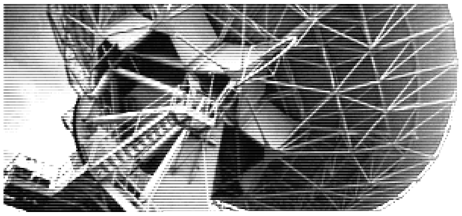

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Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

Dipping into the digital dole

"Come And Get It!"

NTIA opens the door for LPTV/Class A/Translator/Booster grant applications

By Peter Tannenwald
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The National Telecommunications and Information Administration (NTIA) has finally issued a "Notice of Availability of Funds" (*Notice*) and on July 13, 2009, will start accepting applications for grants for upgrading Class A, Low Power TV (LPTV), TV Translator and TV Booster transmitters to digital operation.

While NTIA originally planned to dole the cash out after a formal rulemaking proceeding, that plan has gone by the boards. Instead, NTIA has simply declared that it has cash up for grabs. The *Notice* is NTIA's way of saying "come and get it."

We've all heard the relentless FCC-mandated propaganda about how your "analog television will be kaput!" on July 12, 2009. Of course, that's not entirely true. The analog shut-down deadline does ***not*** apply to Class A, LPTV, and TV Translator stations (we'll call them the "LPTV folks"), which outnumber full power stations by a considerable margin. And no deadline to convert the LPTV universe to digital operation has yet been announced.

Still, quite a few LPTV folks think that their future lies in converting to digital. But – and this is an important but – there is that pesky problem of how to pay for it. Thanks to a $44 million Congressional appropriation (Section 3009 of Public Law 109-171, for you legislative wonks), NTIA is finally stepping up to the plate with a grant program to help the LPTV folks convert. Whether the amount of money available will do the job is another question, but some grant is surely better than no grant. So let's grit our teeth and plunge head-first into the process NTIA has set up for tapping into the stream of federal dollars.

Whether the amount of money available will do the job is another question, but some grant is surely better than no grant.

There are two federal grant programs for the LPTV folks. One, already in progress, is limited to helping pay for converters that pick up digital signals over-the-air and convert them to analog for retransmission. These grants won't help construct digital facilities, so we can ignore them here. Anyway, that particular grant program will close down on June 12, 2009.

The second program *will* help the LPTV folks buy digital transmitters. It opens up in July. But don't count on a huge federal feeding trough. Only rural stations will be eligible for grants, which will come in two classes: one with a $6,000 per-station cap and the other with a $20,000 cap. Actual grants may be less if too many stations apply and the money runs short. Priority will be given to non-profit entities. A point system will rank all applicants.

To get in the door, you have to meet two basic qualifications. You have to demonstrate that: (a) you held a construction permit or license for an analog station on February 8, 2006; ***and*** (b) you transmitted an analog signal on or after that date. Pending applications don't count, and if you were transmitting a digital signal on that date, you are disqualified. (It's not clear whether transmitting a digital sig-

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May, 2009 **No. 09-05**

Inside this issue . . .

Supremes just keep us hangin' on

High Court Hands Commission Partial Victory On Indecency

Way likely cleared for resolution of constitutional issues in next round

By Jeffrey J. Gee
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As reported on our blog and briefly in last month's *Memo to Clients*, at the end of April the Supreme Court upheld, on statutory grounds, the FCC's enforcement policy vis-à-vis the broadcast of "fleeting expletives". By a 5-4 vote in *FCC v. Fox Television Stations, Inc.,* the Court held that the FCC had not been "arbitrary and capricious" when it abruptly abandoned its decades-old practice against fining stations for broadcasting isolated or "fleeting" curse words. Shortly afterwards, the Supreme Court also vacated a separate lower court order that had invalidated the FCC's action against the famous Janet Jackson Super Bowl broadcast (*FCC v. CBS Corp.*).

Although the FCC and Acting Chairman Michael Copps were quick to claim victory and vindication from the Court's decisions, the issue of broadcast indecency is far from settled.

As our readers will remember, the *Fox* case had its origins way back in 2002, when Cher uttered the words "fuck 'em" during the 2002 Billboard Awards Show. During the 2003 Billboard Awards Show, fellow raconteuse Nicole Richie noted that it wasn't "so fucking simple" to "get cow shit out of a Prada purse." Meanwhile, not wanting to be the only clean awards show, the 2003 Golden Globe Awards included Bono's pronouncement that his award was "fucking brilliant." For decades prior to these broadcasts, the FCC had refused to fine stations for such isolated or fleeting expletives.

The reversal of that policy began with the FCC's 2004 consideration of the Golden Globe Awards. Initially, the FCC's staff applied the FCC's long-standing policy with respect to fleeting expletives and declined to find Bono's exclamation to be indecent under the FCC's rules. After a political backlash – and, perhaps not coincidently, after the cataclysmic reaction to the Janet Jackson equipment malfunction – the Commissioners reversed the staff decision. In the Commission's revised view, the Bono broadcast was indecent and fleeting expletives could be penalized by the agency.

The FCC did not issue fines at the time, though, acknowledging that the former policy (exempting fleeting expletives) had been in effect at the time of the Bono broadcast. Thus, when the FCC issued its 2006 "omnibus" indecency order, it did not hesitate to brand the statements of Cher and Ms. Richie as indecent, despite years of precedent to the contrary. Fox, which aired the Billboard Awards, appealed the decision, arguing that the FCC's action was (a) "arbitrary and capricious" because it did not provide a sound basis for reversing the fleeting expletive policy and (b) unconstitutional because it went too far in limiting First Amendment freedoms.

In 2007, the United States Court of Appeals for the Second Circuit reversed the FCC's decision and returned the case to the FCC for further consideration. In reversing the FCC's decision, the Second Circuit found that the FCC had not adequately justified its departure from decades of prior decisions as required under the federal law governing administrative agencies (*i.e.*, the Administrative Procedures Act or "APA").

Although the Second Circuit's decision was based on the APA consideration, the court's decision went on to criticize the FCC's policy on First Amendment grounds, pointing out the inconsistency of protecting children from the "first blow" of a single expletive from Cher or Ms. Richie at the Billboard Award Show but not from GI's fighting World War II in "Saving Private Ryan." The Second Circuit's First Amendment musings (or "dicta" in legal jargon), however, were not an official part

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Focus on FCC Fines

By R.J. Quianzon
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Government goes after churches and schools – It was a bad month if you happened to be a church or religious school with a radio station. In the span of a few weeks, the FCC doled out fines ranging from $4,800 to $8,000 to such licensees.

A Baptist church in South Carolina was hit with a fine for filing its renewal paperwork late. The church's collection plate will need to take a couple of more laps around the congregation to make up the $4,800 fine that the government has slapped on the station. The fine arose because the church's AM station license expired on December 1, 2003, but the church didn't file its renewal paperwork until 15 days later. The FCC requires renewal applications to be filed four months prior to a license expiration date (so technically the renewal application, when it finally walked in the Commission's door, was four and a half months late). The church had not realized that it was late until it hired an FCC attorney to complete other paperwork. Once the attorney spotted the oversight, a renewal application was immediately filed. The church now faces a new deadline: it's got 30 days to send a check to the U.S. Government or the matter may be pursued by the U.S. Justice Department.

Similarly, a small Presbyterian college in West Virginia was branded with its own fine for filing its paperwork late. The government hit the station with a $7,000 fine. To put things in perspective, that's a little less than a semester's tuition at the school. The school's noncommercial FM license expired on October 1, 2003. Two months later, the FCC wrote to the school, advising it that the station's license had been terminated and its call sign deleted. On the same day that the school received its letter from the FCC, it immediately filed a renewal application and a request to operate under temporary authorization. The FCC eventually renewed the license, but still issued the school a $7,000 fine.

A Catholic college in Massachusetts and a college in Boston dedicated to communications and the arts have both been pummeled with $8,000 fines for answers that they gave on renewal forms in 2005. In contrast to the Baptist church and the Presbyterian college described above, these two schools completed their paperwork on time. However, the paperwork honestly disclosed the FCC that the schools were missing a few "issues/programming lists" from their public files. Both stations are noncommercial FM stations and both were first time offenders. In light of that last factor, the FCC cut the fines from initial $10,000 fines down to $8,000.

Government cancels fine for bankrupt station – An AM station in New Mexico which was on the verge of bankruptcy failed to file its renewal application when it was due (and, if you were reading the preceding items carefully, you know the renewal application was due four months prior to license expiration). The station eventually declared bankruptcy, and the trustee who took over the station submitted a renewal application one day before the license was set to expire. In response, the FCC reminded the trustee about the four month deadline and proposed fining the station $1,500. Upon further consideration, the FCC noted that the renewal application was indeed late but allowed the bankruptcy trustee to skate by without a fine.

Multiple licensee pleads "confusion" – So there's this multiple station owner in Florida, and in May, 2008, the Feds descend on a couple of its stations for inspections. And sure enough, they find a number of violations, so they write the licensee up and, in due course, send the licensee two separate notices identifying the violations. Each notice applied to a different station. One of the notices assessed a $25,000 fine for violations at one station, the other notice assessed a $16,000 fine for problems at another station.

The licensee fails to respond to the $25,000 fine notice and, when the FCC issues a formal forfeiture notice for the fine, the licensee claims that the licensee either never received the first notice or that it got that notice "confused" with the other notice (that would be the $16,000 notice). The trouble is that (a) the FCC has a return receipt for the $25,000 notice – signed by the station owner, thank you very much – so Excuse No. 1 is a non-starter. And as far as Excuse No. 2 is concerned, the FCC is unconvinced for a couple of reasons.

First, the two separate notices are clearly distinct, describing different stations and different violations and assessing different fines. It would be difficult to confuse the two.

