

# Memorandum to Clients

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## What's Next for AM Radio?

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Late on Friday, October 5, the Federal Communications Commission (“FCC”) released a [Second Further Notice of Proposed Rulemaking](#) in a five-year ongoing effort to “revitalize” the AM radio broadcast service. The new proposals continue a trend toward allowing higher power operation by smaller stations, by reducing nighttime signal protection for some 60 Class A AM stations located in the continental United States and 16 stations in Alaska. The end result would be less wide area coverage and more local radio service to the public.

To understand why the FCC is considering this action, it helps to understand a bit of the science behind AM signal propagation. AM radio signals travel through both the ground and through the air. At night, the airborne signal component (“skywave”) is reflected back to the earth from the ionosphere – a layer of the atmosphere extending from about 50 to 600 miles above the earth’s surface. The reflected signals may come back down to earth hundreds, if not thousands, of miles away from a station’s transmitter. Class A AM stations – formerly known as “clear channel” stations (no relation to Clear Channel/now iHeart Radio) – are powerhouses, transmitting with 50 kilowatts of power 24 hours a day – 200 or more times the power of the smallest AM stations. You may know of some of them, including historic voices that still have three-letter call signs: WGN and WLS, Chicago; WOR in New York, WBZ in Boston, WBT in Charlotte, WSB in Atlanta, WJR in Detroit, KYW in Philadelphia, WWL in New Orleans, WHO in Des Moines, KSL in Salt



Lake City, KOA in Denver, KGO in San Francisco, and KNX in Los Angeles (apologies if we left out your favorite station). Once upon a time, their signals were fully protected from interference at night and boomed across the land, keeping us connected us with civilization as we chugged along remote rural highways in our cars and trucks and perhaps spawning a lifetime of fandom for a far away major league baseball team to whose games a young boy surreptitiously listened on a transistor radio after bedtime.

Signal reflection doesn’t work so well during the day, so the FCC has allowed other stations to occupy the Class A frequencies in other markets. But those stations have to curtail power during “critical hours” (two hours before sunrise and after sunset) and often have to reduce power to nearly nothing or shut down altogether at night. In today’s 24-hour-a-day, non-stop world, not being able to reach an audience at night is a losing proposition; so the FCC has yielded to constant pressure over the years to allow more power and longer hours of operation by those “other” stations, at the expense of long distance reception of Class A signals.

Now the FCC is proposing to go further, rolling back some previous restrictions on non-Class A AM stations and perhaps eliminating whatever remains (and it’s not much) of the protection of far-away reception. Under the proposals, which are sufficiently complicated that you should talk to your engineer if you really want to understand the details, Class A AM stations would be protected only within a higher strength signal contour (and so within a smaller area) than they are now; at least some, if not all, skywave protection would be eliminated.

While some nostalgia buffs might weep at the final demise of long distance AM service, the FCC asks some thoughtful questions that merit serious attention if you want to get involved in this rulemaking. These questions invite comments as to whether long-distance AM radio service is an anachronism that must now go the way of the dodo or has continuing important value to national security that needs to be preserved.

For example, Class A AM signals are now protected to their 0.1 mV/m daytime service contour. Is that a meaningful signal level? Can today’s AM receivers pick up that weak a signal anymore, particularly with all the radiofrequency “noise” generated by LED and CFL light bulbs, power lines, and electric motors? If no one can receive such a weak a signal, why protect it?

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What about programming services? Although Class A AM stations may broadcast wide area signals, do they provide any programming of regional or national interest, or do they compete only for hometown audience ratings along with weaker stations in their local market? If they don't provide programming of widespread interest, why do we need their widespread signal? And even if some of their programming is not strictly local, we now have satellite and Internet-based audio services with increasingly reliable nationwide reach; so is it worth crippling many small town and/or minority-owned stations to make room for service that doesn't exist or isn't needed even if it does exist?

But there is another side of the coin.

Class A AM stations provide critical links in the nationwide Emergency Action Notification ("EAN") system. They serve as Primary Entry Points for Presidential and other emergency messages. Federal money has been spent to provide backup power to these stations and to harden them against the huge electromagnetic pulses that could result from a nuclear attack. In an emergency, broadcasters all over the country can pick up Class A AM signals on their EAN receivers and get emergency information out to their listeners; and often the public can tune in the distant signals directly. Are we sure that the recently established Internet-based IPAWS emergency alert system is reliable enough to deliver emergency information to every broadcast station and to reach the public in a really serious disaster, especially through small stations that aren't built like concrete fortresses?

