities and the like would be able participate – whether in support or opposition – in satellite modification proceedings, even if such entities aren't permitted to initiate such proceedings.

Any party filing a satellite market mod request would be required to serve copies of the request on all "interested parties", a universe that includes any MVPD operator, broadcast licensee (or permittee, or applicant) or anybody else "likely to be directly affected" if the proposed mod were to be granted. The Commission asks whether franchising authorities and/or local governments should be deemed "interested parties" for this purpose. It's especially interested in comments as to whether *satellite* market modification requests should be required to be served on local franchising authorities, since such authorities have no role in satellite regulation. (Obviously, the same isn't true when it comes to cable.)

The proposed rules would also prohibit a satellite operator from dropping carriage of a commercial station or otherwise altering the status quo during the pendency of a market mod proceeding.

STELAR also authorized the FCC to revisit its definition of "community" for market modification purposes. Historically, that term – or, more precisely, the term "cable community" – has been defined (somewhat circularly) in Section 76.5(dd) of the rules. The same definition has been used for significant viewing purposes in the satellite context although, in areas where there is no pre-existing "cable community", the separate term "satellite community" applies. "Satellite community" is defined as "a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas). The boundaries of any such unincorporated community may be defined by one or more adjacent five-digit zip code areas".

Given Congress's suggestion that the FCC can take another look at the definition of "community", the Commission asks whether it should take the same approach for market modification purposes, *i.e.*, using the "cable community" definition unless no such community is involved, in which event the zip code-based "satellite community" concept would apply. Alternatively, the FCC suggests that it might instead use a zip code-based definition – or some other definition entirely – for all satellite market mods. The Commission's goal is to come up with a definition of community that "will most effectively promote consumer access to in-state programming". Comments on these alternatives are invited.

Comments may be filed by ***May 13, 2015*** and replies by ***May 28***. Comments and replies may be filed through the FCC's ECFS online filing system; refer to Proceeding No. 15-71.

Sue Q. Public? Main Street, Anytown, USA?

NAB to FCC: Erase, Replace White Space Database

By Jon Markman
markman@fhhlaw.com
703-812-0493

The television white space (TVWS) database system, intended to increase the efficient use of TV spectrum, is a mess, according to the National Association of Broadcasters (NAB). Because of that, the NAB has asked the Commission to suspend operation of the system until the "serious design flaws" in the system can be fixed. The FCC is thinking about the NAB's proposal, and has solicited comments on it.

The TVWS database system has been an ambitious undertaking since Day One. The idea, of course, is that there is some TV spectrum everywhere that is not being used at any one time by any licensed operator. Such spectrum can be put to good use by various low-power unlicensed devices (dubbed TV band devices, or TVBDs). But how is a TVBD user supposed to know where, when and what spectrum can be used? Enter the database.

As designed by the Commission, the TVWS database is supposed to include information about all licensed TV spectrum users (a universe that includes TV stations, some wireless microphones and various other users) ***and*** all fixed, unlicensed TVBDs. Operators of fixed, unlicensed TVBDs have to provide detailed information about their facilities – including, *e.g.*, the location of the transmitter and contact information for the operator – before commencing operation. Without accurate location information, it would be impossible to determine which frequencies would be available because it would be impossible to determine whether the proposed TVBD would be close enough to a licensed user to cause interference. And without accurate contact information, neither the Commission nor licensed operators encountering interference would be able to reach the unlicensed operator to correct the problem. The other information required for the database is similarly essential to interference-free operation in the TV band.

Obviously, the available data are less than reliable. That's the bad news.

Maintenance of the database has been delegated to a number of private entities, several of which have already been approved by the Commission to serve as database administrators. But, under the well-established GIGO principle, even the best administrator is only as good as the data it is given. And, according to the NAB, the data coming in from fixed TVBD operators is sketchy at best.

Sites specified by some fixed TVBD operators reportedly include: places 50 miles from Quito, Ecuador, or 500 miles from Cameroon (the latter happened to be in the middle of the Atlantic); empty fields; the middle of the street; and a water tower in Peru, Indiana, even though the supposed height of the TVBDs registered at that site was only about six feet. TVBD user identifications aren't much better: "Sue Q. Public", "John Doe" and "John Smith" all showed up, along with "NoneNone", "first_last" and, in the case of 80 TVBDs, "Meld test". Trying to reach TVBD registrants to get better information is difficult when they list: (a) email addresses such as "none@none.com", "john@doe.com" or "name@gmail.com"; (b) mailing addresses such as "456 Main Street, Anytown, USA", "123 Jump Street, Richmond, VA" or simply "addr"; and (c) phone numbers including "232-555-1212", "408-111-1111" and "999-999-9999". Some TVBD registrants have apparently provided fake FCC ID numbers and device serial numbers.

Obviously, the available data are less than reliable. That's the bad news. The good news is that, for whatever reason, the TVWS database is still relatively limited: only about 550 fixed TVBDs have been registered so far. (Sidenote: The fact that the database administrators don't have a common total for such devices is another indication of the dubious reliability of the system. According to two administrators – *i.e.*, Google and Spectrum Bridge – 558 fixed TVBDs had been registered as of one date; iConnectiv, a third administrator, put the number at 621 for the same date. Since databases are all supposed to be harmonized daily, this discrepancy is obviously problematic.)