And second, further undermining the persuasiveness of the "confusion" excuse was the fact that the licensee hadn't bothered to respond to the $16,000 notice, either. (Compounding the licensee's credibility problem was the fact that, when it sought reconsideration of the $25,000 fine, it also referred to a third notice of apparent liability, the existence of which is unclear.) So the licensee couldn't really claim that it thought that the

(Continued on page 23)

Performance right vs. local radio freedom

Performance Rights Bill Clears A Hurdle

But the finish line is still a long way off

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Marking a preliminary victory for the record industry against broadcasters in the on-going fight over performance rights, in May the House Judiciary Committee passed the Performance Rights Act (HR 848) by a 21-8 margin. That bill, if signed into law, would require over-the-air broadcasters to pay for the right to perform sound recordings. While the Committee vote may appear lopsided, by all indications things will be a lot closer when the action moves to the House floor. In fact, the developing numbers indicate that the bill could be defeated on the floor.

Kevin's Copyright Corner

As the Committee's Chair, John Conyers, happens to be a sponsor of HR 848, the outcome of the Committee vote was never really in doubt. But even as a watered down version was working its way out of the Judiciary Committee, more Representatives were jumping in to block the legislation. By the time the Committee voted, 192 Representatives were official co-sponsors of the Local Radio Freedom Act (H Con. Res 49). That number had already jumped to 208 as Congress began the Memorial Day recess, a sharp increase in just a short period of time that leaves one believing that the magic number of 218 opponents (a majority of the House of Representatives) will be formally opposed to the Performance Tax before long.

Perhaps sensing that his chances are slipping away, Chairman Conyers amended HR 848 prior to the Committee vote in an apparent effort to make it more palatable by reducing the impact on small broadcasters. The major amendments are:

Creation of a multi-tiered flat fee paid by qualifying "Minority, Female, Religious, Rural, Small, Non-commercial, Public, Educational and Community Stations and Certain Uses". The "certain uses" actually have nothing to do with these designations but everything to do with gross revenues:

For any station that qualifies as a "public broadcasting entity" under the Copyright Act:

- © A station with less than $100,000 in gross annual revenues must pay annual royalties of $500.00
- © A station with at least $100,000 in gross revenues must pay annual royalties of $1,000.00

For any other stations:

- © A station with less than $100,000 in gross annual revenues must pay annual royalties of $500.00
- © A station with at least $100,000 but less than $500,000 in gross revenues must pay annual royalties of $2,500.00
- © A station with at least $500,000 but less than $1.25 million in gross revenues must pay annual royalties of $5,000.00.
- © A station with at least $1.25 million in gross revenues will pay according to the results of any eventual Copyright Royalty Board ratemaking proceeding.

The station's payment requirement becomes effective on a delayed basis, according to the total gross revenues achieved by the station during the previous *four* calendar quarters:

- © A station with less than $5,000,000 over the previous four calendar quarters will not have to pay a performance royalty for the three years following enactment of this law
- © A station with less than $5,000,000 over the previous four calendar quarters will not have to pay a performance royalty for the first year following enactment of this law

Of course, even most small broadcasters will still fall into the highest payment bracket. We've had conversations with broadcasters large and small and every one of them says, without fail, that adding a $5,000 annual expense would be difficult to endure. We doubt that having three years to prepare for such payments would ease the pain.

That may not be a problem, though, as it's hard to believe these amendments will move the co-sponsors of the Local Radio Freedom Act. H. Con Res. 49 is an unequivocal statement against ***any*** performance right:

> 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.

Tit for tat, quid pro quo, . . .

Pay for Play?

Two can play that game

By Peter Tannenwald
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I think broadcasters have let the record companies put them on the defensive by establishing a one-sided framework for the public discussion of the performance royalty issue. And that may be why broadcasters seem to be having trouble in the struggle with record companies over that issue. Maybe it's time to change that framework.

At the NABOB annual awards dinner a couple of months ago, I listened to NABOB President Jim Winston bemoan the burden that would be placed on struggling minority station owners if they had to pay the "performance royalties" being touted by the record industry. I thought to myself that the performance royalty debate has been in favor of recording artists, because the record companies have managed to cast their side as poor suffering recording artists who have supposedly been victimized by a free-loading broadcasting industry. Artists have worked hard to create these recordings – as the argument generally goes – so why should they have to let their work be used for free by fat-cat broadcasters?

That approach, of course, misses the other side of the debate: the undeniable truth that airplay provides artists with valuable, if not vital, exposure to vast audiences, exposure that helps those artists sell records (pardon me – I mean CDs and downloads), fill concert seats, move merchandise, and establish the public images which are so crucial to their popular success. You will notice that in most music awards shows, artists give an appreciative shout-out to the radio industry in their acceptance speeches.

Broadcasters have historically provided exposure for free, just as the artists have made their recordings available to broadcasters for free. That *quid pro quo* arrangement has served everybody – artists, broadcasters and the listening public – well for decades. But if artists now want to change the deal by charging for the use of their recordings, that is a two-way street. Why not let broadcasters ask artists to pay for the exposure they get on the radio?

Well, how are we going to do that? Isn't that illegal "payola" that can get you jail time? Not so, if you do it right, with proper disclosure. The trick is to fix the disclosure rule so that it does not stand as a barrier but rather can be complied with reasonably and practically.

Somewhere over the last 50 years, the term "pay for play" seems to have become synonymous with "payola", which in turn is associated with Fraud and Deception and Bad Things (even though I lived in New York as a teen-ager and loved listening to Alan Freed, the disc jockey who gave rock'n'roll its name before becoming the disgraced poster boy for payola).

The term "pay for play" seems to have become synonymous with "payola", which in turn is associated with Fraud and Deception and Bad Things.

But "pay for play" is ***not*** in and by itself improper or illegal. After all, isn't conventional advertising payment for air time? Paying for play is perfectly legal, as long as appropriate sponsorship identification is provided. (Sponsorship ID was the "gotcha" that caught Freed and some of the other big-time jocks.) So as long as a broadcaster provides appropriate sponsorship ID for playing songs, why not develop a rate card for music and let artists know what it will cost to get their songs on the air?

Now we would have an approach that would permit standard marketplace forces to operate. Each side would have something that the other side wanted, and they would negotiate who pays whom for what.

In some ways, that arrangement would be similar to the "retransmission consent" alternative in the cable television carriage arena. By allowing cable operators and television licensees to negotiate carriage terms, Congress allowed those parties to determine the value of carriage. Historically, cable operators were thought to have the upper hand in the Cable/TV relationship – hence the need for "must-carry" legislation – but in recent years, the broadcasters, as owners of content that is in high demand, have taken control, and the marketplace has demonstrated that, in many cases, cable needs TV stations as much as (or more than) the stations need cable. As a result, many TV stations have developed retransmission consent into a significant revenue stream.

The radio/performance royalty situation is a bit trickier. Recording companies have been allowed to consolidate their rights through SoundExchange, a monopoly which may be administratively convenient but (like any monopoly) is plainly anti-competitive. So if perform-

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Details? The staff can figure them out

Ownership Report Regimen Re-Vamped

More filings, different deadlines for commercial licensees; Changes on the horizon for NCE's

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A new FCC Ownership Report regime goes into effect November 1, 2009, and at this point, it looks like *all* commercial licensees – along with a variety of broadcast owners and investors previously exempt from any such filing – will be having to file new reports on that date. . . if, that is, the FCC's staff is able to pull off a number of procedural and technical high wire acts.

The shift in reporting requirements arises from concern (most notably on the part of Acting Chairman Copps and Commissioner Adelstein) about the relatively low percentages of minority individuals and females among the ranks of broadcast owners. Copps and Adelstein apparently would like to implement some race/gender-based initiatives to promote increased minority/female ownership, but such initiatives are, well, frowned upon by the Constitution except in rare situations where some limited "remedial" measures may be used to correct past discrimination.

The re-vamp of the ownership reporting process is a first step on the road toward re-instituting some form of minority ownership policies.

Whether broadcast licensing presents such a rare situation is doubtful. After all, the Commission has historically disclaimed any discrimination in its licensing activities, and the aggressive minority ownership policies in place from 1978 to 1995 (when the Supreme Court imposed stringent limits on such policies) would seem to belie any claim of discrimination by the agency.

Still, Copp and Adelstein, among others, believe that there is serious "underrepresentation" of minorities and women in the ranks of broadcast owners, "underrepresentation" which presumably could, in their view, justify governmental intervention. But nobody can be sure of exactly what the actual level of "representation" is just now because, according to the Commission, its own ownership reporting process has for years failed to provide adequate and accurate data. So as a first step on the road toward re-institution of some form of minority ownership policies, the Commission has decided to re-vamp its ownership reporting process.

Under the plan, many folks – including a range of investors and lenders – who have not historically been required to file ownership reports will have to do so from here on out. The new regime would make the following changes:

- ***All*** commercial licensees must file. Mom and pop operations owned by a one person, or by a couple of people in partnership (with no corporations or LLCs involved), used to be exempt. No more.

- The ownership reporting requirement will apply not only to all commercial full power radio and television stations (which were already subject to biennial reporting), but also to LPTV stations and Class A television stations (all of which were previously exempt).

- Everyone will file on the same date, every two years, beginning November 1, 2009. Biennial ownership reports will no longer be pegged to the anniversary date of a station's last renewal application deadline.

- The data reported must be accurate as of October 1 of the same year in which the report is filed. The previously applicable 60-day window for information accuracy is essentially shortened by half, and report filers will no longer be able to choose a reporting day convenient to them.

- More investors and lenders must report their racial, ethnic and gender makeup to the FCC – even if the interest that they hold does not rise to the level of an "attributable" interest under the Commission's ownership attribution rules and policies. So, for example, the silent investor who holds a minority stake in a broadcast company dominated by a single majority investor must begin reporting the racial, ethnic and gender makeup of its owners.

- Investors and lenders must not only report the names of the licensees and the stations owned by those licensees as at present, but must provide an FCC-issued Federal Registration Number (FRN) for each and every licensee in which they have a reportable interest.

- The FCC will begin random audits to verify what is reported. The FCC Order did not, however, specify if proof of ethnicity, gender or race will be required or how the truth of such reported facts

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New 301, 314, 315 and 345 forms now available

Applications Tweaked In Wake of Diversity Order

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The FCC has announced that it is implementing another part of its sweeping *Diversity Order* (adopted in late 2007 but not released until March, 2008) by modifying a number of basic broadcast application forms. The changes took effect May 21.

