Fletcher, Heald & Hildreth®

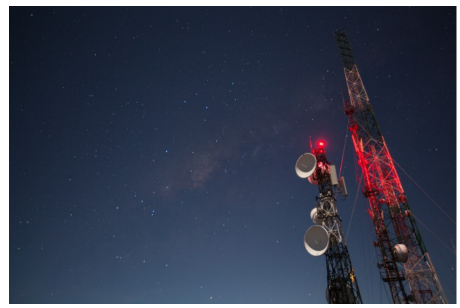
MEMORANDUM TO CLIENTS

February 2020

No. 20-01

Monitor Your Tower Lighting or be Prepared to Pay Up - Scripps Settles with FCC to the Tune of $1.13 Million

In an order released on January 13, the Federal Communications Commission ("FCC") announced that Scripps Broadcasting Holdings had agreed to a $1.13 Million settlement with the FCC's Enforcement Bureau to resolve violations of tower lighting monitoring rules. What makes this case especially interesting is that the party who is paying the fine and instituting a years-long compliance plan wasn't even the party responsible for the wrongdoing!



In 2018, the FCC began an investigation after a small aircraft crashed into a TV tower owned by Cordillera Communications (Cordillera was purchased by Scripps for $521 million that same year). While it determined that there was nothing about that particular tower that contributed to the accident, the Enforcement Bureau did find widespread issues with Cordillera's tower lighting monitoring processes. Cordillera also failed to maintain adequate records documenting each tower lighting failure. Because Scripps bought the wrongdoer (rather than just the assets), Scripps is tagged with the consequences of that company's violations of the FCC rules.

This case is a good reminder that the FCC is serious about tower lighting, monitoring, and recordkeeping to demonstrate that monitoring has been done properly. The FCC rules require either a daily visual inspection of tower lights or use of an automatic monitoring system for tower lights to provide an alert of an outage, and maintenance of a log of the daily inspection by a chief operator or a log generated by the monitoring system. It is also a good reminder that due diligence in an acquisition must include tower lighting monitoring records.

Finally, while this case enforces against a tower owner, we remind you that a radio or TV station licensee who does not own the tower can still be held liable for tower lighting failures – the FCC's rules require a licensee who knows that the lights on its tower are out to report the outage and undertake efforts to ameliorate it.

Review your procedures for monitoring tower lighting to keep your liability exposure to a minimum!

Picking NCE and LPFM Winners Simplified

by Peter Tannenwald
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The FCC has changed in its rules for selecting winners from groups of mutually exclusive ("MX") noncommercial educational full-power radio ("NCE") and Low Power FM ("LPFM") applicants and has made it easier for MX applicants to negotiate voluntary time-sharing agreements. In the FCC's Report and Order, it has also shortened the minimum holding period for LPFM licenses and has clarified what requirements must be met by parties seeking to assign the licenses of NCE and LPFM stations.

Applications for new NCE and LPFM stations and for major changes in existing stations may be filed only during specified time periods announced by the FCC, called application "windows." All applications filed during a given window are deemed to have been filed on the same date, with no preference given to the first to file. When multiple applications are filed that conflict engineering-wise so that not all may be granted (*i.e.*, they are MX), the FCC selects winners by a system of points. (The point system was developed because, although the Communications Act mandates awarding applications for commercial broadcast stations by auction, the statute forbids the use of auctions for noncommercial services, both full and low power.) The point systems are slightly different for full power and low power stations; but in general, points are awarded to applicants that own no other stations, are made up of local residents, have been in existence a long time, will provide a first or second service to unserved areas (NCE only), and commit to broadcast eight hours of local programming a day (LPFM only). The FCC normally determines and publicly announces which applications are MX and then opens a 90-day settlement window. For LPFM applicants, during that settlement window, groups of two or three

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applicants may voluntarily agree to share airtime and may then be evaluated based on the sum of their separate points.

When the point system does not lead to a single winner, and not all the applicants settle, winners are chosen by tie-breakers, favoring applicants that have the fewest other granted authorizations and then applicants that have the fewest pending applications. As noted below, for NCE applicants a third-time breaker has been added.

In the past, if tie-breakers were not decisive for NCE applications, the Commission was supposed to convene a trial-type hearing to determine a division of time among the applicants. For LPFM applicants, the FCC simply imposed involuntary time-sharing arrangements. The FCC is now abandoning the hearing process for involuntary time-sharing among NCE applicants and is basically following the process used for LPFM involuntary time-sharing. In both NCE and LPFM cases, the three tied applicants with the longest uninterrupted local presence will participate in the involuntary time-sharing arrangement and the others will be dismissed.