Because the TVWS system is so limited, the NAB figures that now would be an excellent time for the Commission to put the system on hold for a while and clean it up with new, more stringent rules. Any clean-up effort will almost certainly be more complicated as the database grows. In particular, the NAB would have the Commission: (a) require all TVBDs, mobile and fixed, to incorporate geolocation capability; and (b) beef up the rules to provide "real and effective accountability" when it comes to data entry. That latter suggestion would involve, among other things, mandatory confirmation, by the database administrators, of at least the "facial integrity" of incoming data. Whether the Commission will agree remains to be seen.

For now, the FCC has invited preliminary comments on the NAB's proposal. Comments are due by ***May 1, 2015***. Once any incoming comments are reviewed, the FCC may issue a Notice of Proposed Rulemaking, or it may not. If you think that the NAB's concerns warrant FCC action, now would be a good time to let the FCC know.

Digital Transition Deadline for LPTV/TV Translators Officially Suspended

But Class A deadlines remain in effect

By Peter Tannenwald
tannenwald@fhhlaw.com
703-812-0404

Last October, we wrote about FCC proposals looking toward the future of Low Power Television (LPTV) stations after the upcoming incentive spectrum auction and associated repacking the TV spectrum into a smaller number of channels. One of the FCC's proposals was to defer the September 1, 2015, deadline for LPTV stations and TV translators to complete construction of digital facilities and to terminate analog operation. The FCC tentatively concluded that it should grant that relief, because LPTV licensees should not be forced to invest in new facilities until they know whether they will be able to find channels after the spectrum repack.

While the FCC's overall LPTV rulemaking has not yet been wrapped up, the Media Bureau has now announced an immediate suspension of the September 1, 2015, deadline for LPTV and TV translator stations. As a result, those stations may, if they wish, continue to transmit analog signals indefinitely, until the FCC says otherwise. There is no need to file applications to extend the expiration date of granted digital construction permits; in fact, the FCC does not want to have to deal with extension applications.

LPTV stations and TV translators may choose to complete digital construction now or wait in limbo and see how the chips fall after the repack.

The suspension applies ***ONLY*** to the expiration date of construction permits for an existing analog LPTV or translator station's initial digital facilities. This includes both flash-cuts from analog to digital on the same channel and permits to build companion digital stations on a different channel. The extension does ***NOT*** apply to the expiration date of construction permits for modification of facilities of stations that are already on the air with digital signals. Those permits still expire on the date indicated on the face of the permit.

The suspension also does ***NOT*** apply to any Class A stations. Class A stations are still subject to two deadlines: (a) They may not transmit analog signals after September 1, 2015, and (b) their signals will be protected in the spectrum repack only as the signals are authorized as of May 29, 2015.

Analog Class A stations that have not completed construction of digital facilities by May 29, 2015, will have only their licensed analog coverage protected in the repack. To obtain protection for their digital coverage area (which is usually larger than the analog area), they must have completed construction and filed an application for license to cover their digital construction permit by May 29; it is not necessary that the license application have been granted by that date.

If a Class A station does not complete digital construction by May 29, it will still be subject to the September 1 deadline for all Class A stations to complete digital construction. Under appropriate circumstances, a six-month extension of the September 1 deadline may be requested; ***but extension applications must be filed by May 1, 2015, to take advantage of a lenient evaluation standard***. After that, extensions will be granted only where the circumstances delaying construction are beyond the station's control and were not reasonably foreseeable – a standard that is strictly applied.

So LPTV stations and TV translators may choose whether to complete digital construction now or wait in limbo and see how the chips fall after the repack. Class A stations must get a move on it and enter the digital world by May 29 to get protection for their digital facilities; and even if they don't make that deadline, they will still have to exit the analog world forever by September 1 (or at least file an extension application by May 1 if they can't make the digital transition by September 1).

Stations that go dark because of inability to complete digital construction by the later of September 1 or their extended deadline (assuming that they request and are granted an extension) must notify the FCC within 10 days of going dark, file a request for authority to remain dark after 30 days, and get back on the air no later than one year after they go dark. Some rulemaking commenters have requested a change in the policy that calls for immediate license expiration for stations off the air more than a year. However, that policy is based on Section 312(g) of the Communications Act. While the FCC may have some limited discretion to waive that provision, the FCC will not generally do so.

Buddy, gonna shut you down

Field Office Phase Out?

By Laura Stefani
stefani@fhhlaw.com
703-812-0450

Word on the street (first reported last month by our friends at *Radio World*, as far as we can tell) is that the FCC's Field Offices are on the budgetary chopping block: according to a memo reportedly circulating within the Commission (and co-authored by the Chief of the Enforcement Bureau and the Managing Director), the number of Field Offices would be sliced by two-thirds (from 24 to 8), and staffing would be cut almost in half (from 63 to 33). Field Offices in major cities – think Seattle, Denver, Boston, Philadelphia, Houston – would all be gone.

Ding Dong, the (Enforcement) Witch is Dead! Good news, right?

Not really.

Sure, visions of surprise inspections and write-ups for hypertechnical violations may plague the fevered imaginations of some, but the fact is that Field Offices are, and have long been, the friend of the licensed, street-legal operator. As a practical matter, voluntary inspection programs have largely removed the threat of drive-by, "gotcha" inspections. And while we may all chafe a bit at the occasional citation for a broken tower fence lock or unmown grass at the transmitter, such things tend to be rare, at least for licensees who are reasonably attentive to regulatory compliance.

