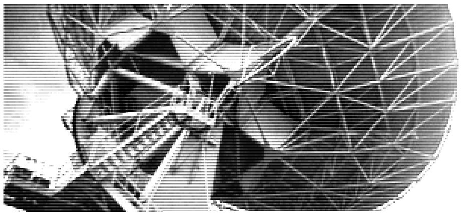

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Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

The quad pulls a Sisyphus

FCC Begins Quadrennial Review Of Media Ownership

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Talk about your Sisyphean tasks. The FCC has announced that it is starting to roll the rock of ownership regulation back up the hill, again. In a sweeping Notice of Inquiry (*NOI*) that highlights in a number of ways the overwhelming complexity of its chore, the Commission has invited comments on virtually any aspect – practical, theoretical, conceptual, you name it – of its regulation of media.

If you have something (anything, really) to say about media ownership, here's your chance.

Just as Sisyphus did not undertake his own chore voluntarily, the FCC's repeated efforts to review its media ownership regulation have been mandated by Higher Authority – in this case Congress which, in the 1996 Telecom Act, ordered the Commission to review these rules every four years to determine if they remain "necessary in the public interest as a result of competition". Amid persistent, often acrimonious, controversy, the FCC has dutifully done so, and is now doing so again – even though the results of its previous reviews still aren't final.

The inquiry this time is extremely broad, requesting comment not only on existing rules but also on the "fundamental questions" related to media ownership regulation, the answers to which it hopes will guide the rest of this proceeding. Acknowledging the "profound" changes in the media marketplace in recent years, the *NOI* assures readers that the Commission has "no preconceived notions" about the ultimate outcome of the proceeding.

> *The FCC claims to have "no preconceived notions" about the ultimate outcome of the proceeding.*

The fact that the Commission chose to kick off this proceeding with an *NOI* probably means that it'll be quite some time before we can expect to see any new rules adopted. The last ownership review began with a Notice of Proposed Rulemaking (*NPRM*) in July, 2006, and the FCC's decision wasn't released until February, 2008 – and though that decision was promptly appealed, briefing of the case in the Court of Appeals has still not wrapped up, which means that a decision in that forum is *still* at least months away.

This time, the Commission will need to evaluate comments and reply comments on last week's *NOI* before it even issues an *NPRM*. (By issuing an *NOI*, the Commission may be attempting to avoid some of the criticism directed at its handling of the 2006 proceeding, *i.e.*, that the *NPRM* there failed to propose specific rules. In the *NOI*, the Commission has promised that the *NPRM* it eventually develops from comments on the *NOI* will "invite comment on proposals for regulations".)

In addition to input on the ownership rules themselves, the *NOI* requests comment on the "analytical framework" to be used in evaluating those rules – like what factors should be considered in determining if those rules advance its public interest goals and, if they don't, what rules would. Noting its continued commitment to the public interest goals of competition, diversity, and localism, the Commission ques-

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May, 2010 **No. 10-05**

Inside this issue . . .

The regulatory eyebrow is raised

Serial CPs, Implied STAs and Spectrum Warehousing

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Spectrum warehousing – the practice of acquiring spectrum and then sitting on it, unused. Maybe because you don't want your competitor(s) to have it, maybe because you can't afford to do anything with it just now, maybe for other reasons. Whatever may be the case, the FCC has historically frowned on the practice. The Commission figures that once authority to use spectrum has been issued, that spectrum should be used.

The trouble is, while the Commission talks a good game, its willingness to throw the flag on apparent warehousing practices has been more muted – and occasionally, at least in the eyes of some, misdirected. (For instance, the trial balloons floated by some FCC reps in connection with the National Broadband Plan – the suggestion being that TV licensees are somehow wastefully sitting on spectrum that could be better used for broadband. But it's been less than a year since the TV industry completed its forced march out of the Analog Desert and into Digital Paradise, so even if they're not taking full advantage of the spectrum – and it's not at all clear that they're not – it's a bit early in the game to declare them malingerers and take their spectrum away because of that. Oh yeah, and has the FCC analyzed how much broadband-suitable non-broadcast spectrum is sitting fallow? – some Senators don't think so. But I digress.)

In any event, we can report that the FCC's Audio Division recently flexed more than its vocal cords when it comes to spectrum warehousing. And in doing so, it alerted licensees involved in channel reallotments that they had better be on their toes or risk losing the authority to operate at all.

The case involved a little corner north of Dallas, Texas. Back in the late 1990s the licensee of KIKT in beautiful Greenville, TX, asked to have its channel moved over to (apparently more beautiful) Cooper, TX. In early 2002 the Commission granted that request and promptly modified the FM Table of Allotments to reflect the change. Once the Table had been changed, the station's continued operation in Greenville was technically inconsistent with the rules – but the Commission sensibly sidesteps that problem by conjuring up an "implied" special temporary authorization (STA). That implied STA permits the licensee to continue operation in its former community while taking care of the follow-up chores necessary to effectuate the move.

One of those chores, obviously, was obtaining a construction permit to cover the move to Cooper. The FCC gave the licensee 90 days to file its CP application. After six months' worth of extensions, the licensee filed that application, and eventually a construction permit to move over to Cooper was granted in 2003 – with an expiration date in 2006.

When that expiration date rolled around, however, the new facilities still hadn't been built, and the CP expired. But wait! The same day, the licensee filed another application for the same Cooper facilities. That application was granted, with an expiration date of 2009.

That's when things started getting interesting.

During the second CP period (2006-2009), the licensee of a station in Krum, TX, filed an application to improve its facilities. The Krum application was based on the amended Table of Allotments as of 2002 – that is, it assumed that KIKT's channel was in Cooper, even though KIKT was still operating in Greenville pursuant to its implied STA. The Commission granted the Krum application, but with a condition preventing it from cranking up its modified facilities until KIKT moved over to Cooper, since the modified Krum facilities would result in interference to the continued Greenville operation (the one authorized by the implied STA).

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Recordkeeping: A Wellspring of FCC Fines

This month's column focuses on one of the easiest targets for FCC fines – station records. Television stations must keep detailed records regarding their Children's Television Programming, including any violations that may occur. In turn, the stations provide reports and summaries to the FCC. In addition, almost all radio and television stations must participate in the Emergency Alert System (EAS), another activity which generates records (written or computer-created) that are easily reviewed by FCC inspectors when they drop by the station for an inspection.

Focus on FCC Fines

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More than a quarter-million dollars in children's programming fines – The FCC issued a total of $270,000 in fines on a single day this month, hitting TV stations from Spokane to Orlando for violations of the children's television programming rules. Most of the stations were fined for exceeding commercial limits; one station had its fine bumped up for failure to adequately publicize the availability of its children's programming report.

FCC rules governing commercial limits in kids' programming are very clear and the FCC's enforcement tends to be very strict. Of note, regardless of which political party happens to control the FCC, that regimen of strict enforcement of the kidvid rules has remained a constant since the inception of the rules.

The children's programming rules fall into two categories to which stations must pay very close attention: (1) the content that a station airs; and (2) the station's recordkeeping and reporting regarding its kids' programming.