Understanding and complying with the FCC's requirements and procedures have been difficult for many applicants. To try to make the system simpler and more transparent, the FCC has adopted these changes:

1. Applicants are no longer required to amend their governing documents to require fulfillment of promises not to acquire other stations and to limit directors or trustees to local residents in the future. Some governmental applicants have been legally unable to amend their documents without legislation, and some large institutions have been reluctant to amend their documents for various policy reasons. Diversity and localism promises must still be documented and fulfilled for at least four years after a station goes on the air, and facilities modifications that result in signal overlap with other stations with common ownership attribution will be prohibited. Only the formality of amending governing documents has been eliminated.
2. Applicants that have attributable interests in other stations and are willing to divest those interests to maximize their NCE points or to comply with the LPFM absolute prohibition on holding an interest in any other station will now have until the station goes on the air to complete divestitures rather than having to divest during the initial application window. Under that approach, unsuccessful applicants will never have to divest. However, a commitment to divest must be made during the application window.
3. The two current tie-breaking opportunities will be enlarged to three. In the third tie-breaker, priority will be given to an applicant that filed for a station in a previous window but did not win because of failure to achieve the most points and has remained in continuous existence since the previous window.
4. When NCE tie-breakers are unsuccessful, the FCC will not have hearings but rather will move NCE applicants to the LPFM model, where involuntary time-sharing is imposed, with contiguous 12-hour blocks assigned to two grantees and 8-hour blocks assigned to three grantees.

To facilitate voluntary time-sharing agreements, the FCC has relaxed its anti-collusion policies to allow LPFM applicants to negotiate point aggregation and time-sharing all the way up to the time Media Bureau actually imposes involuntary time-sharing. Settlements involving time-sharing may be structured to be contingent on the FCC's awarding each applicant the maximum number of points, and agreements may state that applicants who are awarded fewer points will automatically drop out. If a time-sharing agreement is rejected by the FCC, all previously negotiated time-sharing agreements will be voided, and a new 90-day window will be opened for negotiating new agreements.

To tighten up policies intended to avoid some abuses that have been found in past applications, the FCC will add a question to both the NCE and the LPFM application forms requiring the applicant to certify that it has reasonable assurance of the availability of its proposed transmitter site and providing the name and telephone number of the site owner or agent who gave that assurance. In addition, LPFM applicants who have among their officers and board members persons who have participated in unlicensed and unlawful radio station operation (often called "pirate radio") will be flatly disqualified and will no longer be able to cure this fatal defect by removing the offending person(s) from their organization.

When FCC proceedings result in time-sharing, the FCC will permit all the participants to share a common transmitter site and transmitter and antenna. With or without a common site, if one or more sharing parties fail to build on time or decide to cancel their construction permit, the remaining applicants may divide up the forfeited hours however they choose.

The construction period for all new LPFM stations will be extended from 18 months to 36 months, formalizing an existing FCC policy under which 18-month periods have routinely been extended to 36 months on request. The construction period will be automatically tolled by the FCC where litigation challenging a grant remains unresolved or international coordination has not been completed, without the need for the permittee to request tolling.

The FCC has also modified its rules that limit modifications and sales of operating NCE and LPFM stations.

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For the first four years after going on the air, NCE stations that were awarded based on a preference for providing a first or second service to an unserved or underserved area have not been permitted to modify their facilities to withdraw the service they promised to provide; but the FCC will now allow applicants seeking modifications to propose some loss if they offset it with at least the same amount of first and second service gain to different areas, and the new proposal would have prevailed had it been made at the time the initial preference was awarded.

If an NCE station is sold before it has been on the air for four years, the seller may not make a profit on the transaction. The limitation of recouping only actual out-of-pocket costs is a continuation of the present policy. If the initial construction permit was awarded on the basis of points, the buyer must certify that it would have qualified for the same number of points had it been the original applicant.

The absolute prohibition on any sale of LPFM construction permits and the three-year holding period for licensed LPFM stations will be relaxed to permit sales 18 months after the construction permit is awarded, with the purchase price limited to recoupment of the cost of filing and prosecuting the original application and acquiring equipment and constructing the station. Recoupment of operating losses will not be allowed. For LPFM stations awarded on the basis of points, a buyer within the first four years of operation must qualify for the same number of points that the seller got. If involuntary time-sharing is in effect, the buyer must have been in existence with a local presence for at least as long as the sharer in the group with the shortest local longevity.

The FCC has also simplified procedures addressing changes of more than 50% in the voting board members of an entity with a pending NCE or LPFM application – a change that in the past has constituted a "major change" transfer of control that normally would disqualify the applicant.

All changes in the board members of a governmental applicant will be deemed "minor" if the basic mission of the entity remains unchanged, regardless of whether the changes are gradual over time or take place suddenly (*i.e.*, within a six-month time period). A minor change requires an amendment to the application that may decrease an applicant's comparative points (point increases are not recognized), but it is not disqualifying. Non-governmental applicants must also report board changes and may change 50% or more of their boards without being disqualified, but only if the change is gradual.

In 1989, the FCC proposed to exempt governmental licensees of existing stations from any obligation to file transfer of control applications no matter how or when their boards change. Some licensees have taken the position that legal "control" of a governmental entity never changes because the entity is ultimately responsible to the voting public. The FCC has not officially endorsed that position and has explicitly stated that it is not resolving the governmental transfer application issue at this time. Meanwhile, non-governmental holders of NCE licenses and granted construction permits will continue to have to file short-form transfer of control applications for gradual board turnover and long forms for sudden changes of 50% or more. For LPFM licensees and permittees, both sudden and gradual board changes will continue to be permitted at any time. Sudden changes will require only a short form application. Gradual changes will not require an application, at least as long as the entity's "mission" is not changed; and since LPFM stations do not file biennial or other ownership reports, LPFM stations may undergo unlimited gradual changes in their boards with no vehicle for reporting those changes to the FCC.