The Commission is contemplating use of a "tiger team" approach.

More common are the situations when a licensed station encounters interference from some other source, often one it can't identify on its own. Maybe it's somebody suffering inadvertent frequency drift; maybe it's intentional, malicious interference; maybe it's a pirate; maybe it's an unlicensed transmitting device working where or how it shouldn't be. Whatever the case, your friendly local FCC official has just the right combination of technical expertise and regulatory muscle to resolve the problem.

Recently, a client called about a problem with what the FCC field agents term a "malicious interferer", one of those regrettably troubled individuals who choose to use transmitters (legally obtained or otherwise) to spew obnoxious content on licensed radio frequencies. In this instance, the interferer was broadcasting racial slurs and obscenities on frequencies used by universities and others, forcing them to cease (at least temporarily) using the equipment they were lawfully licensed to use. We reached out to the nearby FCC Field Office, which began an investigation that brought an agent to the location several times. Working with local law enforcement, the Field Office succeeded in scaring off the interferer. We suspect that this happens a lot more often than gets reported.

In a recent post on the FCC's blog, Commissioner O'Rielly acknowledged the continuing problem of radio piracy in no uncertain terms. (Sample quote: "If broadcasting were a garden, pirate radio would be poisonous crabgrass.") And who does a legitimate broadcaster call to spray regulatory Roundup on that crabgrass? The local Field Office, of course. Which is one very good reason why slashing the availability of conveniently located field operatives is NOT a reason for celebration. (Unfortunately, while bemoaning the insidiousness of radio piracy, O'Rielly declined to take a position on the possible closure of Field Offices.)

The persistent pirate plague is not the only concern. As the Commission encourages spectrum sharing, particularly where mobile, unlicensed transmitters are involved, the potential for unintended, unexpected interference will soar. What's worse, the folks likely to be operating the interfering devices will probably not be communications professionals savvy in the art of spectrum use. Rather, increasingly they will be folks taking advantage, innocently or otherwise, of the vast array of equipment available on the legitimate open market or from less legitimate sources – think jammers, boosters and the like. These are not people likely to respond favorably when your chief engineer calls over to ask for some friendly cooperation in identifying and correcting incoming interference. Is this really the time to shrink the available governmental enforcement capability?

Testifying on Capitol Hill, Chairman Wheeler (who thinks RIF-ing field offices is a good idea) described how effective enforcement could be accomplished with just a small handful of field offices. According to Wheeler, the Commission is contemplating use of a "tiger team" approach. Field agents assigned to the

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eight surviving field offices would be on call, ready to hop a plane at the drop of a hat and swoop in to respond to interference SOS calls. How would they schlep their gear? Why, "prepositioned equipment" would be cached at various sites around the country, based (apparently) on "population/spectrum use density". On their way to a distress call, the tiger teams would apparently make a pit stop at the closest "prepositioned equipment" depot to pick up what they might need. *Radio World* reports that those sites would include Kansas City, Denver, Salt Lake City, Phoenix, Seattle, San Juan, Puerto Rico, Anchorage, Alaska, Honolulu and Billings, Montana.

Now bear in mind that the eight remaining field offices would (again according *Radio World*) be in NYC, LA, San Francisco, Chicago, Atlanta, Miami, Dallas and Columbia, Maryland. Wheeler apparently believes that field agents can be expected to arrive on-site responding to calls for assistance anywhere in the country within 24 hours. It appears, though, that they would have to get there by flying commercial – no FCC-dedicated Globemaster (like S.H.I.E.L.D.'s "Bus") or Invisible Jet (like Wonder Woman's) is in the budget. Whether or not 24 hours is a reasonable expectation remains to be seen. But if a tiger team has to fly, commercial, to an equipment depot site and then somehow get to the place where the interference is occurring, 24 hours seems a bit optimistic.

Both Chairman Wheeler and Enforcement Bureau Chief Travis LeBlanc delivered sales pitches for the anticipated down-sizing at the recent NAB Convention. They noted that: it has been some 20 years since a management evaluation has been made of FCC Field Offices; most of the employees at those offices are eligible for retirement; not all the employees are busy all the time; and FCC inspectors are operating with outdated equipment that the FCC plans to replace with funds saved from closing offices. They argued that deploying up-to-date equipment will more than offset the reduction in Field Office locations and personnel.

One broadcaster in the audience at the NAB told LeBlanc that most stations around the country see local Field Office inspectors, not Washington headquarters, as the presence and personality of the FCC in their lives. When field inspectors visit, station staffs jump to attention, and the staffs know that they need to be able to demonstrate compliance with the agency's requirements. A "tiger team" dispatched from afar just won't have the same impact.

When field inspectors visit, station staffs jump to attention. Would a "tiger team" dispatched from afar have the same impact?

Some are speculating that this proposal isn't motivated solely by concern for efficiency and modernization. Rather, the suggestion goes, it's designed to enable the Chairman to add more FTEs (that's government-speak for budgeted positions) to the FCC headquarters staff to work on net neutrality complaints while avoiding a budget fight with a Republican Congress that is loath to support the net neutrality efforts. That seems an odd trade-off for an agency whose *raison d'être* since its inception has been the preservation of order and the prevention of chaos in spectrum use.