The forms that have gone under the knife are the 301 (for construction permits), 314 (for consent to voluntary assignment of authorization), 315 (for consent to voluntary transfer of control of licensee/permittee) and 345 (for voluntary assignment/transfer of control of FM/TV translator and LPTV authorizations).

Generally, the Commission has changed these forms in three ways.

First, the method for determining attributable interests to demonstrate compliance with the FCC's multiple ownership rules has been revised to conform to the *Diversity Order*'s modified treatment of "eligible entities" for equity-debt-plus (*EDP*) purposes. ("Eligible entities" are, of course, entities that qualify as small businesses under the standards adopted by the Small Business Administration (SBA).) Under *EDP*, an entity may be tagged with an attributable interest in a broadcast licensee even if that entity is not technically an owner of the licensee. That historically occurred when the non-owner was (a) either a significant program supplier or an attributable owner of another same-market station holder *and* (b) held a 33% or greater equity and/or debt position in the licensee – when those factors coincided, the non-owner's interest was deemed "attributable". But in the *Diversity Order*, the FCC relaxed that rule to allow *up to 50% equity and/or debt interest* in an "eligible entity" licensee or a *debt interest alone (no equity) of up to 80%* of the asset value of a station. The new forms include instructions about these new limits and a question regarding whether the applicant is claiming status as an "eligible entity".

In addition, the assignment and change of control applications (Forms 314, 315 and 345) now require a certification concerning compliance with the FCC's anti-discrimination rules in connection with the transaction for which approval is being sought. In the *Diversity Order*, the Commission adopted a new rule (47 CFR Section 73.2090) banning discrimination on the basis of race, color, religion, national origin or sex in the sale of commercial broadcast stations.

In the revised Forms 314 and 345, the assigning/transferring party is required to certify that it (or any other party to the application) did not violate this rule in connection with the transaction for which it is applying for the FCC's consent. In the revised 315, that certification obligation falls to the licensee/permittee (as opposed to either the transferor or transferee). Since the certification requirement applies only to commercial stations, an "N/A" box has been provided for applications involving noncommercial stations. If a commercial station applicant cannot certify that it did not violate that rule, it must attach exhibits to the application disclosing the persons and matters involved, and an explanation why such non-compliance should not impede grant by the FCC of the application.

The new forms have been loaded into CDBS and are currently available for use. In fact, you've ***got*** *to use them.*

Finally, the assignment and change of control forms for full service stations (Forms 314 and 315) now ask whether the proposed transaction involves a radio station that is a part of a non-compliant grandfathered cluster of stations. If the answer is yes, the buyer must then certify that, within 12 months of the consummation of the transaction, it will bring itself into compliance by divesting station(s) as necessary either to an "eligible entity" or to an irrevocable trust that will in turn assign the station(s) to an "eligible entity". The *Diversity Order* expanded the ability to deal off grandfathered station clusters to *any* buyer (such sales had previously been limited to eligible entities), subject to certain limitations.

Applicants who check the "yes" box for this question must submit a form of an irrevocable trust agreement providing for the assignment of the license(s) to an eligible entity. (Note that the application requires submission of such a form of agreement even if the proposed buyer indicates that it intends to divest the excess station(s) to an eligible entity, rather than to an irrevocable trust for later assignment to an eligible entity. This may be an oversight on the Commission's part that will be corrected eventually. For the time being, though, the application requires submission of the irrevocable trust form in either case.)

The new forms have been loaded into CDBS and are currently available for use. In fact, you've ***got*** to use them. It's not clear what happens if you started to complete one of the revised forms on CDBS prior to May 21 – it's possible that, in that situation, you will have to copy over all the information onto a new version of the form.

Up, up and away!!!

FCC Announces Proposed 2009 Regulatory Fees

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The Commission has released its annual Notice of Proposed Rulemaking (NPRM) laying out its proposed 2009 regulatory fees. To no one's great surprise, for the second year in a row all but one of the 61 categories of broadcast-related fees are proposed to go up. (The lone exception is the fee for a broadcast auxiliary license, which – also for the second year in a row – is proposed to remain at $10.) The proposed fees are listed in the chart on the next page.

And when we say "up" we mean "UP". Reg fees for all full-service TV licenses in the Top 100 markets would increase by more than 9%, with UHF stations in the Top 10 going up by more than 14% and VHF's in Markets 11-25 up by more than 13%.

On the radio side, Class C AM's in all markets are looking at double digit surges mainly in the 13%-14% range (and as much as 15.4% for stations serving populations of 25,001-75,000). Class D AM's would fare only slightly better, with increases in the 11%-12% range (except for those serving fewer than 25,000 listeners – they'd only get whacked for a 9.5% increase). All FM stations are looking at reg fees that would be 5%-9% higher than last year.

The Commission this year is proposing to make the electronic filing of reg fees (through its on-line Fee Filer system) mandatory.

Beyond the numbers, the Commission this year is proposing to make the electronic filing of fees (through its on-line Fee Filer system) mandatory. In past years the FCC has strongly recommended e-filing, but has not absolutely required it.

Also, as the DTV transition approaches, the Commission has confirmed that it does not plan to charge full service TV stations double – i.e., for both their analog and digital operations – if they were in fact broadcasting two signals as of October 1, 2008. Rather, the Commission will charge only for the analog. Presumably none of this will be an issue next year, since the transition will have occurred by October 1, 2009, and there should be only a few exceptional situations in which full service stations may still be holding two separate authorizations.

The NPRM invites comment on the proposed fees as well as a variety of other administrative matters (such as mandatory electronic filing and future treatment of digital TV fees). The deadline for comments is June 4; for reply comments it's June 11. As you might guess from the somewhat abbreviated comment periods, by "inviting" comments the Commission is largely just jumping through procedural hoops it's required to jump through. Feel free to lob in your comments, but don't be surprised or discouraged if they are not embraced in any meaningful way by the FCC.

No word yet on precisely when the fees will be due, but traditionally the deadline falls in September (or possibly August), in order to assure that the FCC has collected its fees in time for the start of the next budget year in October.

Note that you can expect to get hit with a 25% late payment fee if your reg fee is not received by the Commission prior to the deadline they will be establishing. That can amount to a hefty penalty in many cases, so it is prudent to take care to make timely payment.

And as we have reminded readers for a couple of years already, timely and full payment of reg fees is particularly important in light of the Commission's "red light" system. Under that system, a licensee which fails to pay the required reg fee is "red lighted". When that occurs, the licensee will not be granted any new authorization – including grants of assignment/transfer applications as well as new permits or licenses – unless and until the "red light" is cleared either by payment of the outstanding fee or the making of appropriate arrangements with the Commission for such payment. If a delinquent licensee files an application of any kind, that application will be dismissed if the delinquency is not clear up within 30 days. In view of this, we urge everyone who is subject to regulatory fees to be sure to get their payments made in full and on time.

FEE CATEGORY	PROPOSED FY 2009 Annual Regulatory Fee (USD)
TV VHF Commercial Stations	
Markets 1-10	77,575
Markets 11-25	60,550
Markets 26-50	37,575
Markets 51-100	22,950
Remaining Markets	5,950
Construction Permits	5,950
TV UHF Commercial Stations	
Markets 1-10	24,250
Markets 11-25	21,525
Markets 26-50	13,350
Markets 51-100	7,600
Remaining Markets	1,950
Construction Permits	1,950
Low Power TV, TV/FM Translators/ Boosters	400
Other	
Broadcast Auxiliary	10
Earth Stations	210

Satellite Television Stations	
All Markets	1,275
Construction Permits	650

Commercial Radio Stations

Population Served	AM Class A	AM Class B	AM Class C	AM Class D	FM Classes A, B1 & C3	FM Classes B, C, C0, C1 & C2
<=25,000	675	550	500	575	650	825
25,001 -75,000	1,350	1,075	750	875	1,325	1,450
75,001 -150,000	2,025	1,350	1,000	1,450	1,825	2,725
150,001- 500,000	3,050	2,300	1,500	1,725	2,800	3,550
500,001 -1,200,000	4,400	3,500	2,500	2,875	4,450	5,225
1,200,001- 3,000,000	6,750	5,400	3,750	4,600	7,250	8,350
>3,000,000	8,100	6,475	4,750	5,750	9,250	10,850
AM Radio Construction Permits	480					
FM Radio Construction Permits	650					

(Continued from page 1)
nal on a companion channel while transmitting analog on the main channel knocks you out of the box.)

Next you have to demonstrate that your station is located in a "rural community" not contained in an incorporated city or town with a population of more than 20,000 persons. This might ordinarily be a deal-killer for many, but NTIA has saved the day by disregarding the size of a station's community of license and relying instead on the population within the station's protected analog signal contour. The contour is determined using the sophisticated Longley-Rice method, which supposedly reflects actual service with considerable accuracy. NTIA believes that the "vast majority" of LPTV folks will pass this test, at least if they do not serve a substantial part of an "urbanized area" as designated by the Census Bureau.

And to help applicants determine their population numbers, NTIA has created maps for about 90% of the LPTV folks. When you fill out the on-line application at the NTIA website, the system will supposedly generate a map for you with a population count, and will indicate whether or not you're eligible. (Tip: Watch out for large yellow areas on the NTIA map, because those are the dreaded urban areas that can disqualify you.) If you don't like NTIA's mapping results, you may submit your own calculations and map.

The remaining ten points are doled out based on the applicant's "rurality" score. "Rurality"? Yup, "rurality".

If you're still eligible after the map maze, it's time to calculate your point score. Each station can get up to a total of 30 points, doled out as follows:

- ☺ Nonprofit entities get ten points. (Governmental licensees do *not* qualify as nonprofits.)
- ☺ Stations with an FCC 50/50 Longley-Rice contour covering fewer than 10,000 people who are not within an urban area will receive ten points.
- ☺ As to the remaining ten points, those depend on the applicant's "rurality" score. "Rurality"? Yup, "rurality", a concept which NTIA will implement as follows: "A station whose FCC 50/50 Longley-Rice coverage contour serves an area that does not include an urban area with population greater than 20,000 people will receive ten points. A station whose coverage contours include urban areas with a population greater than 20,000 can receive between six and nine points. Stations receiving fewer than six points are not located in an eligible rural community and thus not eligible to participate in the Upgrade Program."