There are aspects of the new rules, both new and old, where we expect further nuances to be developed through FCC Staff interpretation. We suggest a consultation with legal counsel in the event of a change of 50% or more in board membership, especially if the entity has a pending application, but for licensed stations and granted construction permits as well.

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Who Should Say What to Whom When Cable TV Retransmission Consent Negotiations Fail?

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Retransmission consent negotiations have been coming down to the wire more and more in recent years, as broadcasters have sought to recoup more of the value they feel their signals have, and cable operators have resisted increases in their expenses. FCC rules currently require cable operators to notify both subscribers and the local franchise authority ("LFA") 30 days before a change in services or rates. The removal of a channel because of the expiration of a retransmission consent agreement falls within the scope of the rule. However, when retransmission consent negotiations continue right up to the 11th hour before an existing agreement expires, or the parties agree to extend an agreement a week or even a day at a time, there are obvious practical problems with a 30-day rule that requires notice before you know whether a channel is actually going to be removed.

The FCC is now proposing to modify its rules to require notification to viewers of removal of a channel because of a failed retransmission consent negotiation be given "as soon as possible" when negotiations fail less than 30 days before removal of the channel. Notices 30 days in advance would continue to be required if negotiations fail more than 30 days before the end of a retransmission consent contract and for all channel and rate changes not related to last-minute retransmission consent negotiations. The FCC also seeks comment on whether to reduce the 30 day notice period to 15 or 5 days.
The FCC is also proposing to eliminate its own requirement for separate notices to the LFA, because LFAs have the authority to specify for themselves what notices they want, either through their own franchising process or through authority granted to them by the Communications Act.

Eliminating notices at the 30-day point when the cable operator does not yet know the final outcome of negotiations makes sense. Right now, cable subscribers may be notified of the impending removal of a channel, but the channel may never be removed. And what happens if negotiations proceed, stall, and resume? How many notices should subscribers get, and how do you avoid confusing them?

If a notice of a prospective channel removal is not required until retransmission consent negotiations are considered to have failed, subscribers are more likely to have an accurate picture of what to expect.

Of course, the simpler a proposal looks, the more complicated it can become. The FCC asks how "as soon as possible" should be defined, as those words are far from precise in their meaning. It also asks how notices should be delivered – by newspaper ads (a method the FCC is moving toward abandoning as obsolete for notices of broadcast applications), by a slate or crawl on the channel being taken dark, or by some other method.

Finally, the FCC says that it will accept comments on other possible changes in notices that cable systems must give their subscribers.

FCC Proposes to End Radio Station Program Duplication Restrictions

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The FCC has proposed to repeal Section 73.3556 of its Rules, which prohibits two commercial AM or two commercial FM radio stations from devoting more than 25% of the hours in an average broadcast week to duplicating programming if they are commonly controlled (through either common ownership or time brokerage) and the principal city contour of one station overlaps more than 50% of the principal city contour of the other station. Broadcast of the same program on two stations within 24 hours is deemed to be duplicative.

Program duplication restrictions have been on and off the FCC's books since 1964. The first rule was intended to reduce inefficient use of the spectrum when FM stations did little more than rebroadcast commonly owned AM stations at a time when FM was just developing and economic strength was concentrated in the AM band. Later, when FM became fully competitive, the rule was eliminated in favor of allowing market forces to dictate how much programming would be duplicated. The rule was restored in 1992

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but confined to two stations in the same service (AM or FM) carrying the same programming, intended to promote program diversity when the demand for radio station licenses far exceeded the supply.

Today's marketplace is very different from what it was when the duplication rule was last reviewed. AM stations rebroadcast their signals on FM translators; some programming originated on either AM or FM stations is repeated on FM HD streams of different stations in a market, and some licensees try to serve a wide area by putting the same programming on several small stations. The FCC has tentatively concluded that the rule no longer serves any valid purpose. The FCC's suggested response is to get rid of the rule altogether.

Parties advocating retention of the rule are asked to state what the scope of the rule should be in terms of percentage limits on duplication and the amount of signal overlap that invokes the rule. It also asks whether, given the current economic distress of many AM stations, AM stations should be completely released from the rule, and the rule should apply only to FM stations.

Initial comments were due on January 22, 2020, and Reply comments are due February 6, 2020.

Radiofrequency Exposure Limits Revised: FCC Proposes Expanding Rules to Cover Higher Frequencies

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The FCC has resolved many of the issues that it has been considering since 2013 with respect to limits on the exposure of human beings to radiofrequency ("RF") energy. An important aspect of the decision is that existing exposure limits will not be tightened. However, the environmental rules dealing with RF exposure have been significantly rewritten, with more uniform criteria for exemptions from environmental assessment, more flexibility in how to establish compliance, and more specificity in required mitigation techniques in exposure risk situations.

The issue of whether or not to tighten exposure limits has been controversial and has been the focus of increasing concern because of the proliferation and increased use of RF devices close to the human body, including cellphones, medical implants, wireless power chargers, and small cells for 5G mobile services. In declining to tighten limits, the FCC decided to follow the lead of the Food and Drug Administration in finding that the weight of scientific evidence has not linked cellphones with health problems and does not dictate revisions on exposure limits for other devices. The FCC declined to adopt lower limits for environments where children are likely to be present. It noted that the extremely low limits advocated by some commenters would make it impossible to transmit any usable amount of energy and would thus essentially end the explosion of wireless radio technologies.