The plan to down-size the Field Office operation has not formally surfaced. To the extent that reports about it have emerged, they have been met with considerable skepticism. As an example, Bob Weller of the NAB posted a strong piece ("Defanging a Paper Tiger") on the NAB's blog. It's possible that such opposition may give Chairman Wheeler and Bureau Chief LeBlanc some pause … or not, as they seemed to stand their ground at the NAB convention. Check back with CommLawBlog.com for updates.

Brrrrr - FM Minor Mod Freeze Announced

With the deadlines for FM Auction 98 now on the books, (*see* the related story on page 3), the Commission has also announced that it will not accept ***ANY*** commercial or noncommercial minor mod applications ***between May 18 and May 28, 2015***. That's the filing window for short-form (Form 175) applications for Auction 98.

These freezes are standard operating procedure when it comes to broadcast auctions. The goal is to avoid the creation of any conflicts (unforeseeable or otherwise) with auction proposals that could muck up the auction process. So if you have any intention of filing for a minor mod in the near term, you'd best be sure to get it filed before May 18 or be prepared to cool your heels for ten days until the freeze thaws on May 28.

For more information on the auction itself, see our related posts on CommLawBlog.com.

Closing the translator window?

Wheeler to AMers: I've Got Your Revitalization Item ... Right Here

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

About 18 months ago, the Commission adopted a Notice of Proposed Rulemaking (*AM Revitalization NPRM*) that represented, in the words of then -Acting Chairwoman Clyburn, "the next significant step in our effort to buttress AM broadcast service and ease regulatory burdens on AM broadcasters". Commissioner Pai, a long-time supporter of the AM industry, declared the NPRM a "landmark effort ... to energize the nation's oldest broadcasting service". Optimism ran high that AM was about to catch a break.

Then things went quiet. We here in the *Memo to Clients* bunker have received a boatload of inquiries asking where the much-vaunted *AM Revitalization* proceeding stands. And now we have some idea: In a recent post on the FCC's blog, Chairman Wheeler has announced that he "intends to conclude" this proceeding "in the coming weeks".

There's good news and bad news here.

On the plus side, the fact that the Chairman is looking to "conclude" the proceeding at all is a big step in the right direction. The word on the street has been that a draft decision had been prepared by the Media Bureau staff and delivered to the Chairman's office some time ago, but Wheeler was not inclined to fast track it. Whether that was because of other distractions (net neutrality and spectrum auctions being two obvious examples) or because of internal disputes with one or more other Commissioners (*e.g.*, AM cheerleader Commissioner Pai, who has found himself cross-wise with the Chairman on more than one occasion) or because of some other factor, it's impossible to tell. But at least we now know that we can expect some movement.

(The fact that we don't have a specific time frame for that movement is, however, a bit disappointing. Wheeler says "coming weeks"; in a statement applauding Wheeler's announcement, Pai expresses hope that action will be taken "in the next couple of months". Weeks? Months? Hmmm. But let's not look a gift horse in the mouth.)

On the down side, there appears to be trouble ahead for possibly the most eagerly anticipated element of the revitalization proposal: a window for new FM translator applications that would be open only to AM licensees. While the Chairman, in his blog post, seems to approve of most of the proposals advanced in the *AM Revitalization NPRM* (we summarized those proposals here), he draws the line at an FM translator set-aside. He has two "concerns". First, he seems to think that there may already be enough translators to take care of any AM licensees who want one. Second, he questions whether any new translator filing opportunity should be limited to AM licensees only.

With all due respect, the raw number of FM translators currently authorized is irrelevant to the survival of AM stations if those translators don't happen to be located in areas where AM stations can take advantage of them. As we have seen, the ability to move a translator to a place where it can be used by an AM licensee is narrowly circumscribed. Unless the constraints on such moves are significantly loosened, saying that there are plenty of translators around is like telling a guy in the middle of a desert that he doesn't need to worry about water because there's plenty of it somewhere on the planet – even if it doesn't happen to be in the desert where he is.

Saying that there are plenty of translators around is like telling a guy in the middle of a desert that he doesn't need to worry about water because there's plenty of it somewhere on the planet.

As far as an AM-only window goes, Wheeler thinks that spectrum availability should be an "open opportunity" that doesn't "favor one class of licensees" to the exclusion of others. Perhaps. But in the *AM Revitalization NPRM*, the Commission (of which the current Chairman was then not yet a member) considered that question. It tentatively concluded that "an applicant-limited and technically limited window ... will provide immediate benefits to the AM service without materially affecting future FM translator window applicants"; by contrast, "an open window could frustrate our goal of providing expeditious relief to AM broadcasters".

Those conclusions were, of course, tentative, so Chairman Wheeler is well within his rights to differ with them. But he should at least be prepared to acknowledge those earlier conclusions and explain

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why they weren't valid or why, if they were valid, he is now inclined to ignore them.