Remember that each station is scored separately. The number of stations a particular licensee owns does not help or hurt.

OK, you have managed to file your application, you are still in one piece, and your "rurality" score is six points or more. So far, so good – but you're not out of the woods yet.

You can get a grant ***only*** for money *you have actually spent*. That is, you ***must*** purchase your digital transmission plant ***before you even apply*** to NTIA, let alone get a grant. (Moreover, you must have spent the money on digital transmission facilities *after* February 8, 2006. If you spent it earlier, you're out of luck.) NTIA will *not* give you a voucher, letter of credit, or anything else you can use to place an order. Thus, you must put yourself at financial risk before knowing whether you will get any reimbursement money. You can start an application online and figure out how many priority points you have without actually completing the filing, so at least you don't have to stab completely in the dark.

An important open question is whether you must have made full payment for your digital equipment before you apply or whether you may finance the purchase with installment payments to the vendor. In other words, you do have to be legally obligated to pay for the equipment, but you *may* not have to lay out the full purchase price in cash. NTIA is still mulling over that question.

You get back the amount you spent, up to a cap. There is no standard fixed grant amount, but there are two grant caps. If you are *modifying* your analog transmitter, your cap is $6,000 per station. If you are *replacing* your analog transmitter, the cap is $20,000. Why so little? The caps are based on an assumed 100-watt analog transmitter and 25-watt digital operation. NTIA apparently focused on small rural translators. You can, of course, modify or buy a larger transmitter; but you have to pay the difference if the cap does not cover your costs.

Reimbursable costs are limited to equipment related to the transmitting plant. Studio and production equipment upgrade costs are *not* eligible for reimbursement. NTIA's website will have a list of what equipment costs may be claimed.

If you do get a grant, there are more federal forms to fill out, but we will let that challenge wait for another day.

Those fortunate enough to get points for being nonprofit or serving fewer than 10,000 persons get to apply first. Their deadline is ***July 13, 2009, at 5 p.m. sharp (Eastern time)***. Your application must be in NTIA's hands by then, not just dropped in a mailbox. NTIA encourages that applications be prepared online and then printed out and submitted using a private express delivery service (*e.g.*, UPS, Federal Express, etc.). The online system apparently has some glitches which might complicate actual online filing. Regular old USPS service (whether Express Mail, Special D or routine snail mail) is particularly discouraged because all postal deliveries are radiated to protect against anthrax, and the radiation turns paper into crispy crum-

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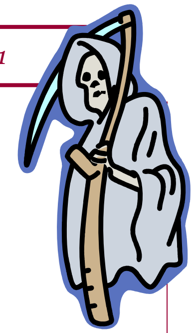

Fear the reaper

Section 312(g): Statutory Death Sentence Still Lurks in the Books

By Davina Sashkin
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Back in 1996, Congress stuck Section 312(g) into the Communications Act, specifying that any broadcast station which failed to transmit a broadcast signal for 12 consecutive months would automatically, and irreversibly, lose its license. Congress softened up a bit in 2004 (at the, um, urging of then-Senator Ted Stevens) and gave the FCC some discretion to let long-silent stations keep their licenses, but (as we have reported in previous *Memos to Clients*), the Commission has been less than enthusiastic about putting that discretion to use. Two recent cases – one from the U.S. Court of Appeals for the D.C. Circuit, the other from the Media Bureau's Video Division – provide strong reminders that Section 312(g) continues to pose a serious threat to broadcasters.

In the first case, the court affirmed the Commission's determination that an FM station's license had automatically expired even though the station had not stopped operating for a full 12 months. The FCC recognized that the station had been operating, but the Commission pointed out that the station had not been operating *with its authorized facilities*. The licensee had applied for a construction permit to change its facilities (including its site) and, apparently under the mistaken impression that its permit had been granted, it had moved over to the new site and started broadcasting from there. The licensee argued that, since it had been transmitting a broadcast signal (as Section 312(g) requires), the automatic death sentence was inapplicable to it.

The Commission saw things differently. In the FCC's view, in order to avoid loss of licensee under 312(g), a licensee must be operating with facilities which the Commission has authorized, whether by permit or license or even STA. The court agreed. (Full disclosure: FHH represented the licensee in its unsuccessful appeal, but not in the earlier proceedings before the Commission.)

This decision is problematic. The specific language which Congress used in Section 312(g) – *i.e.*, that stations which "transmit a broadcast signal" are not subject to automatic loss of license – says nothing about whether or not the facilities being used in such transmissions have been authorized. Indeed, many observers have viewed 312(g) as a "use it or lose it" measure to prevent "spectrum warehousing" by licensees who simply fail to operate at all. In this view, a licensee who clearly has operated, albeit with incorrect or unauthorized facilities, is doing what it's supposed to be doing under Section 312(g). While such licensees might be subject to other penalties (*e.g.*, fines for unauthorized operation or operating with facilities at vari-

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bles. (For some reason, UPS and FedEx delivery people just stroll through the door and drop their packages on the table right in NTIA's offices.)

For everyone else, the deadline for the second round is ***September 1, 2009***. After NTIA takes care of the first two rounds of filers, they will take additional groups, one month at a time (with each round closing on the first of the month) until the money runs out. (Obviously, filing *after* the initial deadline that applies to you is a good way to risk losing out.)

A good point score is ***not*** a guarantee that you'll get a grant. NTIA says that it will make grants based on point score, recommendations of its program staff, and geographic distributions. NTIA does not explain the details of non-point factors or whether any subjective judgments will be involved.

Note that, in addition to the grant application itself, you will need to submit a bunch of other federal forms which are required generally for Department of Commerce grants. NTIA has supposedly simplified those other forms, reducing most of them to mere certifications of compliance. Of course, whether or not you really can legitimately and correctly make such certifications is another story entirely.

(Also, if you opt for online filing, be alert to the fact that, once you get the application form figured out online, you make your filing at www.grants.gov. But you can't file any application online at www.grants.gov unless you have pre-registered and have an ID number. Registration takes about five days – so if you're going to file online, don't put off pre-registering.)

NTIA has provided a list of all the necessary components of a complete application. You can find the full text of the *Notice* at http://edocket.access.gpo.gov/2009/pdf/E9-10961.pdf. When you go there, head to Section III – Application Procedures, Section A – Content and Form of Application Submission (found at the 11th page of the 15-page *Notice* PDF).

NTIA says that its staff will help stations through the application process. So will we at Fletcher Heald & Hildreth, P.L.C., if you would like us to help pilot your ship through the shoals. Just let us know.

(Continued from page 11)

ance), they should not be subject to summary execution under Section 312(g).

But that view has now been rejected by the Commission, with the court's approval. The court reasoned that 312(g) must be read holistically with the rest of the Communications Act, which requires that all broadcasters operate pursuant to licenses issued by the FCC. To do otherwise is to operate a pirate station, a clear violation of the statute in the eyes of the Commission. While the unfortunate licensee in this case was clearly not a "pirate" in any conventional sense, though, the FCC and the court concluded that the licensee's operation with unauthorized facilities was not enough to avoid 312(g) treatment.

But this leaves the FCC in something of a bind. To be consistent, the Commission will theoretically have to declare "expired" the license of any station which happens, for whatever reason, to have operated longer than 12 months with unauthorized facilities. Suppose that a station has been operating for years, even decades, from a particular antenna site, only to find (through the miracle of GPS technology) that the coordinates of that site specified in the station's license in fact differ significantly from the site's actual coordinates. (This could occur if the original coordinates were measured wrong, a real possibility in pre-GPS days.) That would mean that the station has been operating for years with unauthorized facilities – in that hypothetical case, from an unauthorized transmitter site. Will such stations lose their licenses automatically? Or how about if, unbeknownst to the licensee, the station's equipment has been chronically malfunctioning, operating at wrong power levels or with misdirected directional antennas, etc.? Sure, those stations have been operating, but not with "authorized facilities". Will they lose their licenses?

It's not clear how the FCC will be able to escape the impact of its own (and the court's) decision.

It's difficult to believe that the Commission will be inclined to whack such licensees. But it's not clear how the FCC will be able to escape the impact of its own (and the court's) decision. After all, in the recent case, the licensee argued that it had relocated its station under the mistaken, but arguably reasonable, belief that it had been authorized to do so. Unless and until the FCC clarifies exactly how it plans to distinguish "authorized" from "unauthorized" operation in such cases, it will be best to assume that only stations operating with facilities which have been fully and expressly authorized by the Commission are safe from Section 312(g).

Worse yet for unfortunate broadcasters caught in the 312 (g) web, the FCC ruled, and the court agreed, that the Commission need not give the broadcaster a break as a matter of routine fairness. (As noted above, the Commission is allowed to do so under the 2004 amendment to 312 (g).) Here, the FCC refused to credit the broadcaster's plea that it had misunderstood the status of its construction permit application. So the FCC again declined to exercise its discretion to be forgiving in all but exceptional cases (such as weather emergencies). Ouch!

The issue of "authorized" vs. "unauthorized" operation is not the only less-than-crystal-clear issue raised by Section 312(g). As a recent Video Division decision demonstrates, even operation of "authorized" facilities may not be "operation" enough to avoid loss of license. According to that decision, the transmission of a test pattern, or any other such "equipment tests" emitted from licensed facilities, is not sufficient to save the license from automatic expiration.

Back in February, 2008, a television station which had been off the air (and therefore was facing a looming 312(g) problem) returned to the air four days before the 12-month expiration date. The station broadcast a test pattern for 24 hours, then went silent again. Unfortunately, according to the Video Division, test patterns are not "broadcasting" for the purposes of 312(g). As a result, the Division held that the station's license had automatically expired in February, 2008.