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Although the limits themselves remain unchanged, the criteria for determining exemptions have been made more uniform across different types of equipment. There will be three categories of exemptions: (1) extremely low power devices that transmit at no more than 1 milliwatt; (2) devices used within 0.5m to 40 cm of the human body, based on a table of

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values that takes into account power, distance, and frequency; and (3) other devices based on a general formula. In determining exemptions, account must be taken of multiple fixed devices operating in proximity to one another, based on the number of signals emitted and not the number of antennas. For example, if two 1 mW devices are intended to be used next to each other, they will be treated as a 2 mW device and will not be eligible for the 1 mW exemption. However, the fact that a mobile device may pass close to a fixed device will not be taken into account, since mobile device locations are impossible to predict, and a mobile device is not likely to remain near a fixed device for more than a short time.

Unlicensed devices operating under Part 15 of the FCC's Rules will be subject to the new rules. All equipment currently being marketed in compliance with FCC standards and used as specified in user instructions may continue to be marketed and used, but manufacturers will have to evaluate their products under the new rules after an 18-month transition period.

The new rules limit situations where exposure levels at specific locations may be evaluated pursuant to exposure standards for trained workers to sites where access is realistically limited, and all workers (including contractors) who may come close to an antenna are all properly trained. Otherwise, the lower exposure levels for the general public will apply. Transient exposure above FCC limits may not exceed 30 minutes. The FCC is particularly concerned about rooftops that are supposedly not open to the general public but to where untrained persons have access (whether authorized or not). The more small cells that are installed on buildings, the higher the risk of exposure to harm. The new rules specify four levels of signage required for sites that pose exposure risks.

Compliance at sites with multiple users will be the responsibility of all users. The exemption from an environmental assessment ("EA") relied on by many broadcasters if their emissions will result in exposure of less than 5% of the FCC limit for uncontrolled environments remains in the rules, but exemption from an EA will not relieve low-level emitters from the obligation to cooperate in mitigating overall exposure at the site. It behooves site tenants to insist on language in their leases or licenses that require the site owner to make all site users cooperate in keeping the overall site below FCC limits. Multi-user sites will have two years from the effective date of the new rules to determine whether their sites are in overall compliance or whether a deeper EA is needed.

In the coming months, FCC Bulletin OET56, with general questions and answers about RF exposure, will be withdrawn. Bulletin OET65, with more detailed requirements, will be revised.

Finally, the FCC has invited comments as to whether it should extend its regulation of RF emissions from the present range of 100 kHz to 100 GHz up to 3 THz (3,000 GHz). In light of current research and development efforts focusing on frequencies well above 100 GHz and into the THz range, it is likely that the FCC will adopt some standards to regulate emissions in these bands.

The effective date of the new rules and the deadline for comments on the proposed regulation of higher frequency bands will be based on when the FCC decision is published in the *Federal Register*.

Meanwhile, operators of transmission systems that have previously been considered "categorically exempt" from environmental assessment should analyze their installations under the new rules to make sure that they will continue to be in compliance.

Davina Sashkin Recognized by LexBlog Excellence Awards

We are proud to announce that Davina Sashkin's CommLawBlog article "Shutdown Uncertainty: What Broadcasters Should Do Now" was awarded 1st runner up for the Best Breaking News Post of 2019 by LexBlog, the leading blog platform for the legal community. This award is given "for outstanding same-day or second-day reporting of a legal news development". Congratulations, Davina!

Selected New Developments in Broadband – January

by Jeff Mitchell
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Capitol Hill

House Democrats are reportedly putting the finishing touches on a broadband-only infrastructure spending bill that could allocate as much as $80 billion to broadband deployment and digital equity. A formal announcement is expected in February.

National Telecommunications and Information Administration (NTIA)

NTIA is sponsoring an all-day Smart Agriculture & Rural Supercluster Workshop in Phoenix, AZ, on February 19, 2020 (registration; agenda). The February webinar is The Role of States in Expanding Broadband Access and will also be held on Wednesday, February 19, 2020. Information from past webinars is available in the webinar archive. The BroadbandUSA Newsletter for January is available.

United States Department of Agriculture (USDA) – Rural Utilities Service

ReConnect Program

On December 12, the USDA announced that $550 million would be available in 2020 for a further round of ReConnect Program applications. Once again, the program will be split between grant only, 50/50 grant/loan, and loan only, with up to $200 million available in each category. The official funding announcement is available here. Application forms and other resources are here. *The application window for all three categories of 2020 ReConnect funding opens January 31, 2020, and closes March 16, 2020.* (Last year, each category had a separate window.)

ReConnect training workshops are again underway around the country, with upcoming events in Seattle, Denver, and Atlanta. Recent ReConnect funding announcements include multi-million dollar projects in Arkansas, West Virginia, Virginia, North Dakota, Minnesota, and Iowa. A map showing all proposed and approved ReConnect projects in 2019 is available here. Application dates for RUS Community Connect Grants and Distance Learning & Telemedicine Grants for 2020 have not been announced.

Precision Agriculture

The FCC's Precision Agriculture Connectivity Advisory Task Force met for the first time on December 9; the meeting can be viewed here. USDA's recent report on rural broadband infrastructure focused on next-generation precision agriculture.