In most instances, the FCC has an easy job when it comes to compliance with these rules. Licensees are required, in effect, to turn themselves in every license renewal cycle: the renewal application requires extensive, detailed disclosures concerning children's programming, including disclosure of any instances in which the amount of advertising exceeded the FCC-imposed limit. With the admission in hand, the FCC merely has to send any guilty station a bill for the applicable fine.

The latest FCC fines ranged from $25,000 to $70,000 depending on the number of violations that the stations had and the "severity" of the violations as determined by the FCC. One station with a total of 78 violations got stung for $25,000. Three – with violations running from 106 to 127 – got hit for $30K each. A total of 153 violations triggered a $40,000 fine in another case, and 164 violations upped the ante to $45,000 in another. One station in Spokane, Washington, got hit for a sizable $70,000 fine, for more than 86 overcommercialization violations *and* a failure to adequately publicize the availability of its children's TV reports. (You can find more on that latter aspect in the article on Page 6 of this issue.)

Failure to keep EAS records results in $8,000 fines – When FCC agents sweep into your station they usually ask to see two sets of documents – your public file and your EAS logs. The EAS logs reveal whether your station has been properly monitoring and testing its EAS equipment; they also provide a detailed summary of whether or not your station has been complying with the FCC rules. With your logs in hand, FCC agents may have all they need to write you an $8,000 fine.

With the exception of stations that have applied for and been granted an exception, every broadcast station in the United States is part of the nationwide EAS. The FCC has repeatedly stated that it takes any violation of EAS rules seriously and expects full compliance by stations. The rules require periodic testing of a station's equipment, periodic area-wide testing, announcements of important emergency information and logs recording EAS activity.

In three recent cases, FCC agents inspected television and radio stations and discovered damaged or missing EAS equipment. The next step in the inspection was to review the station logs to see how long the equipment had been inoperable. The FCC found that the logs were in worse shape than the equipment and had not been kept up to date to indicate how long the equipment had been out of service. The FCC's rules (Section 11.35(b), to be precise) permit stations to operate up to 60 days with defective equipment. Because the stations could not refer to log entries proving that the equipment had been broken for fewer than 60 days, the FCC fined each for failing to comply with EAS rules.

Each station was hit with an $8,000 fine for faulty EAS equipment. One of the stations was also walloped with an additional $14,000 in fines for transmitting with excessive power and for failing to maintain its public file. Another station had an additional $13,000 tacked on to its EAS fine for public file and transmitter remote control violations.

Part 17: Subject To Change

FCC Looks To Overhaul Antenna Structure Strictures

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You know how people have been telling you for, like, years that you really ought to clean out your refrigerator? And when you finally get around to it, you find (among other things) that those fuzzy things that look like a science experiment sprouting behind the old jar of maraschino cherries at the back of the top shelf have sell-by dates that went by several years ago?

That's what the FCC is experiencing right now – but instead of its refrigerator, what needs cleaning up are the rules governing antenna structure construction, lighting, marking and maintenance.

And so the Commission has released a Notice of Proposed Rulemaking (*NPRM*) looking to overhaul its tower-related rules, which comprise Part 17 of the rules. While the Commission specifies a number of particular changes it has in mind (see below for examples), the proceeding appears to encompass the entire regulatory scheme of Part 17. Anyone who has an antenna structure or expects to build one may want to take the opportunity to offer their suggestions, since history suggests that, once the structure rules are revised, they're likely to stay that way for a while.

The FCC, of course, has long required all of its regulatees to comply with various non-RF related aspects of their antenna structures. (Insider tip: While you may want to refer to them as "towers", don't; the government prefers the more elegant term "antenna structures".) And it routinely issues forfeitures for non-compliance with, *e.g.*, lighting and painting specifications. The goal is to keep aviators and aviation passengers from flying into those structures.

But because the focus here is on aviation, the FCC shares antenna structure responsibilities with the Federal Aviation Administration (FAA). Historically, the FAA has set most of the substantive standards (for, *e.g.*, lighting and painting), even though the FCC has the responsibility for enforcing those standards. But the two agencies apparently don't coordinate as well as they might – and, as a result, discrepancies between the FAA's requirements and their FCC equivalents can develop.

For example, the FCC rule section on painting/lighting specifications currently requires conformance with an FAA circular that was superseded, by the FAA, more than six years ago. (This problem had been called to the FCC's attention back in 2006.) The FCC proposes to fix the problem now by (a) deleting references to any circulars, and (b) requiring instead that structure owners comply with whatever determination the FAA issues with respect to their particular structures.

Along the same lines, Sections 17.14 and 17.17 of the Commission's rules – which specify (a) which structures are subject to notification to the FAA and (b) which are exempt – merely parrot the FAA's rules. The FCC correctly observes that this approach "risks creating confusion in the event the FAA were to change its criteria". So now the FCC proposes simply to cross-reference, in its own rules, the corresponding FAA rule.

Curiously, discrepancies within the FCC's own rules have developed as well. Sections 17.2 and 1.907 both purport to define "antenna structure", but they use slightly different language. The Commission asks whether the two should be "harmonized". (Our suggested answer: "yes".) And the FCC's definition of "antenna structure owner" – *i.e.*, the guy who bears ultimate responsibility for compliance with lighting/marking/etc. requirements – could be read to include not only the structure's owner, but also the owners of any antennas that happen to be located on the structure. Since that reading would be inconsistent with longstanding Commission precedent, the FCC suggests that the definition should be clarified some.

Similarly, FCC rules currently require that each structure's Antenna Structure Registration number be displayed "in a conspicuous place so that it is readily visible near the base" of the structure. But elsewhere the Commission has suggested that the number be displayed "along a perimeter fence" or "at the point of entry of the gate" – in both cases, places not necessarily "near the base" by any means. Since the purpose of the display is to provide the public information, the latter approach seems to make more sense than the one in the rules. The FCC proposes to resolve this by requiring the display to be visible from "the closest publicly accessible location[s]" near the base.

And if you're looking for internal discrepancies, look no farther than Section 17.58, which requires compliance with Section 1.70 of the FCC's rules. But check this out – Section 1.70 was deleted from the FCC's rules in 1977! Not surprisingly (but without a hint of obvious embarrassment), the Commission now proposes to delete Section 17.58.

The Commission also proposes to streamline requirements regarding inspection and maintenance of marking and lighting by, *e.g.*, eliminating the separate inspection component entirely while retaining the obligation to as-

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Compromise Tower Agreement - For The Birds

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As the FCC tries to get a grip on its overall regulation of antenna structures (*see* our related story on page 4), there is a ray of hope that one historically contentious aspect of the tower registration process may be heading toward a compromise solution. In May a Memorandum of Understanding (MOU) was signed by several communications industry groups ***and*** several conservation groups. In their MOU the parties propose some interim processing standards for the FCC that might break a years-long impasse and result in new procedures (interim, at least for now) governing the regulation of new tower construction.

The issue here is, for the most part, birds.

Since way back in 2001, conservation groups (including the American Bird Conservancy and the Forest Conservation Council) have been pushing to get the Commission to take steps to help save birds in the Gulf Coast region. They claimed that bird collisions with communications towers kill millions of birds annually – just the kind of thing that the National Environmental Protection Act (and the Endangered Species Act and the Migratory Bird Treaty Act) were designed to address.