And what about FM translators? If you ask any AM station that has to go dark or cut back to flea power at night, you will likely hear that an FM translator is what they really need – never mind more throwing AM nighttime power into the cacophony of nighttime interference that isn't getting better and will probably get worse. If FM signals are the better answer, why are we spending all this time and effort trying to balance competing interference, diversity, and economic interests in the AM band? Are we really "revitalizing" AM, or are we walking around in circles?

What is your answer to the conundrum of how to make sense out of the AM band and to provide relevant programming services to the largest number of viewers while creating an economic environment in which broadcasters can realistically survive? If you have ideas, you will have an opportunity to tell them to the FCC in comments, which will be due 60 days after the proposals are published in the Federal Register.

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## FCC Proposes Rules for Distributing Repack Funds to LPTV, TV Translator, and FM Stations

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The Federal Communications Commission ("FCC") has invited comments on a proposed "catalog" of categories and amounts it thinks are reasonable for reimbursement of expenses incurred by low power TV ("LPTV") and FM radio stations as a result of involuntary channel changes imposed by the post-incentive auction repacking of the TV spectrum. Congress initially appropriated funds to reimburse costs incurred by only full power TV stations changing chan-

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nels; the full power TV industry is currently going through the reimbursement process. Congress later added more money so that displaced LPTV and affected FM radio stations could also seek cost reimbursement, with FM stations eligible to claim reimbursement if they are forced temporarily or permanently to modify or to relocate their transmission facilities to accommodate repacked TV stations. We've previously discussed this portion of the repack reimbursement process [here](#) and [here](#).

The proposed catalog indicates costs estimated by the FCC for certain kinds of equipment and services it expects stations to incur during the repack. It was prepared by the same outside contractor that prepared a similar catalog of costs for full power TV and Class A stations. The catalog does not address eligibility for reimbursement, which is the subject of a separate proceeding, but only sets out the FCC's estimated "reasonable" costs for certain categories of expense. In general, to be eligible, an LPTV station: (1) must have been displaced by the repack, (2) must have filed an application for a new channel, (3) must have had that application granted by the FCC, and (4) must actually build facilities on its new channel. The FCC does not propose to pay for more than one channel change for LPTV stations, even though some stations will be forced off their existing channel before a permanent displacement channel is available and thus will have to move first to an interim channel and later to a final channel. Eligibility for an FM station hinges on the station having been forced: (1) to move to a new tower, (2) to relocate its antenna(s) on an existing tower, and/or (3) to operate with auxiliary or other temporary facilities during the time that a TV station is constructing new facilities on a shared tower.

While the cost catalog – even once it is adopted – is not the final word on amounts the FCC will reimburse, it is signifi-

cant for several reasons. First, it indicates the types of expenses the FCC may be willing to reimburse. The list is comprehensive and includes both equipment and services, although we notice the FCC apparently thinks that FM stations will incur HVAC costs, but LPTV stations will not. Second, the costs in the final catalog will serve only as benchmarks. Stations that actually incur higher costs will be able to claim them, though stations seeking reimbursement above catalog limits will have their feet held more closely to the fire in terms of having to prove why they need to spend so much more than stations whose claims are within the catalog limits. In any event, no stations will be able to recover costs beyond actual cash expenses they can prove they paid out. Finally, the FCC will be able to pay out only the amount of money made available by Congress; so if total claims exceed available funds, the FCC will likely get even tougher during the review process and may ultimately reduce claims it does approve to less than 100 cents on the dollar.

The reimbursement claims experience for full power and Class A stations has not always been easy, as federal fraud laws apply to FCC processes, resulting in the FCC's acting very meticulously (sometimes to the point of frustrating claimants) in requiring complete and detailed documentation of incurred costs and of actual amounts paid to vendors. If you believe that you will be eligible for reimbursement, you should review the catalog carefully and then keep all receipts and other documentation in detail for every dollar you hope to claim. You should also obtain written price quotations from vendors in advance of making purchases. Keeping good records from the outset will make life a lot easier when it comes time to file a claim.