FCC

The Commission's next meeting will be January 30, 2020; the agenda includes a Report and Order that will establish rules for the $20.4 billion Rural Digital Opportunity Fund (RDOF) which will distribute high-cost universal service support through reverse auctions to bring high-speed broadband to unserved areas. Other items include hearing aid compatible headset rules, Video Relay Services (for the disabled), modernizing broadcast TV notice delivery requirements, and enforcement action.

Suspension and Debarment

The FCC in December 2019 adopted a notice of proposed rulemaking (NPRM) to expand the agency's suspension and debarment rules. Although the FCC has suspension and debarment rules that already apply to E-rate and the other universal service programs, the proposed rules would apply to all FCC programs and would give the Commission more discretion to suspend or debar program participants prior to completing a formal fact-finding investigation. Suspended and debarred entities would be placed on a federal government-wide exclusion list, potentially affecting their ability to re-

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ceive funding from other federal programs. Comments are due February 13; replies are due March 16.

Spectrum

2.5 GHz Rural Tribal Priority Window (formerly EBS)

The FCC last summer decided to auction remaining unlicensed Educational Broadband Spectrum (EBS) (2.5 GHz band) to commercial users. This spectrum is suitable for mobile and fixed point-to-point wireless services. Prior to this auction, however, tribal entities in rural areas have a limited opportunity to apply for licenses for available 2.5 GHz spectrum in their areas. *This "rural tribal priority window" opens February 3, 2020, and closes August 3, 2020*. The FCC has made available a number of resources for the tribes including a mapping tool, information about the application process, and access to training materials. The general FCC website with links to these resources is here: https://www.fcc.gov/25-ghz-rural-tribal-window.

C-Band (3.7-4.2 GHz)

C-Band is mid-band spectrum important for 5G deployment which makes it quite valuable. Broadcast satellite operations are the current licensed users of the spectrum. FCC Chairman Ajit Pai in November 2019 announced he wants to reorganize the C-Band spectrum by putting existing operators into a 200 MHz band, creating a 20 MHz buffer and then auctioning the remaining 280 MHz band through a public auction. Chairman Pai's C-Band proposal is expected to be taken up at the February 28 FCC meeting.

3.1-3.55 GHz

The Commission recently approved an NPRM for Facilitating Shared Use in the 3.1-3.55 GHz Band. The 3.1-3.55 GHz band is currently used by the Department of Defense for fixed and mobile radar as well as secondary non-federal amateur and experimental users. The Commission's goal is to relocate non-federal users to clear as much as 100 MHz spectrum for commercial 5G. Comments on these items will be due once they are published in the Federal Register.

Citizens Broadband Radio Service (CBRS) (3.5 GHz)

The FCC's CBRS auction of priority access licenses (PALs) is scheduled to begin in June. This spectrum is being used for naval radar so away from the coasts much of the spectrum is fallow. In deciding to reorganize the spectrum, the Commission allowed licensed use (through PALs), and General Authorized Access (GAA), which allows unlicensed access to available channels managed by a frequency coordinator called a Spectrum Access System (SAS). DOD recently released an estimate of costs it will incur to share the spectrum of over $98 million.

5.9 GHz band

The Commission recently approved an NPRM for Promoting Innovation in the 5.9 GHz Band which would reorganize spectrum previously reserved for Dedicated Short Range Communications in order to support the development of next-generation "Cellular Vehicle to Everything" (C-V2X) technology as well as increase unlicensed utilization (*e.g.*, more Wi-Fi channels). The FCC proposes to make the lower 45 MHz of the 5850-5925 MHz band available for unlicensed use and allocate the upper 20 MHz for C-V2X.

E-rate

Category 2 Budgets

The FCC recently issued its long-awaited order making Category 2 (Cat2) budgets permanent. To transition, the FCC extended the five-year Cat2 test period by one year, with the new Cat2 rules starting in 2021. The Cat2 rules for funding year 2020 are effective January 20, 2020; the new Cat2 rules for funding year 2021 and beyond will be effective upon Office Management and Budget approval. On December 19, the Wireline Bureau published further details about how to

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calculate Cat2 budgeted funding for the 2020 transition year. On January 21, the State E-Rate Coordinators Alliance (SECA) sought limited reconsideration of the Cat2 Order related to the cost-allocation rules applicable to services shared with currently ineligible Non-Instructional Facilities (NIFs). Another reconsideration petition was filed concerning the plight of schools with only part-time students.

Texas Carriers' E-rate Rulemaking Petition on Overbuilding

At stake is whether the FCC should open a rulemaking to consider changes to program rules governing fiber construction. Recently, Valley TeleCom replied (with exhibits) to the Cochise County (AZ) school superintendent (who had previously responded to an accusatory letter from FCC Commissioner Michael O'Rielly). Schools Health and Library Broadband Coalition (SHLB) recently filed a letter to Chairman Pai responding generally to the Texas carriers.

Amortization of Up-Front Capital Costs

On January 27 the FCC released an order making permanent a suspension of the rule requiring carriers to amortize their up-front costs for capital expenditures associated with E-rate eligible services. The order will be effective 30 days after Federal Register publication.

Rural Health Care (RHC) Program

2019 Funding Demand

The concern is high that the demand again exceeds available funding, at least for the $150 million allocated to the Healthcare Connect Fund for multi-year and infrastructure costs. The *RHC Reform Order issued in August* created a new prioritization mechanism for when funding demand exceeds the funding cap, but those rules are not in effect for this funding year. The FCC recently released guidance for the different effective dates for the many new rules enacted in the *RHC Reform Order*.