However, the Commission's relatively loosey-goosey (to use technical avian terminology) approach to tower regulation provided no mechanism for any potential objectors to bring such concerns to the FCC's attention before any tower was constructed. While many towers *are* subject to the Commission's Antenna Structure Registration (ASR) program, the registration process has historically not included any *pre*-registration public notice of proposed construction. In a 2002 petition, the bird fanciers asked that the Commission start issuing such pre-registration notice; they also argued that the Commission should have undertaken separate environmental assessments for about a gazillion towers already built throughout the Gulf Coast region.

The Commission looked into the claims preliminarily, but ultimately decided to consider bird-related issues on a nation-wide basis (not just in the Gulf Coast). The birder groups were not inclined to wait, and they sought judicial intervention. In 2008, the U.S. Court of Appeals for the D.C. Circuit landed on the side of the avian avengers. The Court concluded that the FCC needed to straighten up and fly right, with more notice

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Hark! The Tower Angels Sing!

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If you happen to be a tower owner using the Hark Tower Systems, Inc. lighting monitoring system – good news!! The Wireless Telecommunications Bureau has announced that you are now eligible for expedited processing of requests for waiver of the quarterly inspection requirement under Section 17.42(b) of the Rules.

Several tower lighting monitoring systems, including the Eagle Monitoring System by Flash Technology and the TowerSentry Monitoring System, as well as the Hark system (as we reported in the May, 2007 *Memo to Clients*) have been deemed by the Commission to offer "sufficiently robust monitoring of the control devices, indicators and alarm systems so as to render quarterly inspections unnecessary." In light of this, the WTB has adopted an expedited process whereby a tower owner using one of these systems may obtain a waiver of the quarterly inspection requirement by certifying that:

- its towers are monitored by one of the approved montioring systems (*i.e.*, Hark, Eagle, or TowerSentry), under the process described in the Commission's 2007 ATC/GSI Waiver Order; ***AND***
- it maintains a means to receive notifications of failures from the monitoring system so that the tower owner may readily carry out its duties under Part 17 of the Rules.

The certification must be made under penalty of perjury by a company officer (or person of similar responsibility) with actual knowledge of these facts. This certification and waiver request must be submitted in hard copy to the FCC as usual (no CDBS or ULS e-filing alternative is currently available), but should also be emailed for quicker processing to part17@fcc.gov.

While relief from the quarterly inspection requirement is certainly a plus, this waiver process does *not* offer complete inspection requirement relief – towers must still be inspected annually.

Report from Planet KidVid

Station Fined For Failing To Publicize Children's TV Reports

Precise basis for calculation of penalty unclear

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As reported elsewhere in this issue (*see* Page 3), the Commission recently issued a spate of decisions imposing hefty fines for apparently hefty failures to control the amount of commercials aired during children's programming by certain television stations (along with various other violations of the children's television programming rules). A couple of these cases raise noteworthy issues, particularly when read in conjunction with other recent decisions on children's television matters.

One example: a Washington state station was fined a total of $70,000, $60,000 of which was for airing, on 86 different occasions, a spot that was deemed to create a program length commercial; the remaining $10K was for the station's failure, over the course of one year, to publicize the existence and location of the children's television programming reports.

Finding the happy medium has been left largely to the licensee's discretion, with the threat of large fines if the licensee guesses wrong.

Compliance with the rule requiring licensees to publicize their Form 398 children's TV reports has been a troublesome area for some time. One problem is that the rule itself is vague – it requires publicizing in an "appropriate manner", without giving any hint as to what might or might not be "appropriate." Nor has the Commission provided much guidance – say, in illustrative public notices or particular decisions – about how much publicizing may be enough or what means of getting the word out may be sufficient. It's probably safe to assume that making no efforts at all over a period of years, or even an entire license term, to publicize the availability of the reports would not be good enough; conversely, it's also probably safe to assume that airing several announcements per day would probably be more than enough. Finding the happy medium has been left largely to the licensee's discretion, with the threat of large fines if the licensee guesses wrong.

The Commission did give some guidance in a case involving an Oklahoma station which was decided earlier this year. There, the licensee claimed that (a) it had complied by posting of its Form 398 reports on its website during the license term, but also that (b) it had changed its practice to add on-air announcements to publicize its website and the placement of its children's TV programming reports there. (Actually, the licensee's renewal application stated that the station's program schedule was posted, with indications as to E/I programming and the intended age range – not quite the same thing as the Form 398 – and that the new on-air notices aired weekly.) The Commission held that merely posting the Form 398 on the station website would ***not*** be sufficient, but that the practice of combining the posting with weekly announcements ***would*** do the trick. The fine imposed for the noncompliance (*i.e.*, for the period of the prior license term prior to the addition of weekly announcements) was fixed at $10,000, but was reduced to $8,000 due to good behavior in the past.

The $10,000 figure raises another point. In the Oklahoma case, that amount represented the fine for a violation which extended over an entire license term. The Washington station, by contrast, admitted to a violation of only a year's duration – and it could be argued that the violation was of even a lesser duration, since the Commission has never specified exactly how often stations must publicize their reports. For example, one could conclude that quarterly notices (*i.e.*, about the time that the reports are prepared and filed) would be appropriate. In any event, it is clear that the violation in the more recent Washington case lasted no more than a year and yet still netted a $10,000 fine, the same amount that the Oklahoma station received for a full license term's transgressions.

The Oklahoma station had argued that its own fine should be reduced because other similarly situated stations had received substantially lesser fines (in the $3,000-$4,000 range). The Commission rejected that argument, however, based on the fact that the licensees in those other cases had failed to publicize for only a portion of their license terms. But the Commission failed to point out that, in those instances, the violations had in fact extended for periods greater than one year. This leaves the Commission in the awkward position of having held that a fine of $3,000 or $4,000 was appropriate when the violation lasted only a few years, but then having turned around and fined a station $10,000 for a violation of a year or less.

Of course, the Commission may try to argue that changed circumstances justify increased forfeitures over those imposed in a previous renewal cycle. In a case involving a Florida station released in May, the staff noted that the forfeiture amount had been increased because previous fines had apparently not had a sufficient deterrent effect. Therefore, it stated, in cases in which the violations are comparable to those reported in an earlier renewal cycle, the fines are being raised to strengthen the deterrent effect. The only problem is that many of the earlier cases with lesser

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Turner turn-around try turned down

Supreme Court Mum On Must-Carry Market Mod

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The must-carry rules have dodged another bullet. The Supreme Court has declined to hear an appeal filed by Cablevision relative to last year's decision by the U.S. Court of Appeals for the Second Circuit upholding a must-carry "market modification" ruling by the FCC.

The must-carry rules have long been a thorn in the side of the cable industry – and understandably so. Those rules compel cable companies to carry local stations in their markets, for free. Of course, recent developments on the retransmission consent front might indicate that local station carriage may in fact have considerable value to cable operators. (For example, check out the related article in the March, 2010 *Memo to Clients*.) But still, the concept of "must-carry" – where the government orders a company to give away some of its services for free – is a source of considerable unhappiness in Cable Land.