According to the emphatic assertion of the Division, "it is well settled that conducting equipment tests or transmitting an equipment test pattern does not prevent the automatic expiration of a license pursuant to Section 312(g)." Which would be fine, except the support cited by the Division for this "everybody knows" position is, well, less than compelling. The Division cited only three previous decisions as evidence of the "well-settled" nature of this proposition. But the primary case cited involved a radio station which had operated from unauthorized facilities. Nothing about "test patterns" there (indeed, the notion of "test patterns" would appear to be inapt when it comes to radio stations). And the other cases cited by the Division similarly said nothing at all about test patterns. While those cases may, at some very early point in their history, have included some consideration of "test patterns", nothing in the decisions cited by the Division so indicates; nor could we find copies of any such earlier, unreported, decisions to permit us to doublecheck.

As a conceptual matter, the Commission (and the Division) could presumably declare the broadcast of test patterns to fall short of the standard necessary to avoid Section 312(g) license expiration. And now, it would appear, the Division has done just that. But it is not 100% correct for the Division to have pronounced, unequivocally, that this has been a longstanding and well-established proposition.

Whatever may be the case, though, it is now very clear that the FCC will pull no punches when it comes to 312(g). And the FCC now has the approval of the federal courts to apply a strict interpretation of the statute. Licensees should proceed with caution.

(Continued from page 2)

of its grounds for reversing the FCC's decision.

Thus, when the Supreme Court agreed to review the Second Circuit's decision, the only legal matter properly before it was the question of whether the FCC reversal was valid under the APA. Judicial doctrine dictates that courts avoid making decisions on a constitutional basis if the decisions can be made on a statutory basis. That is exactly what the Supreme Court did, concluding by a 5-4 vote that the FCC's action was consistent with its statutory obligations under the APA.

Writing for the majority, Justice Scalia held that, contrary to the Second Circuit's view, the FCC *did* explain its change in policies, at least enough to satisfy the APA. Scalia, who was joined by Chief Justice Roberts, and Justices Thomas, Kennedy and Alito, concluded that the Commission had recognized that it was shifting course and it had articulated sufficient reasons why it believed the new course to better. So as a matter of administrative law, the new fleeting expletives policy was properly adopted.

Of course, a split decision means that the other members of the Court – Justices Stevens, Ginsburg, Souter and Breyer – did not agree, but without that crucial fifth vote, all they could do was issue dissenting opinions. Following judicial doctrine, none of the opinions addressed the addressed the constitutionality of the new fleeting expletives policy.

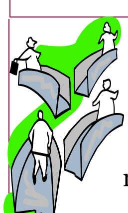
As a result, the case now goes back to the Second Circuit for "further proceedings consistent with [the Supreme Court's] opinion" on the APA issue, but without any direction on how the lower court should address the constitutionality of the FCC's rules. Likewise, as the Third Circuit's decision on the Super Bowl broadcast was based exactly the same APA grounds as the Second Circuit's decision, the Supreme Court's reversal of that action is essentially the same.

Despite the apparent vindication of the FCC's fleeting indecency policy, the Supreme Court's decisions leave broadcasters pretty much as they have been for the past several years. Except for a few cases that were about to hit statute of limitations deadlines, the FCC has basically frozen its decisions on indecency while the appeals process continued. While the Supreme Court has spoken on the APA issue, the appeals go on. We can expect Fox and CBS to go back to the Second and Third Circuits, respectively, and reargue that while the indecency rules may have passed APA review, they violate the First Amendment of the U.S. Constitution, either as written or as applied to their specific cases. The Second and Third Circuits will most likely find themselves forced to address the constitutional question head-on this time around. No matter which way they decide, we can expect that the cases will go back to the Supreme Court within a year or two.

Just because the FCC isn't issuing indecency decisions at the moment doesn't mean that they are not accepting complaints and opening instigations.

In the meantime, broadcasters should continue to protect themselves. Just because the FCC isn't issuing indecency decisions at the moment doesn't mean that they are not accepting complaints and opening instigations. Indeed, it is generally believed that there are thousands of complaints currently awaiting FCC action – each carrying a potential $325,000 fine *per violation*. In the shadow of that threat, broadcasters should take whatever precautions they can to avoid violations. Delays, "bleeps", pixilation, and blacking out questionable material are all important tools. Most important, however, is educating on-air talent, producers, directors and engineers to spot problems before they become violations. Until the Supreme Court gives us a real answer on indecency, broadcasters will continue to be their own best protection.

[NOTE: For an in-depth look at the individual Justices' opinions and an ominous review of what the Court's administrative law determination may mean for all future FCC actions, see FHH's blog at www.commlawblog.com.]



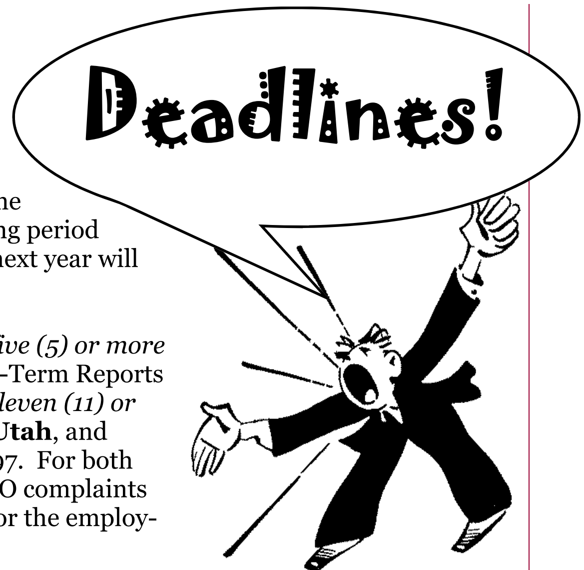
FHH - On the Job, On the Go

On May 5, **Frank Montero** served as the moderator for a panel discussion featuring executives in the Spanish-language broadcast industry. The panel, held in the Rayburn House Office Building on Capitol Hill, served as a briefing for Congressional staff relative to the negative impact that a performance tax would have on the radio industry.

On May 20, **Mitchell Lazarus** spoke to the annual meeting of the National Spectrum Management Association on the topic of "Defining the Harm in Harmful Interference" (a topic he has addressed on the FHH blog at www.commlawblog.com). He warmed up for that appearance with a May 15 talk to the Federal Communications Bar Association' s Engineering and Technical Practice Committee on the practicalities of shepherding new-device approvals through the FCC equipment authorization process.

Media Darling of the Month? That would be **Davina Sashkin**, who managed to get ink (in Comm Daily, no less) with respect to her blog coverage of the proposed overhaul of AM and FM allocation rules and policies.

June 1, 2009



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**, **Ohio**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** must place EEO Public File Reports in their 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 station employment units with five (5) or more full-time employees* and located in **Ohio** and **Michigan** must file EEO Mid-Term Reports electronically on FCC Form 397. All *radio station employment units with eleven (11) or more full-time employees* and located in **Arizona**, **Idaho**, **New Mexico**, **Utah**, and **Wyoming** must file EEO Mid-Term Reports electronically on FCC Form 397. For both radio and TV stations, this report includes a certification as whether any EEO complaints have been filed and copies of the two most recent EEO Public File Reports for the employment unit.

Television Ownership Reports - All *television* stations located in **Ohio** and **Michigan** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All reports must be filed electronically.

Radio Ownership Reports - All *radio* stations located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

July 10, 2009

DTV Consumer Education Quarterly Activity Reports - All *television* stations that did not transition to DTV-only operation by March 31 must file a report on revised FCC Form 388 and list all station activity to educate consumers about the DTV transition. The period to be included is April 1 through June 12, 2009 for stations completing transition by June 12. As with previous reports, this report will be filed through the Consolidated Data Base System (CDBS), the general electronic filing system for applications and reports.

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the second quarter reports on FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file. Once again, information will be required for both the analog and DTV operations.

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 placed in the public inspection file.

Website Compliance Information - Television station licensees must place and retain in their 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 must be placed in the station's local public inspection 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.

July 13, 2009

Rural Radio/Allotment and Assignment Procedures - Comments are due in the Commission's rule making proceeding which has proposed to revise the AM and FM allotment and assignment priorities to ensure that more AM applications go to auction and to prohibit FM stations from moving to more urban areas, as well as to provide special opportunities for tribes and attempt to expand rural service.

(Continued on page 15)

Equitable distribution or spectrum ghettos?

Doubts Surface About AM/FM Allocation Proposals

By Vincent J. Curtis
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As we reported in last month's *Memo to Clients*, the Commission has proposed some major changes in its AM/FM allocations process. The idea is to reduce opportunities for new and existing stations to be "moved in" toward larger metropolitan areas. The Commission is concerned that, as a result of such move-ins, smaller, rural communities/areas are losing local service. So the Commission is proposing essentially to halt the move-in process. From comments elsewhere in the proposal, it's clear that the Commission hopes that its various changes in allocation policies – along with other changes in the reporting of broadcast ownership – are also going to help increase the number of minorities and women in the ranks of broadcast owners.

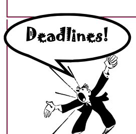
But we've been hearing grumbling among some minority representatives who are not at all happy about the proposed limitations in the allocations area.

It's not that they're not grateful for any effort to help minorities get into the industry. It's more that they see that effort as leading them down a dead end street. If the new allocation rules really are supposed to make new channels more easily available to minorities, that's fine with them – but not if the channels that would become available to them are going to be stuck permanently in small "rural" communities. What good is it to be allowed to get into the ownership end of the business if the opportunities being opened for them are low-end/dead-end stations? Why should *they* be forever restricted to providing small market local service and reaping slim rewards while other broadcasters, in the big cities, are allowed to play in a very different financial league.

The folks we've heard from don't expect any guarantee of commercial success. But they also don't want to be subject to artificial regulations that would prevent them from seeking such success. And owning a station that can't possibly be moved out of Two-Buck-A-Spot-Ville and over to Three-Figures-A-Minute City is just that situation.

The fear – and it's not at all irrational – is that the No New Move-Ins approach may create a universe of second class stations with permanently limited profit potential, a kind of spectrum ghetto. And to that the folks we've heard from are naturally inclined to say thanks but no thanks.

As the Commission gives further thought to its new approach to allocations, it may want to focus on the fact that broadcasting is a business, and broadcasters – regardless of their race, gender or whatever – generally want to be able to compete on a level playing field. A strong case could be made for the view that the FCC's current proposal would not provide such a field.