RHC Reform Order

On November 12, 2019, several parties including SHLB, each filed petitions for reconsideration or clarification of the recent. Other parties filing petitions included the North Carolina Telehealth Network Association (NCTNA) and Southern Ohio Health Care Network (SOHCN) (filing jointly), US Telecom, the Governor of Alaska, and Alaska Communications. (On October 21, GCI (the other major carrier in Alaska) also filed a petition for review in the DC Circuit Court of Appeals.) No oppositions to any of the petitions were filed; comments supporting the petitions can be viewed here.

Net Neutrality

On October 1, the DC Circuit upheld in significant part the FCC's 2017 repeal of net neutrality rules, as well as the so-called transparency rule which requires carriers to disclose changes in their terms of service. The decision in *Mozilla vs. FCC* was not a complete win for the FCC, as the Court reversed the FCC on blanket state preemption and remanded several issues including jurisdictional questions over pole attachment regulation and funding broadband through the Lifeline Program. After requesting additional time from the Court, on December 13, 2019, Mozilla and other parties sought rehearing *en banc* at the DC Circuit – links to all of the petitions for rehearing are available here. Parties on both sides have confirmed that the pending federal court cases in California and Vermont remain stayed until all judicial remedies are exhausted, including the Supreme Court review if it eventually occurs.

In December, the FCC issued citations, orders, and admonishments to a variety of companies for failing to disclose network management practices, performance, and commercial terms for their Broadband Internet Access Services (BIAS) offerings (as required by the FCC's Transparency Rule.) Failure to comply within 30 days could result in fines or forfeitures.

Welcoming Thomas F. Urban II to Fletcher, Heald & Hildreth, P.L.C.

We are pleased to announce that Thomas F. Urban II has joined the firm as Of Counsel. Tom has experience representing clients in everything from business disputes and class action cases to RICO actions and complex mortgage fraud cases.

When it comes to education, Tom has an exceptional pedigree. He received his undergraduate degree from Texas A&M where he studied Aerospace Engineering and graduated *magna cum laude* from the Georgetown University Law Center, serving as an associate editor of the Georgetown Law Journal. After graduating from Georgetown, Tom clerked for Judge Carolyn D. King, formerly the chief judge of the U.S. Court of Appeals for the Fifth Circuit.

Not many members of the U.S. Supreme Court bar can say they've boarded a burning ship and extinguished the fire, but while serving in the U.S. Navy, Tom did just that in a practice exercise. He is also a member of the bars of District of Columbia and Virginia, as well as a member of the U.S. Court of Appeals for the Fifth Circuit, the U.S. District Courts for the District of Columbia and the Eastern District of Virginia, and the U.S. Court of Federal Claims.

"I am very excited to be joining this excellent telecommunications law firm to bolster their already superb litigation practice," said Tom. "I look forward to working with their attorneys and developing new relationships."

Tom is passionate about his substantial pro bono practice representing preschool children with autism in Northern Virginia and working on behalf of the Southern Poverty Law Center opposing a Cert Petition. Somehow, he still finds time on the golf course where he has met Arnold Palmer and Jimmy Buffett.

"We are extremely pleased that Tom has joined Fletcher, Heald & Hildreth. His breadth of expertise in diverse areas of the law is remarkable," said co-managing member Matt McCormick. "Tom brings substantial litigation experience to the firm and will help expand our growing practice in that area."

Available Now: Getting into the Weeds of CBD & Marijuana Advertising

On Wednesday, January 29th, Fletcher, Heald & Hildreth's Frank Montero, Dan Kirkpatrick, and Seth Williams presented a webinar that got "into the weeds" of CBD and marijuana advertising. New questions have been raised since the US Department of Agriculture in 2019 published their interim rules on the "Establishment of Domestic Hemp Projects". To address broadcasters concerns, this webinar – which we are proud to say was offered to the members of over 30 state broadcast associations – covered:

- Differences between marijuana and hemp
- Advertising of marijuana
- Advertising ancillary businesses
- Advertising of CBD and hemp-derived products

If you didn't catch the webinar live or just want to go over the presentation in more detail, you can download and print the presentation's PowerPoint slides here. You may also watch the full video recording of the webinar on YouTube. Of course, if you have any more questions about these issues, please reach out to us at fhhwebinar@fhhlaw.com.

Non-Fixed FCC Telecom Deadlines for 2020

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With the start of a new year upon us, it's worth giving some thought to what needs to be accomplished in the coming year. Each month, we write about upcoming deadlines for broadcasters and telecommunications providers regulated by the FCC, but in addition to the fixed regulatory filing deadlines discussed in these posts, telecommunications providers have other routine compliance obligations for which there are no fixed deadlines. Missing these deadlines can prove just as costly, or in some cases more costly, than missing fixed regulatory filing deadlines.

USF Exemption Certificates – Annually

One of the most important compliance tasks for many telecommunications providers each year is obtaining a USF Exemption Certificate. This requirement applies to any telecommunications carriers or interconnected Voice over Internet Protocol (VoIP) providers that report long-distance (LD) wholesale or Carrier's Carrier revenue on Form 499. This LD wholesale revenue is not subject to USF contributions (which were nearly 25 percent in Q3 2019) from the wholesale provider; however, to avoid having LD wholesale revenue reclassified as end-user revenue subject to USF contributions, a LD wholesale provider must get an exemption certificate from each of its LD reseller customers each year.