In the 1990s the cable industry launched a full-scale attack on must-carry, and came close to getting it tossed by the Supreme Court a couple of times. But in both instances (known to *cognoscenti* as the "*Turner*" decisions – since Turner Broadcasting was the named petitioner in both the 1994 and the 1997 cases), a narrowly-divided Court upheld the FCC's rules and the Communications Act provisions that gave rise to them.

The *Turner* decisions were noteworthy because they involved "facial" challenges to must-carry. That is, the challengers' claim was that the law was unconstitutional on its face, without regard to any particular set of facts to which the law might be applied. A bare majority of the Supremes, apparently convinced that the law might be constitutional in at least some settings, were not inclined to go that far. However, they reserved judgment as to whether must-carry would survive an "as applied" attack – *i.e.*, a challenge based on a specific factual setting – depending, of course, on the peculiar facts of the case.

Cablevision presumably thought that it had an excellent candidate for an "as applied" challenge when WRNN-TV, a station in Kingston, New York – about 100 miles north of New York City – asserted must-carry rights on some Cablevision systems in Long Island. The station's signal had been entitled to must-carry on those systems in the early 1990s, but Cablevision had convinced the Commission to exclude those systems from that obligation, relying in particular on the reach (or lack thereof) of the station's Grade B contour. No problem. The station simply moved its transmitter about 50 miles closer to NYC, thereby correcting the Grade B shortfall.

With its newly shifted Grade B in place, the station asked the Commission to restore its previous must-carry rights on the Long Island systems. The Commission agreed, even though the Media Bureau (which had the first crack at the issue) appeared less than firmly convinced that must-carry was warranted. Still, for both the Bureau and the Commission, the Grade B issue was plainly important.

Since the *Turner* cases pointed to the goal of preserving local broadcasting as a primary justification for the must-carry rules, the Kingston case seemed to have obvious potential for bursting that bubble. After all, how could carriage of a station on systems more than 100 miles away be said to be doing anything for "local" broadcasting?

A crucial question: was the market modification at issue "content neutral"?

Maybe not a lot in Cablevision's eyes, but at least enough in the Second Circuit's eyes to uphold the FCC's decision.

Actually, the precise quantum of "local" programming and the precise proximity of Kingston to the cable systems in question were not nearly as important to the Second Circuit as was a more obscure legalistic factor: was the market modification at issue here "content neutral"? If a law is "content neutral", then it has far fewer First Amendment problems than a law which is "content based".

In the first *Turner* decision, the Supreme Court had declined to decide whether a market modification motivated by concerns for localism would be "content neutral" or "content based" – although the Court did hint that it might be the latter, which would have been good for Cablevision in the Second Circuit. Unfortunately for Cablevision, though, the Second Circuit decided that the FCC's action was content neutral. And that determination in turn made it easy for the Circuit to conclude that there was no First Amendment problem here at all. The Circuit had even fewer problems with Cablevision's Fifth Amendment claim. (Cablevision had argued that the market modification and resulting must-carry obligations imposed an unlawful "taking" of Cablevision's property; the Second Circuit disagreed.)

But as a practical matter, the Second Circuit's decision, while no doubt disappointing to Cablevision, still pro-

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tions how those goals should be defined and whether there are other goals it should attempt to achieve through its ownership rules.

The five particular rules at issue in the quadrennial review are: (1) the local television ownership rule; (2) the local radio ownership rule; (3) the newspaper/broadcast cross-ownership rule; (4) the radio/television cross-ownership rule; and (5) the dual network rule. The *NOI* also requests comment on whether the Commission has any authority to revise the national television ownership limit, currently set by statute at 39 percent.

The bulk of the *NOI* is devoted to discussing how to define the Commission's policy goals in relation to its media ownership rules. The *NOI* identifies four groups of "participants in the media marketplace" – consumers, advertisers, content creators, and "platform owners" (*i.e.* broadcasters, newspapers, cable systems) – and requests comment on how the rules, and the Commission's policy goals, affect each.

The FCC identifies three policy goals: localism, competition, and diversity

The *NOI* also questions how to relate the FCC's policy goals (localism, competition, and diversity) to the media ownership rules. In particular, the Commission wants to know how:

? to define the policy goals of localism, competition, and diversity;
? to promote those goals in the current media marketplace;
? these goals are relevant to each of the four types of marketplace participants;
? to measure whether these goals are met by any given ownership structure;
? to tell when a goal has been met; and
? to balance the three policy goals if they are in conflict.

And the Commission also asks whether new or revised rules would help to meet these goals.

Evidencing the Genachowski Commission's oft-stated desire to be more "data-driven", the *NOI* also questions whether its policy goals are quantifiable and whether any studies or projects should be examined or commissioned to analyze the ownership rules.

In addition to the very broad invitation for comments on amorphous policy issues relating to ownership regulation, the *NOI* poses a number of more specific questions for each of the three stated policy goals.

Competition: The Communications Act specifically ties the Commission's review of its media ownership rules to competition. So the *NOI* asks how competition should be defined in today's media marketplace and how to determine whether combined ownership of multiple outlets helps or harms competition. Other concerns on the table include:

? how to define relevant geographic and product markets, since the Commission will be evaluating competitiveness of markets, not individual firms. Also, how should other factors, such as competition from the Internet and the current financial difficulties facing traditional media, affect this analysis.
? how should "consumer welfare" (in the FCC's view, the true goal of increased competition) be measured since traditional price competition may not apply to a free broadcast product.
? whether – and if so, how – to assess competition between different media platforms, including competition for content, competition for ownership of media outlets, and competition in advertising prices.
? the impact of the ownership rules on specific demographic groups, including minority ownership of media outlets and the provision of programming serving particular demographic groups.

Localism: The *NOI* also seeks comment on how to define localism in the context of the media ownership rules and how to promote it, however it is ultimately defined. If localism is defined (as it traditionally has been) by analysis of locally responsive programming, what types of programming should count in this analysis, and how can they be quantified? If local consumers are satisfied by their local media, would this be sufficient to show that the localism goal is being met? Are there other ways to measure localism, such as by looking at local programming inputs (*i.e.*, local hiring or spending on local news). And on a broader scale, do locally produced content or local ownership actually matter? Finally, and potentially very importantly, a footnote requests comment on the "ease and usefulness" of the broadcast license renewal process, suggesting that the Commission could attempt to address that process in the context of this ownership review, as various public interest groups have urged it to do for some time.

Diversity: The *NOI* requests comment on how to define diversity. It identifies five historical approaches to diversity – program diversity, viewpoint diversity, source diversity, outlet diversity, and minority and female ownership – and questions the relative importance of each and how to measure them. The *NOI* seeks comments on the tentative conclusion that the relevant geographic market in which to evaluate diversity is the area in which "all citizens have [roughly] the same range of media choices". Also, should diversity be measured looking at each media platform individually or by evaluating some combination of outlets?

The FCC recognizes that there may be some tensions between and among these three policy goals, and questions how any conflicts among them should be resolved. Also, are there any additional policy goals that

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should be considered? And how do the existing ownership rules serve these goals? Just to be sure that nothing is overlooked, the *NOI* also asks for comment on any other pertinent issues.