August 1, 2009

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **California**, **Illinois**, **North Carolina**, **South Carolina**, and **Wisconsin** must place EEO Public File Reports in their 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.

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Radio Ownership Reports - All *radio* stations located in **California**, **North Carolina**, and **South Carolina** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

Return of SHVERA

Market Modification Legislation Threatens Retrans Fees

By Jeffrey J. Gee
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It's no secret that cable companies and satellite television providers hate paying retransmission consent fees to broadcast television stations. Even though they often pay more for lower-rated cable networks, cable and satellite operators complain that local broadcasters charge "unreasonable" fees for the right to retransmit the over-the-air programming (network and local) that remains at the center of television viewing. But the complaints of the subscription video providers may be answered by Congress. Currently under consideration is new legislation that may be the "thin edge of the wedge" that could free cable and satellite companies from retrans fees – and consequently eliminate that revenue source for local television broadcasters.

The new legislation is being promoted by Congressman Mike Ross (D-AR) in connection with the reauthorization of the Satellite Home Viewer Reauthorization and Extension Act (SHVERA). According to the bill's supporters, hundreds of thousands of good Americans are brutally denied access to local news and information from their home state. How could that happen? Why, it's all because the Nielsen-defined "Designated Market Areas" (or DMAs) that determine local television markets sometimes cross state lines. As a result, a person's "local" television station according to the DMA may be in an adjacent state. The bill would save these local news-starved citizens by allowing cable and satellite operators to import the signal of out-of-market television stations (that is, stations from outside the DMA) that are located in the same state as the viewer.

The real target of the bill is programming that is already available in virtually every market.

Providing access to in-state local news, of course, is a laudable goal. The problem with the proposed legislation is that it is entirely unnecessary and, frankly, disingenuous. The copyrights for local newscasts – allegedly the target of the bill – are held by the local stations that create those newscasts. If the cable and satellite operators wanted to bring in that local programming, all they need to do is get permission from the originating station. If that programming doesn't duplicate the programming of the in-market stations (which it wouldn't), there would be no way for the in-market stations to object. Moreover, if the DMA lines are truly a distorted reflection of local viewing, cable companies and broadcasters both have the ability — under existing law — to file market modification petitions with the FCC to make stations "local" in areas that would otherwise be outside their DMA-defined markets.

The real target of the bill, however, isn't non-duplicating local news programming. Rather, it's the network and syndicated entertainment programming that is already available in virtually every market. Local broadcasters pay for the exclusive right to distribute such programming within their local markets. This exclusivity gives network-affiliated stations the ability to charge retransmission consent fees to cable and satellite operators. If a cable system wants to carry *American Idol*, it needs to come to terms with the local FOX station.

If, on the other hand, the cable system could import FOX programming from a different market, it appears from Congressman Ross's summary of his proposal that the cable system wouldn't need to deal with the local FOX station and its pesky demands for compensation. If the local FOX affiliate demanded any compensation for its programming, the cable operator could simply take the FOX Network programming from another market and bypass the local FOX station. Even better, the imported signal could be had for the essentially fee-free statutory copyright license. Thus, the proposed legislation would effectively eliminate retransmission consent fees by removing the exclusivity that forces cable and satellite operators to the negotiating table. At the very least, the cable operators could use the threat of bringing in out-of-market stations to the "border counties" to reduce broadcasters' bargaining power.

Supporters of the bill might call that a gross overreaction, as the bill applies only to those cross-state DMA border counties that are in the same state as the imported station. This "limited" group of counties, however, includes counties from 98 DMAs and, in many cases, represents 40 percent or more of the households in those DMAs. And that is assuming the cable systems in question actually limit the carriage of the imported station to those border counties. Few stations could afford to lose 20 percent of the households in their DMA, let alone 40.

The television market modification bill proclaims a good purpose (access to in-state local programming), but actually results in an anti-competitive private benefit for cable and satellite operators. If the affected cable and satellite operators truly wanted to import in-state local programming (and not the network and syndicated programming already available in the market), they could obtain such programming today without any additional rules or laws. Or, if a new law really is needed, that law could have been limited to the importation of locally

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ance royalties are imposed, SoundExchange will be the single 800-pound gorilla with which all broadcasters will have to deal.

But the existence of Sound Exchange would not prevent individual broadcasters from formulating rates for putting music on the air. They could be paid by individual record companies, who of course would have to include the right to play the music, thereby bypassing and leaving Sound Exchange as the place to go for a blanket license for whatever music is left over.

Since the law already allows pay-for-play with adequate disclosure, the major barrier that broadcasters would face is developing a means of identifying the sponsors that is both legally sufficient and realistic. Some (though not all) lawyers think that the present law requires disclosure of payment every time a paid musical selection is played. Broadcasters may want to petition the FCC to clarify that the law imposes no such requirement and that it is sufficient for stations to make, say, a general announcement four times a day relative to music sponsorship. (Think: "Dear listeners: To keep the FCC happy, and to comply with a tangle of stressful laws, we want you to know that we have been paid to play the music you hear today. Here are the record companies that paid us....") The public would be told who is paying, and broadcasters would get a fair chance to counter the royalty demands of Sound Exchange with corresponding demands of their own.

If necessary, Congress might be asked to break SoundExchange's monopoly, to allow more options for negotiations between artists and radio licensees short of separate negotiations for each recording. Some rights aggregation could continue, to avoid administrative chaos, but the ultimate goal would be to achieve a more competitive marketplace setting.

A free marketplace may have some disadvantages. The best artists will presumably be able to charge stations for playing their music, while lesser-known artists may have to pay for airtime. Royalty rates may turn out to be prohibitively high for many broadcasters, particularly the smaller ones. It is not difficult to envision a possible scenario in which only the wealthiest radio broadcasters could play the most popular music, lesser-known artists have to pay for exposure while their better known counterparts rake in cash, and small radio stations have to get creative to stay in business. It could be rough sledding for many on both sides, particularly in the early rounds. I have no desire to disadvantage small broadcasters and would support some regulatory intervention to ensure to ensure that they are not streamrollered.

Still, if the broadcast industry sits back and lets the record companies limit the debate to the narrow question of whether performers should be paid for their work, they are looking for a chance to get hosed. Broadcasters have significant economic muscle which can and should be flexed, letting the artists and recording companies know that upsetting their longstanding relationship with broadcasters may backfire. They should go to the FCC and Congress and demand that legal barriers to free and open marketplace negotiation be removed rather than having lawmakers decide which way the cash flows. Fix the sponsorship identification rule so that it becomes practical to comply with it, and then let the fur fly. TV has a free marketplace for retransmission consent. Why not radio as well?

Once the playing field is leveled, so that legal barriers like the details of the sponsorship rule do not interfere, maybe lawmakers who have jumped on the artist/ record companies' "fairness" bandwagon will recognize that that bandwagon is all about money, like so much else in the business world, rather than about "fairness". And maybe there is something to be said for retaining the *status quo*.

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produced (*i.e.*, non-network) programming (programming that duplicates in-market programming, *i.e.*, the network programming, would then be subject to blackout in exactly the same way that the network non-duplication rules presently operate).

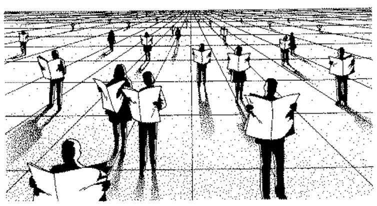
The only new benefit this legislation would bring is that it would allow cable and satellite operators to import out-of-market network and syndicated programming and thereby eliminate the only leverage local broadcasters have in retransmission consent negotiations. Local television stations that would prefer to keep retransmission consent fees would be well advised to contact their Congressional representatives to voice their opposition to this legislation.

Long ago Congress set up the statutory framework giving TV stations a choice of insisting on a legal right of free cable carriage or taking their chances on free marketplace bargaining with cable operators. As technology has enabled cable systems to multiply the number of channels they can deliver to subscribers, the number of over-the-air viewers has shrunk, and Internet-based technologies have increased viewer options, TV broadcasters have found themselves in an increasingly competitive environment for access to viewer eyeballs and increased difficulty in supporting themselves with advertising revenue alone. Now that broadcasters have finally figured out that their programming product is so valuable that wired distribution technologies cannot live without it, it would be ironic if Congress were to lose its taste for the free market framework it originally created and choose instead to prevent broadcasters from realizing the full value of the product they create.

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

Updates on the News

FCC on HD Radio: More comments, please — About a year ago a consortium of radio licensees and equipment manufacturers asked the Commission to please, please, please increase the maximum permissible digital power of FM stations using "HD Radio" technology. The requested increase was not a minor tweak by any means: the proposal would rocket the current max upward by a factor of ten, to 10% of the station's authorized analog power for some, but not necessarily all, stations. (It seems that some Super B stations running at that higher digital power might interfere with the analog signal of some first adjacent B's, so Super B's would be exempted out of the increase). Since the proponents painted a generally glorious picture of how good HD Radio is, you have to wonder why they feel the need for a major league power increase. And while the threat of potential interference tends to get downplayed by the proponents, the fact that even they recognize the need to deny at least one class of station the proposed increase because of interference concerns does not inspire confidence.



In any event, last October the Commission invited comments on the proposal and, as it turns out, there appears to be considerable disagreement as to whether the proposal really is a good idea. Still, the proponents are urging expeditious action to fix "the coverage shortfalls and reception difficulties" which occur at the current levels. But NPR, which has provided a wealth of test data and related analysis already, has advised that it's working on yet more testing, with a further report due to be presented this coming September.

So the Commission has asked for further comment from the public. In particular, the FCC asks whether it should hold off on the proposed power increase until the next NPR study is submitted and people have had a chance to review and comment on it. Alternatively, the FCC suggests that it might be inclined to act now – and if it were to do so, it wants to know whether it should establish standards to "ensure the lack of interference" to analog operations on first adjacents. Along the same lines, the Commission asks whether it should establish "more specific procedures to resolve digital-into-analog interference complaints."

If you feel like chiming in on any of these questions, here's your chance. As of this writing the deadlines for comments and replies haven't been announced, but the time frames are likely to be short, so check our blog (www.commlawblog.com) for updates.