Meanwhile, you should also review the FCC's catalog of expenses and consider filing comments with the FCC if you feel the FCC has underestimated the cost of necessary equipment and/or services or omitted them entirely.

## ***FCC Proposes to Reaffirm its Limitations on the Authority of Local Cable Franchise Authorities***

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The Federal Communications Commission ("FCC" or "Commission") has released a [Second Further Notice of Proposed Rulemaking](#) ("NPRM") by which it proposes to adopt a set of rulings that would limit the authority of cable local franchise authorities ("LFAs") in the franchising and regulation of cable systems in response to a recent court case that threatens to expand LFA authority over cable systems and their diverse service offerings. While these proposed pronouncements are responsive to LFA actions, the FCC



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has asked whether they should also be applied to state-level franchising and cable regulation.

### **Background on the Shared Local and Federal Regulatory Authority Over Cable Systems**

Before discussing the NPRM, a little background is in order. Cable franchising is an arcane area of law, which mixes federal, state, and local law and regulation. [The Cable Act of 1984](#), as amended in 1992, sets the rules for what has been called a “deliberately structured dualism.” That is, dual locality/FCC authority over cable systems and cable service. Localities exercise this authority through LFAs (that in many cases are not even separate local offices), who control the public rights-of-way that cable companies use to string their cable, while the FCC is charged by the Cable Act with exercising federal jurisdiction. FCC policy and LFA desires are frequently in tension, with LFAs often seeking franchise agreements that will give them greater regulatory authority and payments than the FCC or cable operators believe to be appropriate. It is rare to find a LFA that is actually interested in or capable of regulating any services offered by a cable system.

For the LFA, it is all about what they can get from the cable operator – Public, Educational and Governmental access channels and the franchise and other fees that LFAs extract from cable operators who pass the fees along to subscribers. For years, LFAs have fought with cable operators and the FCC over franchise fees and other ways to extract money (and other benefits) from cable operators, as well as the regulatory authority of LFAs. While we thought these battles had been settled by definitive court and FCC rulings, certain very aggressive LFAs (particularly Montgomery County, MD) have continued to fight for more money and power, and have had some recent success in convincing courts that FCC limits on LFA-imposed fees and LFA regulatory authority have not been legally justified. The proposed NPRM is a reaction to these recent LFA successes.

### **The Montgomery County Court Decision**

The primary impetus behind the proposed NPRM is the 2017 decision of the Sixth Circuit US Court of Appeals in *Montgomery County v. FCC*. In this case, the LFA attacked the FCC’s doctrine that LFAs are prohibited from regulating non-cable services offered over cable systems – business data services, VoIP services, and high speed Internet access services among others. This doctrine is called the “mixed-use” doctrine. Because of this doctrine, LFAs have not been able to require cable operators to obtain separate franchises for these non-cable services or to assess franchise fees on these non-cable services. In addressing the challenge to this doctrine, the Court found that the FCC had adequate-

ly justified the doctrine only as applied to the services of a common carrier that provides cable services. For other cable companies, the Court found that the FCC had not shown a sufficient basis for shielding their non-cable services from LFA regulation.

The Court also determined that the FCC had not adequately justified the decision to treat cable-related in-kind contributions as franchise fees. An example of these “contributions” are cable services to government buildings provided at no charge. This is important because franchise fees are limited to five percent of a cable system’s gross cable services revenues.

### **Proposals in the NPRM to Respond to the Montgomery County Decision**

The NPRM proposes to correct these deficiencies in the FCC’s prior rulings. First, the NPRM proposes to declare that the “mixed-use” doctrine applies to cable systems not owned by telephone companies (*e.g.*, Comcast or Charter) as well as cable systems owned by telephone companies (*e.g.*, AT&T and Verizon). The Montgomery County Court found that the “mixed-use” doctrine applies to telephone company cable systems because the Cable Act’s definition of a “cable system” says that LFAs may regulate these “Title II” carriers only to the extent that they provide cable services. The NPRM tentatively finds that this “Title II exception applies not just to traditional telephone companies (*e.g.*, AT&T and Verizon), but to any entity that offers a Title II service over its cable system. Thus, if Comcast offered a telecom service with its cable plant (*e.g.*, business data service), this exception would apply to Comcast. In other words, LFAs would not be able to impose regulations on traditional telecom services provided by cable companies.