With respect to the five particular ownership rules under consideration, the Commission raises a number of relatively specific questions, including:

Local television ownership rule: Are the "eight voices" test and/or the "top four" restriction still relevant and, if so, how they should be evaluated? Should compliance still be evaluated using television contours and, if so, what contours should be used in the post-DTV transition world? If the rule is retained, should the failed/failing station waiver criteria also remain in place?

Local radio ownership rule: Does it continue to make sense to retain separate sub-caps for AM and FM radio stations? How, if at all, should such factors as LPFM stations, competition from other media, or market share be considered in crafting a local radio ownership rule?

Newspaper/Broadcast Cross-Ownership: Would relaxation of the newspaper/broadcast cross-ownership rule help newspapers survive in a way that would increase local news and information? If the rule were to be retained, what types of waivers should be available? If the rule were to be relaxed, what factors should be examined in determining when to allow combinations – and in particular, should market share be considered and how should voices in the market be measured? Finally, should radio and television be treated differently for purposes of this rule?

Radio/Television Cross-Ownership: Should (and if so, how) the existing rule for counting voices in the market be adapted to account for recent technological and competitive developments? How should the FCC justify a decision to retain the current numerical limits and under what circumstances should waivers be available?

Dual Network Rule: Should the dual network rule continue to specifically prohibit mergers between ABC, CBS, NBC, and Fox? If it's retained at all, should the rule be revised to more generally target mergers between networks with specific characteristics? If so, what should those characteristics be?

Finally, the *NOI* questions the type of regulatory regime that should be implemented if the existing rules are revised. Alternatives include bright-line rules, a case-by-case approach, or some kind of hybrid approach – and the FCC asks for comment on the relative merits of each. In an echo of its 2003 revision of the rule, the Commission also asks whether it should replace its existing rules with a "broad cross-media approach" to regulation.

Lastly (and really not at all surprisingly), the Commission asks how, if at all, its National Broadband Plan is relevant to media ownership.

Notably absent from the *NOI* is any significant discussion of the appeals of the Commission's 2008 ownership order that are currently pending in the U.S. Court of Appeals for the Third Circuit. The outcome of that proceeding could obviously have a significant impact on the Commission's regulation of media ownership. Media parties and public interest parties filed briefs with the Third Circuit on May 17. The Commission's brief should be filed in the coming weeks, and should shed some additional light on the current Commission's views on the underpinnings of its media ownership regime. Although the Commission in the *NOI* does not specifically address the pending Third Circuit appeal, the questions raised there are clearly relevant here.

While the Commission can't be faulted for launching this *NOI* – it is, as noted above, required by Congress to do so – the utility of the exercise is, at best, questionable. Why, after all, should the agency undertake an analysis of ownership rules the validity of which has still not been resolved by the courts? And more fundamentally, what purpose is served by opening yet another proceeding in which the Commission is attempting to come up with specific regulations to address broad issues and policies which the Commission has still not been able to define? One obvious example – the Commission identifies "localism" as a basic "policy goal", but the Commission doesn't define "localism" and, instead, solicits comments on how to define it. That's bad enough, but let's not forget that, in 2004, the Commission adopted an inquiry focused specifically on "localism". That proceeding (MB Docket No. 04-233) is still pending. And yet, here comes the FCC, asking the same fundamental, definitional questions — again.

Here comes the FCC, asking the same fundamental, definitional questions — again.

How can the Commission be expected to rationally develop rules to address basic policies which the Commission has not defined, despite the fact that it's been trying for years to do so? And further complicating the problem is the fact that the impact of media on the public is subject to constant change as a result ***not*** of governmental regulation, but of technological change and private consumer choice – neither of which is readily controlled by the government. That means that, in attempting to formulate ownership rules, the FCC is shooting at a constantly moving target. And since the time-line for adoption of ownership rules is measurable in years (as we have seen in the past two ownership review proceedings), the likelihood that the Commission will be able to formulate rules in 2010 that will be meaningful in, say, 2013, appears relatively small.

Nevertheless, the FCC, like Sisyphus, starts to roll its rock back up the hill because that's its fate.

The filing dates for comments and replies have not been set, but check back here for updates; if there's anything you ever wanted to tell the FCC about broadcast ownership, this is your chance.

SOC-ing it to the cineplex?

Waiver Opens Door To Closing Movie Windows

By Jeffrey J. Gee
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In 1981, MTV told us that video killed the radio star. (Actually, the Buggles told us that in 1979 – but their song got on the map by being the first video shown on MTV.) Now, some 30 years later, it's about to kill the cinema star, or at least the cineplex. At least, that's what some alarmists fear will happen as a result of a recent FCC decision to allow cable and satellite companies to switch off set-top box outputs that do not provide sufficient copy protection.

At issue is a heretofore obscure FCC rule that prohibits cable and satellite companies (also known as multichannel video programming distributors or MVPDs) from disabling the audio-video outputs of customer's set-top boxes. The prohibition is designed to protect consumers by ensuring that early adopters of high definition television (HDTV) would be able to connect their televisions to sources of HDTV programming. The prohibition, however, has long worried content providers because analog outputs (and some digital outputs) do not recognize copy protection technology. As a result, a movie flowing through an analog output might be going to a television set but it might also be going to a recording device, effectively by-passing the industries copy protection schemes.

We will be watching these developments with great interest (and microwave popcorn).

In an attempt to plug this "analog hole", the Motion Picture Association of America (MPAA) requested a broad waiver of the rule. The MPAA, which represents the studios that make and distribute movies, argued that without the ability to disable these non-secure outputs, content owners would never authorize distribution of the latest and greatest content through cable or satellite. A grant of the requested waiver would facilitate – and might even encourage – movie studios and MVPDs to provide home audiences with first-run high definition movies and other premium content.

The FCC agreed, although it placed several limits on the waiver. In practice, the waiver allows MVPDs to make use of a technology known as selectable output control (SOC). SOC allows an MVPD to encode programming with a signal that remotely disables certain of the audio/video outputs on the end user's set-top box. SOC particularly targets those outputs that do not recognize copy protection technology (*e.g.*, analog outputs). Allowing MPVDs to use SOC, the FCC reasoned, would encourage content providers to make new, high definition content available to home audiences because it would reduce the risk of unauthorized duplication and distribution of the content. The FCC attempted to limit any negative impact on consumers by limiting the timeframe in which SOC may be activated, limiting the outputs targeted by SOC activations and warning that SOC implementations that cause consumer confusion could lead to a revocation of the waiver.

This waiver arguably benefits consumers by encouraging content providers and MVPDs to provide access to first run movies to home audiences. Certain commentators, however, have proclaimed this as the beginning of the end for movie theaters. Why would people continue to endure traffic, parking, eight-bucks-a-bucket popcorn, and noisy, cellphone-using, chair-kicking fellow audience members if all the latest movies are available at home, in high def?