Perhaps the most intriguing aspect of all this is Commissioner Pai's statement applauding Wheeler's blog post. Pai makes no specific reference to the FM translator window proposal (and Wheeler's apparent rejection of that proposal). Does that suggest that Pai would accept a revitalization order that does not include an AM-only translator window? That would be a major disappointment to many AM licensees. There is one glimmer of hope, though. In his statement, Pai observes that "there is nearly unanimous support in the record for the ideas put forward by the Commission under Acting Chairwoman Clyburn's leadership". Those ideas included the AM-only translator window. Is it possible that Pai is looking to form a three-vote bloc (with fellow Commissioners O'Rielly, a Republican, and Clyburn, a Democrat) intending to embrace, among other proposals, an AM-only window? Obviously, this is pure speculation, but it's at least something to think about.

In any event, the AM Revitalization proceeding appears to be about to break through whatever bureaucratic logjam it's been bottled up in. We can all keep our fingers crossed. (Of course, you should check back here for updates.)

FHH - On the Job, On the Go

On April 23, **Kathy Kleiman** and her film-making colleagues showed their documentary, *The Computers*, at UPenn's School of Engineering and Applied Sciences. The site was appropriate because that's where the underlying story of the film took place. *The Computers* presents the story of the women who, in 1945-1946, programmed ENIAC, the first electronic general-purpose computer. (**Kathy** will be presenting the film at other colleges and universities; if you're interested in arranging for a screening for your organization, be sure to let her know.)

Meanwhile, on April 28, **Frank Montero** made a presentation on FCC issues to the New Jersey Broadcasters Association Board of Directors. In May **Frank** will be in D.C., speaking at the annual meeting of the George Washington University Law School's Barrister's Society (he's the incoming Chairman of the Society) on the 5th, and attending the Public Radio Conference from May 24-25. In between he'll squeeze in a trip to Puerto Rico to attend the annual Convention of the Puerto Rico Broadcasters Association, where he'll be making a presentation on FCC issues. **Davina Sashkin** will be joining him in sunny San Juan.

Heading in the opposite direction will be **Frank Jazzo**, who is slated to attend the Rockefeller College Advisory Board Meeting and Alumni Awards Dinner in Albany on May 15. But don't worry about his tan. The following week (May 20-21) **Frank J** will be heading to the Gulf – Biloxi, Mississippi, to be precise – to speak at the joint convention of the Mississippi Association of Broadcasters and the Louisiana Association of Broadcasters.

Can I get a witness? You sure can, if you're the Judiciary Committee of the D.C. Council. Our own **Kevin Goldberg** will be testifying there on May 7 on the hot button topic of the use of police body cameras. Then he's off to Phoenix, where he'll speak on journalism law issues at the Media Financial Managers Conference on May 18.

And if you're going to San Francisco, be sure to … catch **Laura Stefani**, who will be moderating a panel at the Women Leaders in Technology Law Conference on May 14. Topic: "Making Your Voice Heard: Recognizing the Distinct Communication Styles Between Women and Men and Cultivating the Traits that Stand Out as a Leader".

Kathleen Victory's voice will be heard in Reno on May 14-17. She'll be speaking on a couple of panels at the National Translator Association meeting there.

And coming up in June, **Howard Weiss** will be attending the Virginia Association of Broadcasters Annual Summer Convention in Virginia Beach on June 25-27. And **Harry Cole** will be half of a two-member panel expounding on FCC jurisdiction at the American Conference Institute's FCC Boot Camp in San Francisco. The Camp is being held from June 22-24. We can provide a discount code should any readers want to sign up.

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weight in keeping the rates down. Plus, there may not even be a basis on which to impose a "per performance" rate upon an over-the-air service. You'd probably be more likely to see something tied to a station's overall listenership, AQH numbers or revenue.

We do know a couple of things about limits that the FPFPA would impose on rates:

> There would be a minimum fee for each station, meaning all stations would definitely be on the hook for at least some payment in the future if this bill passes; but
>
> Fees would be capped for certain types of stations. For instance, small commercial stations with an annual revenue of under $1 million (and this appears to be per station, not per company) would pay $500.00 per year. An FCC-licensed public broadcast station would pay no more than $100. No royalties would be owed for broadcast of music used in religious services or incidental uses of music (which may protect talk, sports and news stations).

The two big questions: How likely is FPFPA to pass; and (2) if it does, when will I start paying more in royalties?

But the big questions I've been getting over recently are: (1) How likely is FPFPA to pass; and (2) if it does, when will I start paying more in royalties?

As to whether, I think the odds are below 50% – probably between 25-35% – but they're slightly higher than they have been in the past. The NAB continues to mount strong opposition to imposition of any performance right; its previous opposition has proven effective. And we have a pretty good idea of how many "NO" votes there might be, thanks to the Local Radio Freedom Act. That's a non-binding resolution which has been introduced in both the House (as H.Con.Res. 17) and Senate (S.Con.Res. 4) which simply says that:

> Congress should not impose any new performance fee, tax, royalty, or other charge relating to the public performance of sound recordings on a local radio station for broadcasting sound recordings over the air, or on any business for such public performance of sound recordings.

Since the Radio Freedom Act is, in effect, the anti-FPFPA, it's safe to assume that any member of Congress who signs on to one will vote against the other. Currently, the Local Radio Freedom Act is supported by 158 Representatives and 12 Senators. Of course, those who remember their U.S. government classes will know that 218 Representatives and 51 Senators would be needed to pass any bill. The Local Radio Freedom Act has always garnered at least 218 Representatives in the past.