As for those cable systems offering information services, the NPRM tentatively concludes that Section 624(b) of the Cable Act bars LFA regulation of those information services, as it bars LFAs from establishing “requirements for ... information services.” This ruling would prohibit LFA regulation of Internet access services, which were classified as telecommunications services but are now classified as information services. The NPRM notes that Internet access services cannot be regulated at the state or local level for the additional reason that the FCC preempted regulation of those services when it recently reclassified Internet access services as information services.

The proposed NPRM is less clear on whether and to what extent the FCC would prohibit LFAs from regulating the third leg of the familiar cable “triple play” offering – interconnected VoIP. Interconnected VoIP is an application riding on the cable system (or any other Internet service). The FCC has resisted giving it a regulatory classification, treating

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it in some respects as an information service and in other respects as a telecommunications (common carrier) service, while taking the position in court proceedings that state PUC-like regulation of interconnected VoIP should be preempted. The FCC may soon be forced to take a position on this regulatory classification issue, as the US Court of Appeals for the Eighth Circuit found that interconnected VoIP service is an information service. Presumably, the limitations on state regulation of interconnected VoIP entry and rate regulation would be sufficient to stop LFA's from franchising and imposing fees on this type of service.

Turning to franchise fees, the NPRM proposes that cable-related, in-kind contributions by the cable operator to, or at the direction of, the LFA are franchise fees. An example of these in-kind contributions would be free or discounted cable services provided at government buildings. This FCC proposal matters because the Cable Act imposes a limit on the LFAs ability to collect franchise fees. That limit is the amount that is equal to five percent of the cable system's gross cable revenues. Generally, LFAs collect cash franchise fees to this limit. Thus, if the FCC adopts this proposal, LFAs will have to either forego these in-kind contributions or reduce the cash franchise fees they collect.

## ***FCC Streamlines Rules for Earth Stations in Motion and Seeks Comments on Expanding Frequencies for Their Use***

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We previously have reported on Federal Communications Commission ("FCC" or "Commission") authorization of use of [earth stations installed on aircraft](#) to communicate with Fixed-Satellite Service ("FSS") spacecraft in geostationary orbits. These Earth

Stations Aboard Aircraft are part of a broader category of Earth Stations in Motion ("ESIMs"). FCC regulations regarding licensing and operational requirements of ESIMs tend to be similar, but not identical, across the various sub-categories of ESIMs, with differences generally dependent on the type of vehicle (ships, airplanes, or land-based) to which the Earth Station is attached. Recently, the FCC issued a [Report and Order](#) intended to streamline, consolidate, and

So why are these proposals important? In the last few years, LFAs have seen cable systems gradually transitioning from multichannel video programming platforms to high-speed Internet access platforms. Sure, the number of cable channels is in the hundreds and increases almost yearly, but consumers are "cutting the cord" with greater frequency, taking the Internet service and not the cable service. Because the franchise fee can be assessed only on cable service revenues (due to the "mixed-use" doctrine), the dollars taken by LFAs in the form of these fees is declining. Facing this decline, the LFAs have attempted to take control over the Internet access services and to claim a right to assess franchise fees on these services. Taking control of these services will not only result in greater expense to consumers (governmental fees are typically passed through to end users), but could result in attempts to impose net neutrality regulations through the back door, subjecting cable operators to requirements that lack uniformity across jurisdictions and that are truly beyond the understanding or enforcement abilities of all but the largest LFAs.

The NPRM was published in the Federal Register on October 15, 2018, which means comments are due soon, on November 14, 2018; reply comments in this proceeding are due on or before December 14, 2018.

harmonize the rules governing these earth stations used to provide satellite services. At the same time, the FCC issued a Further Notice of Proposed Rulemaking seeking comments on expanding the frequencies that ESIMs may use.