As multiplex screens grew smaller and television sets grew bigger, theater owners could at least take comfort in the fact that cable subscribers were just about the last people to get new movies. Hollywood's longstanding "windowing" system provided new movies to MVPDs only after they had been released in theaters and then on DVD and other fixed media. The idea has always been that audiences would pay once to see it theaters, again to buy the DVD and again (*via* their cable bill) to see it on cable. Now theater owners may need to face the prospect of losing their window of exclusivity as studios have increased incentives to deal directly with MVPDs on early releases.

Such fears are not without merit. Two weeks after the FCC released its order, *The Wall Street Journal* reported Time Warner Cable Inc.'s proposal to several Hollywood studios to allow its subscribers to see movies at home just 30 days after theatrical release at around $25 per order. According to the report, some version of this proposal may result in first run movies in people's homes by the end of this year. Given that this writer's last trip to the movies cost over $100 in movie tickets, parking, popcorn, and babysitting, we will be watching these developments with great interest (and microwave popcorn).

Specific details up in the air

Interim ASCAP Fees Take Temporary Dip

By Kevin M. Goldberg
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In May a judge in the U.S. District Court for the Southern District of New York threw an interim bone to radio broadcasters in their quest for lower royalties paid for performance of musical works. Before you start setting off the fireworks, though, know that the precise effect on individual stations is still unknown. And it will in any event be limited because of its interim nature. Oh yeah, and it's subject to retroactive adjustment at some point down the line.

But, hey, take 'em where you can get 'em, that's what we always say.

This is temporary and subject to retroactive adjustment once the permanent rate is set.

Back in the January, 2010 *Memo to Clients,* we wrote about the need for interim royalty rates to be paid by radio stations to ASCAP and BMI for the performance of musical works (the underlying music and lyrics in each song transmitted over-the-air and on the Internet). The previous rate-setting arrangement expired on December 31, 2009, and rates for the next term are still in negotiation – so interim rates needed to be established to "ensure a reasonable flow of funds" to ASCAP and BMI. We *thought* the interim rate was going to amount to a seven percent reduction in the rates previously paid by radio stations to ASCAP. Our thinking was based on an agreement announced between the Radio Music License Committee (RMLC) and ASCAP in January. But now Judge Denise Cote has issued a Memorandum Opinion and Order which supersedes that agreement and further ***reduces*** the amount paid *across the board*.

Judge Cote's decision is short on analysis – in fact, at three pages (and two lines), it's just plain short. She offers no details at all. Instead, she points out that she has read the submissions of the various parties and has heard their arguments, and without further ado she announces that "the interim fee payable by the RMLC is $192,413,111 per year" – a figure that amounts to ***$40 million less*** than that which was paid in 2009.

The actual details – including when the reduction will be implemented and how it will be allocated on a per-station basis – should be announced in the near future. (Check our blog – www.CommLawBlog.com – regularly for updates.) But here's what we know now (thanks mainly to an update on the RMLC website):

- © Individual stations will pay less to ASCAP during this interim period than they paid in 2009;
- © Though the now-discarded interim rate was imposed as of January 1, 2010, stations won't get any money back for any "overpayment" so far in 2010 – that is, even though Judge Cote's bottom line number is less than the previously-announced/now-superseded interim rate, and RMLC members will thus have technically overpaid some since January, anyone who overpaid should NOT expect a rebate check in the mail; instead the interim fee adjustments will be worked into your bill starting in June or July bill – so keep an eye out for that;
- © This is temporary, applicable only until the permanent rate-making decision is issued by the District Court – and it's subject to retroactive adjustment once that permanent rate is set.

Here's what we don't know:

- © Just how much of a reduction any individual broadcaster will see in its individual bill from ASCAP and when it'll first see that reduction;
- © Whether broadcasters will see a similar reduction – or any reduction at all – from BMI (similar court proceedings are pending relative to BMI, so we may expect some decision on that point shortly);
- © How long the interim rate will be in effect (it could be years before the permanent rate is set).

As we said, we'll tell you more when we know more.

(Continued from page 6)

fines were in the *same* renewal cycle. The Florida station filed its license renewal application in 2004, in only the third television renewal group. The fact that the FCC didn't get around to deciding its case for five-and-a-half years does not make the violations that occurred prior to 2004 any worse.

The one thing that is clear from the recent decisions is that the Commission remains bound and determined to hold licensees' feet to the fire when it comes to childrens' television requirements. Whether or not consistent with past practice, five figure fines appear to be the developing standard. Regardless of the lack of the less-than-specific requirements of the rules – or perhaps especially in view of that lack – television licensees may wish to pay particular attention to their efforts to comply in this area.

The job's never over 'til the paperwork's done

Want To Save Yourself $3,000? Update Your ASR Registration!

By Steve Lovelady
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Here's a tip for anyone who's buying a station the assets of which include a tower subject to FCC registration.

When ownership of an antenna structure which is subject to FCC registration changes hands, the new owner must update the tower's Antenna Structure Registration (ASR) to reflect that change. The update does *not* occur automatically when notice of consummation of the assignment of the station's license if filed with the FCC. Moreover, the Commission has made clear that responsibility for insuring that the notification is made falls on the *buyer*, not the seller. Since the ASR information is in a separate FCC database, it needs to be updated separately. Way back in our March, 2004 *Memo to Clients*, readers were reminded of this relatively obscure requirement.

We mention this here because a couple of licensees apparently didn't get the memo: both were the subject of recent forfeiture orders – to the tune of $3,000 each – for failing to update their ASR tower ownership.

So, apparently, you can either remember to update the FCC's records, or you can run the risk of having to fork over $3,000. Your call.

Updating ownership information is a relatively simple online chore – one which certainly seems to be easier than writing a $3K check to Uncle Sam. You go to the FCC's ASR homepage, login (you'll need your FRN and FRN password for that), and work your way through a number of screens. We'll get you started: (1) The first choice you have to make after logging in is simple: pick "Manage Your ASR Numbers"; (2) at the next screen, select the option for "OC – Ownership Change", and then click "continue". You'll encounter several more screens after that. You'll need the FRN of the tower's seller (since the tower's registration presumably is listed under the seller's ID), and it will be helpful to have the registration number(s) of the tower(s) changing hands. The later screens may not be as obviously user-friendly as, say, your favorite ATM, but not to worry – you should get the hang of it in short order.

And remember, by taking care of this little chore, you're insuring yourself against a potential $3,000 disappointment.

Good luck.

(Continued from page 5)

to the public and better consultation with the Fish and Wildlife Service, among other things.

The Commission has had the matter under advisement since then.

With the FCC's wheels grinding ever so slowly, the parties – that is, a number of bird groups, on the one hand, and a number of tower folks, on the other – got together to work out some guidelines of their own. The parties to the MOU include the American Bird Conservancy, Defenders of Wildlife and National Audubon Society (collectively referred to as the "Conservation Groups"), and CTIA, NAB, PCIA and the National Association of Tower Erectors (collectively, the "Infrastructure Coalition").

The MOU is the result of their efforts. The MOU creates three categories of ASR actions, each entailing different notice and filing requirements.

Category #1 ASRs include new towers taller than 450 feet above ground level (AGL). For these bad boys, the ASR filing would have to include an Environmental Assessment (EA) ***and*** public notice by the FCC. An EA is no small matter. It requires, first, that the applicant undertake a detailed assessment of an extensive panoply of environmental, cultural, historical and other factors. The Commission then conducts an independent review of the EA and any comments received to determine whether the proposed facility is worthy of a Finding of No Significant Impact (FONSI) on the environment. If the Commission concludes that a FONSI is in order, then the application can be granted.