Keep an eye on the Local Radio Freedom Act, then, to get a good idea of whether the momentum is heading toward radio stations or recording artists. It's interesting to note, for instance, that ten Representatives have signed on to the Local Radio Freedom Act since the FPFPA was introduced. Keep in mind, too, that many Representatives and Senators won't commit on an issue until they absolutely have to. So while the Local Radio Freedom Act is currently 60 votes short of the crucial 218 that would signal likely defeat of the FPFPA, radio stations probably need to start worrying only if (a) the uptick in co-sponsors of the Local Radio Freedom Act stalls out and/or (b) we don't see a similar bump result after significant upcoming mileposts in the legislative process, like a committee hearing or vote on the bill.

I fully expect, by the way, that FPFPA will get both a committee hearing and a vote. Rep. Nadler is the Ranking Member of the Subcommittee on Courts, Intellectual Property and the Internet of the House Judiciary Committee. Rep. Conyers, an original co-sponsor of the FPFPA, is the Ranking Member of the full Judiciary Committee. Under these circumstances, protocol dictates that the bill would normally get a hearing and vote. I won't be surprised if the bill passes out of the subcommittee and full committee.

But what might happen on the House floor is another matter. Given the limited amount of time available to actual legislating in this, the 114th Congress, I'm not sure that this bill would get floor time this year even if the Local Radio Freedom Act doesn't get the support of 218 Representatives or 51 Senators. And the fact that 2016 is an election year means that little will get done then; it also means that anything passing the House and Senate this year must be relatively non-controversial because floor time is too precious to waste on things like reasoned debate.

Things could change, though. For instance, what if the performance right proposal were to be included in a broader bill in an effort to give some "wiggle room" to Representatives and Senators who are co-sponsors of the Local Radio Freedom Act. Would that give them the opportunity to somehow rationalize a vote for such a broader bill because, arguably, there are broader, more laudable interests at stake? Based on the plain language of the Local Radio Freedom Act, I'd still say "NO".

Another possible game-changer: the "divide and conquer" approach the FPFPA's sponsors appear be taking. The capping of royalties for smaller commercial and non-commercial broadcasters is a pretty clear attempt to try force the NAB off its argument that a performance right will harm local broadcasters. After all (the argument would go), annual royalties capped at $500 aren't all that onerous; that being the case, by opposing the FPFPA, the NAB is only trying to protect big corporate companies who can afford to pay. That spin by the FPFPA sponsors might garner a few votes to their side.

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No contest?

Enforceability of Broadcast Contest Rule In Question

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

The hilariously-named Paperwork Reduction Act (PRA) requires the FCC to get the approval of the Office of Management and Budget before the FCC can unleash "information collection" obligations on its regulatees. The PRA process – which provides not one, but two separate opportunities for public comment, thereby ironically doubling the potential paperwork to be created – often appears to involve little more than rubber-stamping. What does this have to do with the FCC's contest rule? Read on.

There's a nugget of considerable value in the PRA. It prohibits the FCC from imposing "any penalty" on anybody for failing to comply with an "information collection" that does not happen to have an OMB Control Number reflecting compliance with the PRA. That prohibition is an absolute get-out-of-FCC-jail-free card: Congress expressly provided that the prohibition against penalties applies "notwithstanding any other provision of law". And if that didn't make it clear enough, Congress went on to say that "The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto".

There's a nugget of considerable value in the PRA.

When the FCC wants to get an OMB Control Number for an "information collection", it must first place a notice in the Federal Register inviting the public to comment on the "information collection". These notices are akin to the legal notices that appear, usually in about 2-point type, at the back of your local newspaper. They're a formality, supposedly intended to put the world on notice, but seriously, who ever reads these things? We do.

And so it was that we came across a terse PRA notice in the Federal Register announcing that the FCC is seeking an OMB Control Number relative to Section 73.1216, its broadcast contest rule. According to the notice:

> The Commission adopted the Contest Rule in 1976 to address concerns about the manner in which broadcast stations were conducting contests over the air. The Contest Rule generally requires stations to broadcast material contest terms fully and accurately the first time the audience is told how to participate in a contest, and periodically thereafter. In addition, stations must conduct contests substantially as announced. These information collection requirements are necessary to ensure that broadcast licensees conduct contests with due regard for the public interest.

Elsewhere in the notice the FCC seems to characterize Section 73.1216 as an "[e]xisting information collection in use without an OMB Control Number". And what does the PRA call an information collection without an OMB Control Number? Unenforceable.

Why the FCC has decided now, nearly 40 years after the contest rule was first adopted, to declare the rule to be an "information collection" isn't clear. But it seems to have done just that. And it is beyond question – as the PRA notice expressly concedes – that that information collection has been in use by the FCC without an OMB Control Number. So it sure looks like the Commission has effectively announced that, at least until the PRA process runs its course and a Control Number is issued, the FCC is not in a position to enforce the Contest Rule.

How this development might come into play in connection with current, ongoing investigations into possible contest violations isn't clear. Nor is it clear how, if at all, this might affect previously-issued fines for contest violations. But if you happen to have a contest problem on your hands, you might want to make sure that your counsel is aware of the Federal Register notice (as well as 44 U.S.C. §3512).

Given the terseness of the PRA notice, we may be missing something here. If so, ideally the FCC will clarify what's going on. Meanwhile, broadcasters who run on-air contests should take a look at the PRA notice for themselves.