The Commission's current regulatory framework covers three types of FSS earth stations that are authorized to transmit data while in motion: Earth Stations on Vessels ("ESVs"), Vehicle-Mounted Earth Stations ("VMESs"), and Earth Stations Aboard Aircraft ("ESAAs"). Each of these types of ESIMs has its own section of technical and operational rules, as well as its own section of application rules. Except for a few platform-specific exceptions, the three rule sections that govern the operation and licensing of ESVs, VMESs, and ESAAs are very similar. In addition, the current rules provisions are limited to communications with satellites in geosynchronous orbit ("GSO") in the conventional C- and Ku-bands, as well as portions of the extended Ku-band.

In the Report and Order, the Commission revised and streamlined four categories of ESIM rules: (1) core rules (*i.e.*, those applicable to all ESIMs); (2) vehicle-type specific rules that apply across multiple frequency bands; (3) frequency-band specific status and coordination rules; and (4) vehicle-type specific rules that apply to a single frequency band.



# Rules

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The FCC also issued a Further Notice of Proposed Rulemaking (“FNPRM”), seeking comment on expanding the frequencies available to ESIMs communicating with GSO FSS satellite networks. Specifically, the Commission seeks comment on:

- Allowing ESIMs to operate in all of the frequency bands in which earth stations at fixed locations operating in GSO FSS satellite networks can be blanket-licensed.
- Expanding the Ku-band space-to-Earth frequency ranges in which ESIMs can be authorized to receive transmissions from GSO FSS space stations to also include the ranges 10.7-10.95 GHz and 11.2-11.45 GHz, and whether these operations would be on an unprotected basis with respect to other services.
- Whether allowing ESIMs in the Ka-band, to receive signals from GSO FSS satellite space stations on a secondary basis in the 17.8-18.3 GHz band and, on a primary basis, in the 19.3-19.4 and 19.6-19.7 GHz band.
- Whether to allow ESIMs to operate in GSO FSS satellite networks in the 8-19.3 GHz (space-to-Earth) and 28.6-29.1 GHz (Earth-to-space) frequency bands on an unprotected, non-interference basis with respect to NGSO FSS satellite systems.
- Any possible effects that expanding the frequencies available to ESIMs communicating with GSO FSS satellite networks may have on existing or future services in these bands or adjacent frequency bands and on any necessary changes to the rules that may be appropriate to accommodate them.

Comments are due 45 days from publication of the FNPRM in the Federal Register, which has not occurred yet.

## FCC Proceeding on C-Band Use

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The Commission issued an Order and Notice of Proposed Rulemaking in the proceeding relating to the use of the 3.7 to 4.2 GHz band. As we’ve previously written, the Commission has been considering allowing the use of the 3.7 to 4.2 GHz band (known as the “C-band”) by mobile broadband. The C-band is currently used to deliver cable and broadcast network programming and the Commission has proposed to allow shared uses of the C-band. The Commission has identified the band as ideal for carrying the 5G services and is under mandate to clear spectrum for 5G use.

Comments were due on October 29, 2018, and satellite operators and mobile carriers presented different views on how to allow other uses of the C-band.

The C-Band Alliance, which consists of four of the satellite companies providing services in the band, has proposed a plan in which it will be allowed to negotiate voluntary secondary agreements with the mobile operators to clear and repack the incumbent C-band users. However, wireless companies have objected to that plan and some have proposed an auction of the spectrum. Other commenters have taken positions on both sides of the issue. The one thing that is clear is that mobile wireless use will be allowed in the C-band.

The deadline for the comments have already passed but if you want to participate in the proceeding, reply comments are due by November 27, 2018.

Note, as well, that licensees of C Band receive only earth stations that were constructed and operational as of April 19 were supposed to register or license their earth station by October 31, 2018 (a deadline that was extended from October 17, 2018) to receive protection from the future allocation of the band.