The USF Exemption Certificate is not filed with the FCC; rather the wholesale provider keeps the certificate as part of its records, which can be used during any future audit or investigation by the Universal Service Administrative Company (USAC) of the FCC. To avoid paying USF surcharges on the wholesale telecommunications inputs, an LD reseller must sign a certification that it has incorporated the purchased wholesale services into its own service offerings **and** expects to be a direct USF contributor based on those offerings. The exemption is service-specific, so an LD reseller may need to identify which of its resold services it expects to be a direct contributor to the USF. Otherwise, if the LD reseller will contribute directly to the USF across all of its services, it can indicate that it will only resell services for which it is a direct contributor to the USF.

For the wholesale provider, maintaining compliant exemption certificates is imperative because any revenue reclassified during a subsequent audit or investigation may be subject to penalties or late fees, interest, and may not be able to be collected as a pass-through from the provider's customer. Given these potential risks for wholesale providers, providers often treat incomplete exemption certificates as not valid. A wholesale provider would then treat revenue derived from any customer with an invalid exemption certificate as end-user revenue, which may be subject to USF and other regulatory fee pass-through charges.

For an LD reseller, completing a USF Exemption Certificate does not eliminate the burden of contributing to the USF. Instead, the certificate indicates that the LD reseller will be a direct contributor to the USF by registering with USAC, submitting quarterly and annual Forms 499, and paying any USAC invoices based on the 499 filings. The benefit of completing an exemption certificate for an LD reseller is to avoid double-paying USF contributions. As noted above – absent an exemption certificate – an LD reseller's wholesale provider will likely pass through USF surcharges to the LD reseller. While an LD reseller could push back on the pass-through charges, doing so may disrupt the reseller's wholesale supply or prompt costly litigation. In addition, if the LD reseller's services are subject to direct USF contribution obligations, which they must be for the LD reseller to complete an exemption certificate, the LD reseller will also have an obligation to register with USAC and pay any required USF contribution owed by the LD reseller. The exemption certificate eliminates the indirect contribution paid through the wholesale provider.

FCC Regulatory Fees – Annually

The FCC recovers the costs of its operations through an annual regulatory fee. Telecommunications providers and other FCC licensees, including broadcasters and a variety of wireless license holders, are subject to the fee. There is no fixed date by which the fee must be paid. Instead, the FCC sets a deadline for payment each year, typically sometime near the end of September. Failure to file the required forms with payment of the fee will result in an automatic 25% late filing penalty. Many telecommunications providers' fees are based on the amount of interstate and international revenue reported on a provider's Form 499-A. However, Commercial Mobile Radio Service (CMRS) providers pay fees based on the number of subscribers they have. Your company should check with its communications counsel each year to calculate its regulatory fee and make sure it files the required forms and payment by the deadline.

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E911 Location Accuracy Live Call Data Reports – Quarterly (for Nationwide Providers)

CMRS providers are required to file periodic E911 location accuracy reports. The reports aggregate live 911 call location data for each location technology used within four geographic morphologies within six representative "test cities." Nationwide providers must file these reports on a quarterly basis. Non-nationwide providers must file these reports every 6 months to cover the areas served by the provider. The Commission recently amended its rules to collect information for "z-axis" or vertical location technologies in addition to the horizontal (x- and y-axis) location technologies previously used for live 911 calls. At this time, the vertical location lives call data reported by CMRS providers will be used by the FCC for informational purposes, not compliance purposes.

Other "As Needed" Filings

Finally, telecommunications providers are subject to a wide variety of "as-needed" filings that have neither a fixed reporting date nor a fixed reporting period. This post won't attempt to identify every possible as needed filing. However, providers should be aware of CALEA SSI Plan requirements and make sure to file revisions to any plan filed with the FCC as information in the plan changes. Providers may also be subject to discontinuance of service requirements, at both the FCC and state level, if they stop offering service. Certain outages and data breaches also require providers to notify the FCC (in addition to taking other steps) when an outage or data breach occurs.

Telecommunications remains a highly regulated industry. Even as the FCC and state regulators have abandoned price and market entry regulations, telecommunications providers remain subject to a wide variety of regulatory fees, regulatory data collection, and national security/law enforcement filings. To ensure your business remains in compliance with these rules, it is important to both monitor developments in the FCC's rules and to consult experienced communications

Upcoming FCC Broadcast and Telecom Deadlines for January – March

Broadcast Deadlines:

January 31, 2020

Biennial Ownership Reports **-** All licensees and entities holding an attributable interest in a licensee of one or more AM, FM, TV, Class A television, and/or Low Power TV (LPTV) stations must file a biennial ownership report reflecting information as of October 1, 2019. Please recall that not only corporations and limited liability companies, but also sole proprietorships and partnerships composed entirely of natural persons (as opposed to a legal person, such as a corporation), are included in the licensees that must file reports. Please recall that noncommercial and commercial entities are required to file by the same date. Additionally, all persons holding an attributable interest in a commercial licensee must have acquired either an FCC Registration Number (FRN) or Restricted Use FRN.