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As far as timing goes, if the bill is to pass at all, I think that would have to happen in 2015 or very early in 2016, since (as mentioned above) election-year activities in 2016 will likely distract Congress. And if it doesn't get passed in 2016, the process will have to start anew in 2017.

Even if the FPFPA does pass, though, you're likely looking at another year or two before royalties are imposed. Even if the CRB starts its rate-making proceeding "as soon as practicable" after the enactment of the FPFPA (as required by the bill), experience shows that such a proceeding can take as long as two years to complete. (Just look at the current Webcasting IV proceeding, setting the streaming rates for 2016-2020: it began in January 2014 and likely won't conclude until December 2015.)

So there is a lot in play here, especially with regard to politics. The bill's passage still seems pretty unlikely and, even it were to pass, its effect may not be felt for several years, but the debate should be fun to watch.

Intern-al Affairs III

The Interns Are Learning - and That May be Bad for You

By Kevin M. Goldberg
goldberg@fhhlaw.com
703-812-0462

Spring break is fading in the rear view. Summer's just around the corner. Soon the interns will be flocking to your door – if they haven't already jammed your inbox – all looking for an opportunity to add a way cool media-related internship to their résumés.

So it's a good time to remind you that you should think hard about whether you need to pay those interns instead of claiming that their "compensation" consists solely of school credit. I specifically use the word "compensation" and specifically put it in quotes because, if you've read any of my previous pieces on this topic, you know that claiming school credit as interns' compensation is a recipe for disaster. You'd be much better off if you were to take the time to study the Department of Labor's Fact Sheet # 71: Internship Programs Under the Fair Labor Standards Act. That way you're more likely to offer an internship program that falls on the right side of the "trainee/employee" line.

Being on the wrong side of the "trainee/employee" line can be very expensive.

And being on the right side of that line is important, because being on the wrong side can be very expensive. Just ask NBCUniversal. They got hit with a suit by three interns back in 2013. The suit blossomed into a class action, with thousands of other interns jumping on the bandwagon. The next thing you know, NBCUniversal is agreeing to settle out for $6.4 million. And even that may not be enough, because at least one intern in the plaintiff class isn't happy with the settlement.

Listen to the words of Dina Agusta, intern-turned-litigant. Last month she notified the Court that she objected to the settlement. The apparent terms of the settlement took $1.2 million or so off the top for the lawyers, with the rest allocated among the former interns themselves. Five of the plaintiffs would receive payments ranging from $2,000 to $10,000; the rest would get about $500 per internship. This didn't sit well with Ms. Agusta, one of the $500 ticket-holders. In her letter she details various aspects of the settlement that appear unfavorable to the intern-plaintiffs, and wraps up by saying:

> I would be willing to risk the low ball offer and go to trial on this matter. ... I wonder how many other class members when presented with this analysis would concur with my reasoning.

It must be said that Ms. Agusta is acting on the advice (and with the continued pro bono representation) of her attorney/father. Still, having pointed out weaknesses she perceived in the settlement, has she led others to join her in opposition? Maybe not. But my guess is that at least a few individuals who were able to score a highly sought-after internship with a famous media company did so on the back of family connections. More than likely, those from prominent families probably count at least a lawyer or two among their kin.

But even if they don't, the word is out. Lawsuits continue to be filed. Settlements continue to occur and judgments continue to roll up. And if Ms. Agusta's battle cry is heeded by other interns, lawyer-engineered settlements that happen to be particularly lawyer-friendly may not be as readily available down the line.

I'm not saying that you absolutely have to pay your interns this summer (or any other time). But I am saying that, in my experience, most media companies have tended to rely on the tried and true "credits instead of cash or checks" formula when it comes to internships. Even if that approach may have held water previously, it has recently developed leaks galore. Given the cost of litigation – especially litigation that goes for almost two years, seems settled for $6.4 million and then may still result in more litigation – it makes simple financial sense to consult with an attorney to be sure that your internship program fully complies with all relevant federal and state employment laws. (Note: The FLSA does provide some exemptions for some smaller companies; an expert should be able to confirm whether or not any particular company rates an exemption.)

[One interesting sidenote: In an earlier post on CommLawBlog.com I mentioned that one law firm in particular happened to represent intern-plaintiffs in a number of similar cases directed at big media companies. This was presumably not coincidental, because the firm was also responsible for a website, aptly-named www.unpaidinternslawsuit.com, seemingly designed to bring more potential plaintiffs in the door. That firm repped the intern-plaintiffs in the NBCUniversal case, and thus stands to rake in nearly $1.2 million if the settlement is approved. It's also the firm against which Ms. Agusta rails with considerable ferocity in her letter to the Court. It would appear that the firm is now standing in Dr. Frankenstein's shoes: its creation, the Class Action Intern-Plaintiff, originally seemed within the exclusive control of the firm. But, like Frankenstein's monster, that creation (or, at least, one iteration of the monster, *i.e.*, Ms. Agusta) has now turned on its creator. That's probably not good news for the firm, or for media companies with flawed intern programs.]

May 13, 2015

Modifying Local TV Markets for Satellite Carriage Rights as Required by STELAR – Comments are due with regard to the proposed rules to implement provisions of the of the STELA Reauthorization Act of 2014 (STELAR) requiring modification of television markets to further consumer access to relevant television programming.