Category #2 ASRs include: (a) new towers between 351 and 450 feet AGL and (b) certain changes in lighting styles (*i.e.*, from a "more preferred FAA Lighting Style" to a "less preferred" style). These would have to be put out on public notice, but no EA would be required up front, although the Commission *could* eventually require an EA to be filed after the agency reviews the ASR application and any comments filed in response to the public notice.

Category #3 ASRs include: (a) new towers no taller than 350 feet AGL; (b) certain other types of tower modifications that normally require an ASR (such as administrative or ownership changes, dismantlement, repair, parts replacement, etc.); and (c) certain changes in lighting styles (*i.e.*, from "less preferred" to "more preferred"). No up-front EA would be required for these. The parties could not agree on whether public notice should be required.

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sure proper lighting at all times. Timely notification of outages would still have to be made to the FAA. As an alternative, if inspection requirements are retained, the FCC may consider exempting certain network operations control center-based monitoring systems.

Another proposal: defining what alterations to a structure would require a new FAA study. The Commission's rules currently contain no such definition, even though the FCC has, since 1995, applied the informal standard that any change in height of one foot or more, or any change in location of one second or more, would trigger a new FAA study. The Commission now proposes to codify that standard.

And another: structure owners would have to keep records of observed or known lighting outages/improper functioning for two years.

Despite the Commission's historical inclination to let the FAA call the shots vis-à-vis the substantive standards for antenna structure lighting/marking, a number of the *NPRM*'s proposals suggest a curious independence of spirit on the FCC's part.

For example, to determine the coordinates of a structure, the FCC suggests that it might insist on specific accuracy standards or survey methods. But the FAA has declined to impose such a requirement, and conflicts with the FAA's process could arise if the FCC insists on specific standards/methods that yield results at odds with the FAA's approach.

Along the same lines, the FAA requires structure owners to notify it of the structure's construction or dismantlement within five days. The FCC, by contrast, provides only 24 hours for such notice and, without explanation, the Commission proposes to stick by that limit.

Since the *NPRM* is intended to "update and modernize" all of Part 17, there are more specific proposals, as well as broad invitations for comments and suggestions. This presents an excellent opportunity for anyone with an antenna structure to weigh in.

But one of the more intriguing aspects of the FAA/FCC relationship may be out of the FCC's hands for now. The FAA has on occasion asserted authority over not only the physical nature of antenna structures, but also their RF characteristics as well. (The FAA's approach is understandable in view of the fact that the FCC defines "antenna structure" to include not only the physical structure, but also any radiating and/or receive systems and related gear.) In particular, at times the FAA has withheld "no hazard" determinations based on the particular frequencies to be transmitted from the structure – for example, where operation of a proposed FM station would interfere with navigation frequencies used at a nearby airport. Since 2006 the FAA has been considering its own *NPRM* which would expand its own notification requirement to include a range of frequency-specific limits. In its *NPRM* the FCC now inquires whether the FCC's rules or policies should be altered in the event the FAA adopts the proposals pending in *its* 2006 *NPRM*. It is not at all clear whether the Commission sees a possible inter-agency impasse here and, if so, what the prospects for resolution might be.

We might all be better off if the FCC and the FAA were to commit themselves to ironing out, once and for all, their shared responsibilities.

While we may welcome the opportunity to chip in our respective two cents' worth to the FCC, all concerned might be better off if the Commission and the FAA were to commit themselves to ironing out, once and for all, all aspects of their shared responsibilities. Unilateral action by either agency creates the possibility of conflict with the other, with resulting confusion for the regulated masses. Of course, the FCC and FAA have been unable to resolve their relationship to date – as is evident throughout the FCC's *NPRM* – so it may be idle to suggest that they should do so now. But there's no harm in asking.

Comments in response to the *NPRM* are due by July 20; reply comments are due by August 19.

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The MOU includes some fine print concerning what constitutes a "replacement tower" as opposed to a "new tower", and some cross-references to certain FAA Advisory Circulars. But by and large the MOU is a short and sweet document that gets right to the point. It also specifically identifies as an "unresolved issue" the question of whether public notice should be required for Category #3 ASRs, but the parties all agree to abide by whatever the FCC may decide in that regard.

The concept of pre-registration public notice for two large categories of towers is a major change from the way the Commission has historically done business. But the fact is that the 2008 opinion by the D.C. Circuit clearly directed the Commission to come up with some notice mechanism to "ensure meaningful public involvement" in the tower registration process – so the FCC doesn't have much wiggle room there.

The parties have submitted the MOU to the Commission in the still-on-going bird-related proceedings started back in 2003 and 2008. While there's never any guarantee about such things, it's hard to imagine why the Commission would *not* embrace the MOU's approach. But you never can tell, so stay tuned for further developments.

March 22 deadline passes with less than total compliance

Reminder II: Closed Captioning Contact Information Still Due

We told you so. Back in the February *Memo to Clients*, we reminded all video programming distributors (VPDs) that they were supposed to file their contact information with the Commission as required under the newly-effective rules relative to the closed captioning complaint process. The contact information was due on March 22. But did everybody do what they were supposed to? Apparently not, because on April 27, the Commission issued a public notice reminding VPDs of the filing requirement, noting that "many VPDs" have yet to provide the required information. Demonstrating the seriousness of all this, the public notice warns ominously, if somewhat vaguely, that "[f]ailure to provide such information could result in enforcement action." That's tellin' 'em.

Anyway, since the Commission seems to feel so strongly about this, we figure that the least we can do is try to give it a hand – so this is a *Memo to Clients* public service message, reminding VPDs that they're supposed to submit to the Commission contact information to be used in the event of a closed captioning complaint.

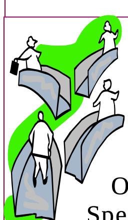
As the public notice indicates, the closed captioning complaint rules provide three ways to get that information to the Commission. Two of those ways are addressed only in passing in the notice, probably because the Commission would prefer that they not be used. (Those two ways are: (1) filing it in hard copy with the Chief of the Disability Rights Office, Consumer and Governmental Affairs Bureau; and (2) sending it in an email to CLOSED CAPTIONING_POC@fcc.gov.) The public notice does go on at some length about the third, preferred, way – submitting the info through the hand webform at https://esupport.fcc.gov/vpd-data/login!input.action.

The Commission is right to push VPDs in the direction of the webform, which has a lot going for it. In fact, it makes you wonder why the Commission offers the other two alternatives at all. Be that as it may, here's the scoop on the webform.

All you need is your FRN, FRN password, and the contact information. The first page you access asks for your FRN and password. After you login with those, you're at a screen with three tabs in the upper left corner. If you haven't entered any contact information for any station (or system, if you're a cable person), you click on the middle tab labeled "New VPD", which will then take you through a series of screens, each soliciting aspects of your contact information. It's all pretty simple (although the Commission provides a "support" tab in each screen, just in case).