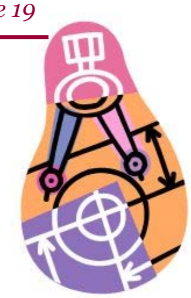
What's up with school bus radio? – Remember back in high school when the teacher would assign a report, making you write about stuff you had no idea about and you had to, like, do research and stuff? That's apparently the way it is at the FCC. Congress has ordered the Commission to write a report on "commercial proposals for broadcasting radio or television programs for reception onboard specially-equipped school buses operated by, or under contract with, local public educational agencies." That assignment was buried in a single paragraph deep within the 2,220+ pages of the 2009 Omnibus Appropriations Act. And get this – the report is due right after Labor Day, just like some kind of summer reading project. Way to go, Congress, messing up the FCC's summer vacation. What a buzzkill!

Congress didn't bother to provide any real context or background for this particular item in the Appropriations Act, so it's difficult, if not impossible, to figure out what Congress had in mind here. It did tell the FCC to consider "the nature of the material proposed to be broadcast and whether it is age appropriate for the passengers"; "the amount and nature of commercial advertising to be broadcast"; and "whether such broadcasts for reception by public school buses are in the public interest". And sure enough, the Commission has in turn posed precisely those questions to the public in an invitation for comments.

If you have any information about any such "commercial proposals" for broadcasting programs directed to school buses, the FCC is all ears. But act quickly – the comment period wraps up on June 15, and the reply comment period on June 29.

DTV upate: Soft test yields good numbers – In May a coordinated nationwide "soft test" of the DTV transition was held and, lo and behold, the result was 55,000 calls in to the FCC's Help Line. While the Commission describes that as "a single-day record" – the suggestion being that 55,000 is a frighteningly high number which bodes ill for the Real DTV Transition – in fact the numbers overall should be reassuring. For example, in the largest market – New York City – a *total* of only 1,277 calls were received. Given the millions of people in that market, 1,277 seems less than a drop in the bucket – especially when you realize that nearly half of those calls related to questions or complaints about the converter coupon program. And those stats weren't unique to NYC. In Chicago (by no means a small market), calls topped out at 1,310, again with nearly half relating to the coupon program.

The take-home message here seems to be that, when the final DTV Transition arrives, we won't be seeing the chaos in the streets that some have predicted.



Found in translation

Replacement DTV Translator Service Adopted

Anticipated service area gaps targeted

By Harry Cole
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As we reported last December, on Christmas Eve Eve (that would be December 23) the FCC proposed the creation of a new "replacement digital television translator" service. The idea was to provide full service TV licensees with access to translators to enable them to fill in gaps between their soon-to-be-history analog service areas and the DTV services areas which they will be left with once the transition occurs.

Proving conclusively that the Commission can move quickly when it wants to, the FCC has released its Report and Order (*R&O*) wrapping up that proceeding by – you guessed it – creating the new replacement DTV translator service.

Of course, the fast-approaching June 12 transition date provides considerable motivation for the Commission here. The government as a whole – that would be the Commission *and* Congress *and* the NTIA – has consistently demonstrated an overriding (and, in the view of at least some observers, overblown and unrealistic) concern that the DTV transition not cause any U.S. TV viewer to lose access to over-the-air service. Since the DTV service area of many stations will fall short of their current analog service areas, the Commission needed to come up with a quick fix. And voilà – replacement DTV translators!

The Commission needed to come up with a quick fix. And voilà – replacement DTV translators!

Needless to say, other options were available: for example, requiring use of DTS technology, or requiring DTV stations to maximize their facilities to eliminate any signal shortfall. While those options remain available, the Commission concluded that they would likely be more burdensome to TV licensees looking to fill in the gaps as quickly as possible.

So the doors are open and the welcome mat is out at the Commission for replacement DTV translator applications. Actually, the welcome mat has been out since last January, when the FCC announced that, to get things moving along, it would permit the filing of applications for new replacement DTV translators even before the service had been created! (According to the Commission, 20 such applications have already been filed.)

Some highlights of the *R&O*:

- Replacement DTV translator applications will have priority over other LPTV/translator applications ***other than*** displacement applications (with which they will share co-equal status). The *R&O* indicates that "applications filed for full-service television and Class A television stations" will have priority over replacement DTV translator applications. BUT the Commission has provided no clear explanation of what it means by "applications for Class A television stations", and the rule itself does not refer to Class A stations separately from LPTV stations.

- Replacement DTV translators will be restricted to Channels 2-51. No fair stepping on the public safety entities and auction bidders who become the primary users of Channel 52-69 once June 12, 2009 comes and goes.

- Applicants for replacement DTV translators will have to demonstrate that: (a) a portion of their analog service area will not be served by their full post-transition DTV facilities; and (b) the translator will be used to serve that loss area. Full-service stations will *not* be permitted to use these translators to expand their service areas, although some *de minimis* expansion may be permitted if it can be shown that such expansion is necessary to replace the loss area. (The term "*de minimis*" will be defined on a case-by-case basis.)

- The replacement DTV translator will be associated with, and have the same Facility ID as, the full-service station's license, and will not be separately assigned or transferred. Thus joined at the hip with its full-service parent station, a DTV translator may not originate any independent programming or do anything other than repeat the signal of that parent at all times. These translators will still be "secondary" spectrum users and will be subject to many existing technical rules governing plain old translators.

- New replacement DTV translator construction permits will specify a three-year construction period. That seems a bit odd, given the FCC's incredible hurry-hurry approach here. After three years, will any viewers still be waiting for restoration of their "lost" analog service, or will they all have given up the ship and signed on for cable or satellite? But according to the Commission – which had originally proposed a mere six-month construction period – practical considerations like ordering, obtaining and installing equipment and getting local land-use clearances make a six-month time limit unrealistic.

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A can of worms?

FCC Seeks Comments on Arbitron PPM Methodology

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The Commission has released a Notice of Inquiry (*NOI*) kicking off an investigation into Arbitron's Portable People Meter (PPM) audience measurement system. The *NOI* was triggered by an "Emergency Petition" filed last September by a number of groups (the PPM Coalition) concerned that implementation of PPM "would drop a financial nuclear bomb on America's minority radio stations". But it's not clear whether the FCC's full-tilt leap into the PPM fray will ultimately solve the problem that the PPM Coalition has raised, and it could turn out to have significant unintended consequences for all concerned.

PPM represents an effort by Arbitron to improve the accuracy of its audience-measurement data. Historically, those data have been (and in many markets continue to be) harvested from hand-written diaries subject to a wide variety of potential errors: poor handwriting, misremembered call signs, inadvertent mis-recording, etc., etc. Trying to remove the human error component, Arbitron came up with a system which, at least in theory, is able to automatically record (on a cell-phone size gizmo which the participant carries around everywhere) every exposure to any radio stream encountered by the reporting listener.

The NOI is just an "inquiry", and not a formal rulemaking proceeding, so the Commission will still have to crank up a rulemaking before it can adopt rules in this area.

But as it rolled out its new system, a funny thing happened. Some stations which had previously shown up well in the ratings dropped precipitously. And a surprising number of those tanking stations turned out to feature minority-oriented programming. While correlation does not necessarily establish causation, it wasn't hard – particularly for minority stations fearing a ratings tumble – to conclude that PPM was somehow at fault.

Who to turn to in the face of such a crisis? Why, the government, of course.

The PPM Coalition and its comrades expressed their concerns to the FCC, while similar complaints were presented to the attorneys general of a number of states. Arbitron ultimately settled with the states, where it faced potentially expensive litigation. While Arbitron may have thought that the concessions that it made in those settlements might have been enough to call off the FCC dogs, it would have been wrong.

In its *NOI*, the Commission seeks comments on three general areas. First, it asks for data and comment on the "PPM methodology and its effect on minority and urban-formatted station revenues". This extraordinarily wide-ranging inquiry solicits detailed minutiae about the design and implementation of PPM as well as information about changes – actual or anticipated – in programming which may be attributed to PPM measurements. Second, the *NOI* asks a number of questions about how, and to what extent, possible inaccuracies in PPM measurements could affect the FCC's ability to rely on Arbitron data – not a small question in view of the fact that the Commission's multiple ownership rules have for decades relied heavily on Arbitron's market definitions.

And finally, only after it's already put all those questions on the table, the Commission asks whether it even has the authority to get involved in this inquiry at all. Remember, it's the Federal *Communications* Commission – *not* the Federal *Audience Measurement* Commission. Historically its regulatory reach has tended to be limited to entities which actually use governmentally-controlled spectrum. And Arbitron, whose business is simply counting heads, is several steps on the other side of that limit. So there's a huge threshold question of whether the Commission has any authority at all to pry into Arbitron's business practices.

Normally, one might expect that a governmental agency would, as a matter of sensible analytical priorities, determine first whether it's got any power to take any action at all before it cranks up an extensive inquiry. What purpose is served by the inquiry if, at the end of the day, the agency is powerless to do anything at all?

But it's apparent from their separate statements that Acting Chairman Copps and soon-to-be-ex-Commissioner Adelstein are determined to jump right into the deep end of the pool, whether or not there's any water there. And for the time being those two constitute a majority of the Commission – so away we go.

The *NOI* is just an "inquiry", and not a formal rulemaking

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proceeding. Accordingly, even if the Commission concludes that it has plenty of authority (and, presumably, adequate staffing and other resources, and, oh yeah, enough expertise in the intricacies of audience measurement), it will still have to crank up a formal rulemaking before it can actually adopt rules in this area. It's unlikely that we'll see any preliminary conclusion of the Inquiry before the end of 2009, and possibly not until well into 2010 or beyond. A follow-up rulemaking would probably take at least as long, so any rules that might be adopted will probably not kick in until 2011, at the earliest. Since Arbitron has indicated that it is prepared to re-examine and adjust its PPM service by 2010, you have to wonder exactly what the FCC thinks it will be able to achieve.

That's especially true when you realize that, according to the *NOI*, one possible basis for FCC authority to delve into this area goes something like this: since the FCC has historically relied on Arbitron data in, *e.g.*, its ownership rules, concerns that the PPM methodology may make those data unreliable could raise questions about the FCC's continued ability to rely on Arbitron. Fair enough.