May 28, 2015

Modifying Local TV Markets for Satellite Carriage Rights as Required by STELAR – Reply comments are due with regard to the proposed rules to implement provisions of the of the STELA Reauthorization Act of 2014 (STELAR) requiring modification of television markets to further consumer access to relevant television programming.

June 1, 2015

EEO Mid-Term Reports – All *radio* station employment units *with eleven (11) or more full-time employees* and located in the **District of Columbia**, **Maryland**, **Virginia** and **West Virginia** must file EEO Mid-Term Reports electronically on FCC Form 397.

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Nevada**, **New Mexico**, **Ohio**, **Utah**, **Virginia**, **West Virginia** and **Wyoming** 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 **Michigan** and **Ohio** 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 the **Arizona**, **Idaho**, **District of Columbia**, **Maryland**, **Nevada**, **New Mexico**, **Virginia**, **West Virginia** and **Wyoming** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

July 10, 2015

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the second quarter 2015 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, as the FCC bases its initial judgments of filing compliance on the contents and dates shown in the online public file. Please note that the FCC's filing system continues to require the use of FRN's prior to preparation of the reports; therefore, you should have that information at hand 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.

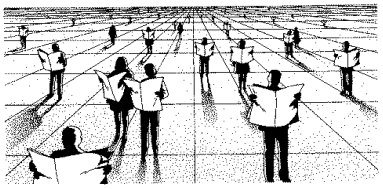
Website Compliance Information – *Television* and *Class A television* station licensees must upload and retain in their online public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to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

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

Updates On The News

One more step toward the incentive auction (*Presenting Form 2100, Schedule 381*) – Late last year we reported on a draft of Form 2100, Schedule 381. That's the form (technical title: "Pre-Auction Technical Certification Form") to be completed and filed by (a) all full-power and Class A TV licensees entitled to mandatory protection in the upcoming incentive auction as well as (b) those with Commission-afforded discretionary protection. (Don't worry if you're not sure whether you're in the universe of those who will have to file: the FCC is going to be releasing, possibly by the end of this summer, an "Eligibility Public Notice" spelling out the facilities that the Commission believes to be entitled to protection.) Schedule 381 is designed to provide the Commission assurance that the technical profile of the television industry as reflected in the FCC's database is accurate.



The latest news: The Office of Management and Budget has approved Schedule 381, so the form is now technically "effective". It doesn't appear to have changed significantly since our December, 2014 report on the draft. You can check out a copy of the schedule on the OMB website.

The deadline for completing and filing Schedule 381 has not yet been set. It's expected to be announced in the Eligibility Public Notice. Still, many if not most affected licensees presumably know whether or not they'll be on the list. Anybody likely to be on the list would be well-advised to take a close look at the form – ***NOW*** – and begin to gather the necessary information. Some should be relatively easy – transmitter and antenna specs in particular. Other stuff, not so much. F'rinstance, do you know when the last structural analysis of your tower was performed? How about the structural standard under which that analysis was performed? (Hint: Two possibilities are TIA 222-Revision F and TIA 222-Revision G. There's also a general "Other" option – you're on your own for that one.)

The information gleaned from Schedule 381 will be used by the Commission both to identify the facilities to be sold in the reverse auction and to form the starting point for the spectrum repacking effort which is the ultimate goal of the auction. Additionally, the completed forms will provide the FCC with a comprehensive database of all the specific transmission equipment (transmitters, antennas, transmission line) currently in use, a database which will be used in determining relocation reimbursements.

In other words, Schedule 381 information will be central to the incentive auction process and its aftermath. Accordingly, everyone will be best served if that information is collected and reported with maximum accuracy.

And yet another step toward the incentive auction (*LPAS provision now in effect*) – As we all know, last June the Commission adopted its massive Report and Order setting out the rules for implementation of the spectrum incentive auction. The auction, of course, is one element of a major reorganization of the spectrum in which (among other things) television stations will be "repacked" into a narrower portion of the spectrum. The repacking affects more than just TV licensees. Wireless microphones and other licensed low power auxiliary stations (LPASs) are allowed to operate on unused TV channels on a secondary, non-exclusive basis, so reduction in TV channels reduces LPAS opportunities as well -- a special problem for wireless microphone users in congested areas.

Deep in the fine print of the magnum opus, the FCC – concerned about the impact that the re-pack will likely have on LPASs, and wireless microphones in particular – sought to ensure that LPAS licensees would have access to as many TV channels as possible post-repack.

One way to achieve that was to permit LPAS operation co-channel with TV stations at distances less than those specified in Section 74.802(a) of the Commission's rules, provided such use was coordinated in advance. To that end, Section 74.802(b) was revised to read:

> Low power auxiliary stations may operate closer to co-channel TV broadcast stations than the distances specified in paragraph (b)(1) of this section provided that their operations are coordinated with TV broadcast stations that could be affected by the low power auxiliary station operation. Coordination must be completed prior to operation of the low power auxiliary station.

While portions of the incentive auction Report and Order became effective last October, the revised Section 74.802(b) did not because it had to be run through the Paperwork Reduction Act drill at the Office of Management and Budget. According to a notice published in the Federal Register, that process has been completed, OMB has given its thumbs up, and the revised Section 74.802 (b) became effective as of ***April 1, 2015***.