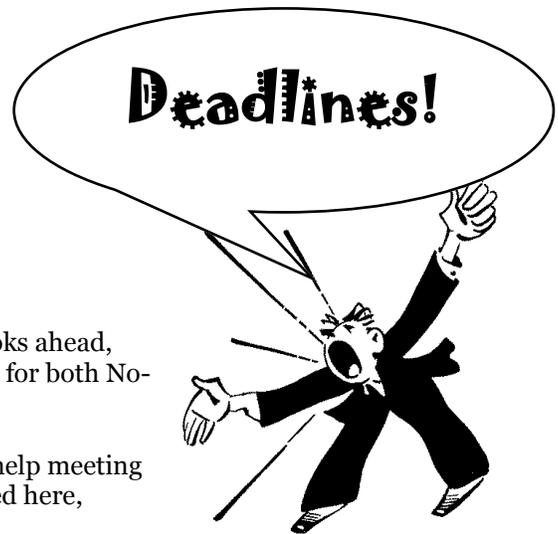


## Upcoming FCC Deadlines

Here at FHH, we are proud members of the #RespecttheBird campaign, which asks people to turn their attention to the December holidays only *after* Thanksgiving has ended. While we love the holiday season as much as anyone, there's just something wrong about seeing decorations before we've disposed of our pumpkins (or in some cases before we even bought them).

That said, there can be good reason for looking ahead. Preparing for deadlines is one of them. That's why this month's "Deadlines" post looks ahead, providing FCC-related deadlines in the areas of broadcast and telecom for both November and December.

Please note that the list is NOT exclusive, so there may be others. For help meeting these deadlines or answering questions about any that may not be listed here, please contact FHH at 703-812-0400.



### Broadcast Deadlines:

**November 19, 2018** – *EAS National Test – Participants' ETRS Form Three Due* – All EAS participants must submit Form Three, which reports the results of the national EAS test held on October 3. If a station successfully received and passed on the test, it must report from which source it first received the test, when it received the test, when it passed on the alert, and other details of what was received. If the station did not receive the test properly, it will be asked to explain why that was the case.

**December 1, 2018** – *EEO Public File Reports* – All radio and television stations with five or more full-time employees located in Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, and Vermont must place EEO Public File Reports in their online public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

*EEO Mid-Term Reports* – All television stations with five or more full-time employees in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont must electronically file a mid-term EEO report on FCC Form 397, with the last two EEO public file reports attached.

*DTV Ancillary Services Statements* – In the unlikely event that a DTV licensee or permittee has offered ancillary or supplementary services along with its broadcast service during the Fiscal Year and has charged a fee for such services, the lucky licensee must file an Ancillary/Supplementary Services Report. In addition, it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report specifically asks for a list of any ancillary services, whether or not a fee was charged, and the gross amount of revenue derived from those services. Ancillary services do not include broadcasts on multicast channels of free, over-the-air programming for reception by the public.

### Telecom Deadlines:

**November 14, 2018** – *Quarterly PIU Reporting and Certification* – Prepaid calling card providers (PCCPs) must report percentage of interstate use (PIU) factors and associated call volumes to carriers that provide them with transport services. Additionally, PCCPs must file traffic information and a certification signed by a company officer stating that the provider is in compliance with the FCC's PIU and USF reporting requirements.

**December 2018** – No scheduled reporting/ certification deadlines for this month.

## ***FHH - On the Job, On the Go***

On October 31 and November 1, **Frank Jazzo, Scott Johnson and Frank Montero** attended the inaugural Western NASBA Conference in Santa Fe, New Mexico.

On November 7, **Karyn Ablin and Frank Montero** attended the WFUV “On the Record” fundraiser at the Fordham Law School in NYC, honoring Ted Koppel with the Charles Osgood Award for Excellence in Broadcast Journalism.

On November 8-9, **Dan Kirkpatrick and Frank Jazzo** attended the Alaska Broadcasters Association Convention In Anchorage. They participated in the “Washington Update” session November 9 with the NAB’s Dennis Wharton.

On November 14, **Frank Montero** will be attending the Radio Ink Forecast conference at the Harvard Club in New York City.

On November 29, **Kevin M. Goldberg** will participate in the second meeting of the 2018-2020 federal Freedom of Information Act (“FOIA”) Advisory Committee at the National Archives in the Washington, D.C. Kevin is one of ten private sector members of this committee, which makes recommendations to the federal government regarding improvements to the federal FOIA.

On December 6, several of the firm’s attorneys will attend the annual Federal Communications Bar Association Chairman’s Dinner in Washington, D.C.

On December 7, **Peter Tannenwald**, Director Emeritus, will attend a meeting of the Board of Directors of Brown Broadcasting Service, Inc. at Brown University.