But let's think about that for a minute.

Implicit in that justification is the notion that the PPM methodology somehow falls short of some recognized or accepted standard of accuracy which Arbitron's traditional handwritten diary method has presumably satisfied. But when was the last time – if ever – that the Commission examined the accuracy of Arbitron's traditional methods? It's really not right to assert that PPM introduces an unacceptable level of inaccuracy if you can't show that the previous method was in fact any more accurate. And if the previous method was indeed unreliable, then doesn't that raise serious questions about the legitimacy of the Commission's longstanding Arbitron-based rules and policies?

The PPM Coalition doesn't help itself or the Commission on that front. One of its complaints about PPM is that the PPM technology does not permit participants to express their "brand loyalty" to a particular station. The PPM Coalition emphasizes that "minorities are by far the most brand-loyal of all consumers." And this "loyalty", asserts the PPM Coalition, is reflected in diary-based Arbitron measurements because "some diary participants may recall listening longer than they actually listened." In other words, PPM precludes inaccurate reporting – inaccurate reporting which is possible in Arbitron's diary method – that could reflect "brand loyalty".

But that assertion could be read as an admission that the established diary-based system was itself subject to inaccuracy. And if (as the *NOI* suggests) measurement accuracy is an important, if not essential, basis for FCC regulatory reliance on Arbitron, should not the Commission be moving ***away*** from ***any*** continued reliance on ***any*** Arbitron data, be they derived from PPM or diaries? Inaccuracy, after all, is inaccuracy – and if inaccuracy cannot be tolerated in PPM, then it should not be tolerated in other measurement techniques.

Of course, beating up on the apparent flaws of Arbitron the Monopolist (with its chokehold on the audience data on which advertisers tend blindly to rely) doesn't help the minority stations which justifiably fear the potential impact of the still-a-work-in-progress PPM system. For many (but not all) of those stations, the early returns on PPM have not been good, and it is understandable that those stations are anxious to seek some form of succor before it's Too Late.

The deeper the FCC reaches into this particular can of worms, the more problems it is likely to encounter.

In view of the jurisdictional and practical limitations on what the FCC might be able to do, the deeper the FCC reaches into this particular can of worms, the more problems it is likely to encounter. Before the Commission can legitimately critique Arbitron's methodologies, the Commission must develop expertise in audience measurement – not something the Commission has any established familiarity with. And any effort by the Commission to regulate Arbitron would require the re-dedication of scarce agency resources.

But those problems assume that we all decide to live with Arbitron. As it turns out, it is obviously not difficult to envision the development of a record which raises questions about the reliability of ***any*** Arbitron data. At that point nobody should be happy: the PPM Coalition would be without any way to try to establish their listenership, Arbitron's credibility would be in shreds, and the legitimacy of any FCC rule or policy historically based on Arbitron data would be subject to attack. Moreover, the Commission would suddenly have to come up with some alternative to Arbitron's market definitions. Good luck with that.

There may be strong political reasons for launching the *NOI*, and maybe the resulting publicity will produce some beneficial changes. But it's hard to see any practical justification for a formal FCC proceeding. In the end, the proceeding may end up on the back burner, evaporating away without further distracting the Commission from more immediate chores more obviously within the agency's authority.

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would be determined during an audit.

Information will no longer be accepted in uploaded attachments to the ownership report form. Everything must be submitted in a standardized format allowing for quick calculations as to racial, ethnic and gender status of those who have been listed on these reports.

While it might seem that the Commission should be able to implement these changes in reasonably short order, in actuality it might prove a bit harder. As part of the re-vamp, the Commission has ordered the Media Bureau to overhaul the Ownership Report form (Form 323) "so that ownership data is incorporated into the database, is searchable, and can be aggregated and cross-referenced electronically." As indicated above, that means, among other things, that the use of attachments will be history. Attachments have provided respondents a convenient way of presenting their own particular ownership information in narrative, or chart, or table, or some other, form. But the information in attachments (normally filed as PDFs) can't be fed automatically into a searchable database, so we'll be kissing attachments good-bye. Accordingly, the form will have to be adjusted to permit the inclusion of information that would otherwise have been in those attachments.

Will each respondent (in the initial report or any follow-up audit) be expected to provide some demonstration that its claimed "minority" participants really are "minorities"?

Additionally, the new forms will have to be adjusted to encompass the expanded ranks of respondents.

And the system will have to be set up to include "verification and review functions" and preclude the filing of incomplete or inaccurate data.

And once the system is set to go, it will have to be blessed by the Office of Management and Budget.

The Commission will also need to ensure electronic filing capacity for what promises to be a mammoth, possibly unprecedented, electronic filing load. Today, whenever a sizable portion of licensed stations must file even small simple forms on the same day, the FCC's electronic filing systems are known to slow, crash and cause massive headaches for filers and FCC staff alike.

And all this has to be ready to go sufficiently in advance of November 1 – just six months from now – to permit thousands of respondents to hop on-line, fill out their respective forms, and submit them. Anything is possible, and the Media Bureau staff are among the most competent folks around, so we can keep our fingers crossed. But it still seems like a pretty tall order. We understand that the Bureau folks believe they can overcome the many procedural and technical issues required for these new report requirements to take effect by November 1.

But even if the mechanical issues relating to the reporting overhaul can be resolved, the revised system still presents certain legal dilemmas. The Commission has told the Bureau to devise and implement a post-filing audit system to check on the accuracy of the information being reported. But how will FCC staff determine when non-objective information is incorrectly reported?

The amount of a loan or the percent of stock someone owns can be precisely determined. But what about the racial and ethnic information that the reports are primarily intended to generate? What is the audit process going to look at? If a respondent claims that certain of its owners or principals are women or minorities, how could the Commission expect the respondent to "prove" the accuracy of that claim? In particular, assuming that the FCC comes up with a suitable definition of "minority" for these purposes, will each respondent (in the initial report or any follow-up audit) be expected to provide some demonstration that its claimed "minority" participants really are "minorities"? How deeply does the Commission intend to delve into such potentially delicate inquiries?

For example, how will a party claiming to be "of Spanish Culture" (a "minority" category specified in the current Form 323 instructions) be expected to support that claim? [Historical note: Back in 1981, the FCC decided that a Polish-born applicant named Liberman qualified as "Hispanic" for purposes of the FCC's minority ownership policies after the applicant attested (among other things) that he was descended from Spanish Jews who had been expelled from Spain in 1492.]

The current form also includes, as definitions of certain classes of "minorities", "person[s] having origin in" any of certain broad ethnic or racial categories (*e.g.*, the "original peoples of North and South America", or "the black racial groups of Africa", or the "original peoples of the Far East, Southeast Asia or the Indian Subcontinent"). But what does "having origin in" mean, anyway?

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How much "origin" is necessary? How far back? The Commission has yet to say.

There are other, similar, unanswered questions, but you get the point.

Racial or ethnic categorization is always a very dicey activity. It is even more so when undertaken by the government – after all, the Constitution generally prohibits governmental discrimination based on such categorizations. Since the Commission seems ready to embark on a race/ethnicity/gender-based regulatory program, it will have to be very clear how it is defining these essential terms.

In the meantime, we wish the Bureau good luck in meeting this latest challenge.

For now, the news is simple: the Commission has revised its reporting requirements. All ownership reports will now be due by November 1 each year. All commercial broadcast licensees, LPTV and Class A television licensees will be required to file. (Note that we have been informally advised that licensees who were required to file their biennial reports on June or August 1, 2009, will still be required to do so, even though they will then have to re-file their reports less than five months later. Licensees with October 1 due dates may get a break; the jury is supposedly still out on that circumstance.)

Meanwhile, the Commission has proposed to revise the ownership report form (Form 323-E) for noncommercial educational (NCE) stations to include similar information about the ethic, racial and gender makeup of their governing bodies. Such information is not currently sought on Form 323-E. A major problem impeding the immediate imposition of such a reporting requirement on NCE licensees is the fact that such licensees tend to include a range of non-stock/non-ownership organizations, such as governments, schools and non-profit entities. How can the FCC determine the ethnicity of such licensees? (The issue of categorizing, for regulatory purposes, the universe of potential NCE licensees has been around for decades. The Commission has historically shown no urgency in addressing it – but the Commission will not be able to avoid that issue much longer if it really wants to inventory minority "ownership" in the NCE ranks.)

In any event, the Commission has requested comments with respect to the question of obtaining more detailed racial/ethnic/gender information in the NCE area. As part of that, the Commission is also considering imposing ownership reporting obligations on LPFM licensees for the first time since that service was created. Comments on these proposals are due to be filed with the Commission by June 26; reply comments are due by July 13.

The new rules affecting commercial licensees, although already adopted by the Commission, won't technically become effective until the Office of Management and Budget approves the modified information collection aspects of those new rules.

Comments on the proposed information collection requirements — on both the commercial *and* noncommercial sides — are due at the Commission by July 27.

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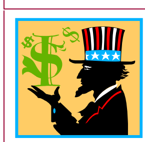
Despite the Commission's effort to get this new service in place *tout de suite*, it's not clear exactly when the new rules will actually take effect. The new rules and procedures were published in the Federal Register on May 20, and will therefore technically become effective on June 19, 30 days after publication in the Federal Register – ***except for*** Section 74.787(a)(5)(i), which governs the application process for the new service. Since that subsection involves "information collection requirements", it must first be approved by the Office of Management and Budget. The Commission has shipped the item over to OMB with a request for expedited review. The smart money figures that OMB won't have any problem with the new application forms and related rules, so it's entirely possible that the Commission will be hanging out the "Welcome" sign for new applications just about the time (June 19) that the rest of the new rules take effect. Stay tuned and check back with our blog (www.commlawblog.com) for updates.



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problem had been taken care of when the $16,000 fine was paid because, well, that $16,000 fine apparently hadn't been paid.

In any event, the Commission did not let itself get confused by the licensee's protestations of confusion: the licensee was held to still be on the hook for the $25,000 (although, in response to a demonstration of financial hardship, the Commission did knock $2,500 off the bottomline, reducing the fine to $22,500).

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