February 1, 2020

License Renewal Pre-Filing Announcements – Radio stations licensed in Indiana, Kentucky, and Tennessee must begin broadcasts of their pre-filing announcements with regard to their applications for renewal of the license. These announcements must be continued on February 16, March 1, and March 16.

Radio Post-Filing Announcements – Radio stations licensed in Arkansas, Louisiana, and Mississippi that have filed license renewal applications must begin broadcasts of their post-filing announcements with regard to their license renewal applications on February 1. If the renewal application is not filed until the February 3 deadline, wait until then to begin the post-filing announcements. Either way, these announcements must continue on February 16, March 1, March 16, April 1, and April 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be posted to the online public file within seven days.

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February 3, 2020

License Renewal Applications Due – Applications for renewal of license for radio stations located in Arkansas, Louisiana, and Mississippi must be filed in the Commission's License and Management System (LMS). These applications must be accompanied by Schedule 396, the Broadcast Equal Employment Opportunity (EEO) Program Report, also filed in LMS, regardless of the number of full-time employees.

EEO Public File Reports – All radio and television station employment units with five or more full-time employees and located in Arkansas, Kansas, Louisiana, Mississippi, Nebraska, New Jersey, New York, and Oklahoma 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.

March 9, 2020

All-Digital AM Broadcasting - Comments are due in response to the Commission's *Notice of Proposed Rulemaking* seeking input on a proposal to allow AM broadcasters to broadcast an all-digital signal using the HD Radio in-band on-channel (IBOC) mode known as MA3.

March 30, 2020

Children's Television Programming Reports - For the first time, all commercial television and Class A television stations must file electronically annual children's television programming reports with the Commission, although the first one will cover only the portion of the year which began with the effective date of the revised rules (September 16-December 31, 2019). These reports 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.

<u>Telecom Deadlines</u>**:**

January 31, 2020

Lifeline Recertification (FCC Form 555) – All eligible telecommunications carriers must re-certify all subscribers every 12 months, except for subscribers in states where the National Verifier, state Lifeline administrator, or other state agency is responsible for annual re-certification of subscribers' Lifeline eligibility. In 2018, the FCC changed Form 555 to make the filing due for all carriers on January 31 each year, rather than on a rolling 12-month basis for each carrier. Carriers should file the form using Universal Service Administration Company's E-file system.

February 1, 2020

Numbering Resource Utilization Forecast (NRUF) (FCC Form 502) – Twice a year, service providers with numbers from the North American Numbering Plan Administrator (NANPA), a Pooling Administrator, or another telecommunications carrier must file a numbering resource utilization forecast. Subscriber toll-free numbers are not included in the report. Interconnected VoIP providers are subject to the reporting requirement along with other service providers who receive NANPA numbers, such as wireless carriers, paging companies, incumbent local exchange carriers (ILECs), and competitive local exchange carriers (CLECs). The next biennial reporting deadline is February 1, 2020.

Quarterly Telecommunications Reporting Worksheet (FCC Form 499-Q) – FCC rules require telecommunications carriers and interconnected VoIP providers to file quarterly revenue statements reporting historical revenue for the prior quarter and projecting revenue for the next quarter. The projected revenue is used to calculate contributions to the USF for high cost, rural, insular and tribal areas as well as to support telecommunications services for schools, libraries, and rural health care providers. USF assessments are billed monthly.

February 14, 2020

Quarterly Percentage of Interstate Usage (PIU) Reporting and Certification – Prepaid calling card providers (PCCPs) must report the percentage of interstate use 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 stat-

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ing that the provider is in compliance with the FCC's PIU and USF reporting requirements.

March 1, 2020

Annual Consumer Proprietary Network Information (CPNI) Certification – FCC rules require telecommunications carriers and interconnected VoIP providers to certify compliance with FCC CPNI regulations. See 47 C.F.R. § 64.2001 et seq. Thus, telecommunications carriers file an annual CPNI certification with the FCC, including: (1) an explanation of any actions they have taken against data brokers; (2) a summary of all customer complaints received in the previous calendar year concerning the unauthorized release of CPNI; and (3) a summary of all CPNI policies and procedures. The filing must be made with the Enforcement Bureau in EB Docket No. 06-36.

FCC Form 477 – This form is filed online biannually on March 1 and September 1. The Commission collects a variety of information about broadband deployment and wireless and wired telephone service on Form 477. Broadly speaking, the following providers must fill Form 477: 1) facilities-based providers of broadband connections to end users, 2) providers of wired or fixed wireless local exchange telephone service, 3) providers of interconnected VoIP service; and 4) facilities-based providers of mobile telephony (mobile voice) services. If you have any questions about whether your company must file Form 477 or what information your company is required to submit in the filing, you should contact your telecommunications counsel.

FHH - On the Job, On the Go

From February 22 - 24, **Frank Montero** will be attend the meeting of the National Alliance of State Broadcast Associations (NASBA) in Washington, DC.

From February 24 - 26, **Bob Winteringham** will attend the APTS Public Media Summit in Washington, DC.

From February 24 - 27, **Dan Kirkpatrick**, **Davina Sashkin**, and **Frank Montero** will attend the National Association of Broadcasters (NAB) State Leadership Conference in Washington, DC.

From February 25 - 28, **Karyn Ablin** will speak at the NRB Convention in Nashville, TN.