The primary advantage of the webform is that the VPD gets to enter the information itself. The other alternatives require FCC staff themselves to enter the data into the system – which obviously introduces the possibility of inadvertent error.

So all you VPDs, let's get to it. We don't want to have to warn you again.



FHH - On the Job, On the Go

Peter Tannenwald participated in not one, but *two* FCC panels — one (on May 6) on the development of the Commission's consolidated licensing system, the second (on May 12) on enhancing the Commission's Spectrum Dashboard.

On May 19 **Mitchell Lazarus** spoke to the National Spectrum Management Association on "Surviving the Spectrum Shortage".

On June 3-4, **Raymond Quianzon** attended the 62nd annual conference on federal taxation at the UVa.

Both Franks will be on the road in June. On June 10-12, **Frank Montero** will be attending and addressing the Puerto Rico Broadcasters Association conference in Ponce. Meanwhile, on June 12 **Frank Jazzo** will participate (along with the NAB's **Dennis Wharton** and retired FCC official **Roy Stewart**) in the Washington Update session at the New Mexico Broadcasters Association annual convention in Albuquerque.

As previously reported here, **Paul Feldman** will be speaking on "Net Neutrality—Friend or Foe" at OTTCon in Atlanta on June 17.

Davina Sashkin has been named to the FCBA 2010 Charity Auction Committee.

Peter, **Paul** and **Lee Petro** all garnered ink this past month for their learned observations. But when it comes to making the grade, **Alan Campbell** took the prize, literally. **Alan** was given the Honorary Alumni Award by Central Michigan University, which recognized him as an "individual who is not a CMU graduate, but gives their time, talents, and enthusiasm as if they were". We'll second that emotion— **Alan**, you're our *Academic Darling of the Month.*

(Continued from page 2)

The Krum licensee wasn't tickled pink about that condition, and asked the FCC to remove the condition and force KIKT to move to Cooper. That request – which KIKT opposed – rested undisturbed until the end of 2009, when KIKT's second permit expired. And on the same day, KIKT filed a third application for the same Cooper facilities. At that point the Krum licensee renewed its request to remove the condition and terminate KIKT's implied STA, pointing out that KIKT had already had more than six (count 'em, six) years in which to construct. KIKT countered that it was "not subject to any order that requires construction . . . by any specific date" and, oh yeah, the Bureau doesn't have the authority to cancel KIKT's implied STA in any event.

The Audio Division was not impressed with KIKT's arguments. It concluded that KIKT had lost "all protection rights" relative to its Greenville facilities back in 2002, when the initial reallotment order moving KIKT's channel to Cooper became final. As a result, the condition on the Krum CP could be deleted, even though the modified Krum facilities would interfere with KIKT's implied STA operation in Greenville. And as to the claim that KIKT wasn't really required to get its modified facilities built by any specific date, well, the Division disagreed with that, too: KIKT's outstanding permit (that would be Permit No. 3) requires completion by its expiration date.

And finally, perhaps the most chilling news. In the Division's view, an implied STA is "subject to summary cancellation if such action is necessary to accommodate the operation of any FM station pursuant to its authorization." Yikes! That means that, if your channel has been modified in such a way as to put you on an implied STA pending completion of the modifications, your ability to continue to operate in that mode could be summarily whacked. While the Division stopped just short of doing that to KIKT here, the thrust of the decision was loud and clear: get the Cooper facilities built now or risk losing authority to continue to operate at all with the Greenville facilities.

The sternness of the Division's reaction may be a function of the facts before it. The Division appears to have concluded that KIKT was involved in spectrum warehousing and may not have been acting in good faith – a conclusion apparently arising from KIKT's practice of getting CPs, letting them expire, and reapplying for them. And KIKT's somewhat in-your-face arguments – that it was under no obligation to construct and that the Division couldn't shut it down anyway – probably didn't sit all that well, either.

But whatever may be the case, all licensees are now on notice of a couple of important things: (a) implied STAs are fragile things; and (b) the Audio Division, at least, is prepared to step in when it determines that an implied STA is being used for warehousing purposes. This should provide considerable incentive to anyone in the middle of a move involving a reallotment (and, thus, an implied STA). The Division's clear message: Get 'er done.

But the Commission itself is not entirely without blame here. It was the Commission, after all, which granted one CP, and then another when the first one expired, and then appeared open to granting a third. More than a decade ago the Commission tried to put a stop to the practice of repeated CP extensions by simply declaring that it would no longer grant *any* extensions. The practice of apply-let expire-reapply arguably serves the same purpose as extensions. Still, in order to produce the supposedly desired result (*i.e.*, extra time to build), that practice requires the agency's cooperation: reapplying for a CP doesn't work if the FCC doesn't grant the reapplication.

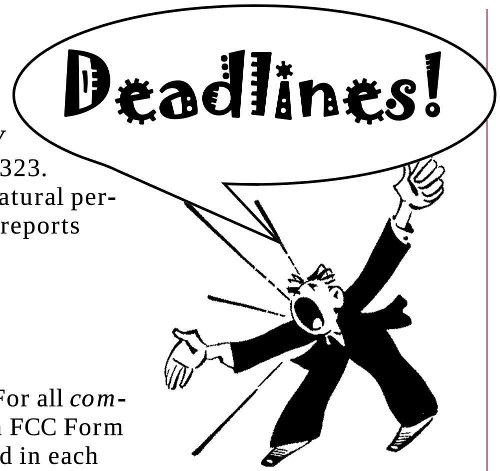
Of course, there may be strong and valid reasons for letting a CP expire and then reapplying for it. Indeed, it's possible that KIKT itself had such reasons. But that approach can still have negative consequences, including undue delay in the introduction of new service. It will be interesting to see whether, in the wake of this decision, the Division becomes more hesitant to grant serial CP applications.

FM ALLOTMENTS PROPOSED – 4/23/10-5/20/10

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (*i.e.*, Drop-in, Section 1.420, Counterproposal)
AK	Fairbanks		224C2 & 232C2	10-81	Cmnt : 6/24/2010 Reply Cmnt: 7/9/2010	Drop-in

Notice Concerning Listings of FM Allotments

Consistent with our past practice, Fletcher, Heald & Hildreth PLC provides these advisories on a periodic basis to alert clients both to FM channels for which applications may eventually be filed, and also to changes (both proposed and adopted) in the FM Table of Allotments which might present opportunities for further changes in other communities. Not included in this advisory are those windows, proposed allotments and proposed channel substitutions in which one of this firm's clients has expressed an interest, or for which the firm is otherwise unavailable for representation. If you are interested in applying for a channel, or if you wish us to keep track of applications filed for allocations in your area, please notify the FHH attorney with whom you normally work.



July 8, 2010

Ownership Reports - All *licensees* and *entities holding an attributable interest in a licensee* of one or more *AM, FM, TV, Class A television*, and/or *LPTV* stations must file an initial biennial ownership report on the revised FCC Form 323. For the first time, sole proprietorships and partnerships composed entirely of natural persons (as opposed to a legal person, such as a corporation) must file reports. All reports must be filed electronically.

July 12, 2010

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. Please note, however, that for television stations, only digital programming will be included, as all analog programming ended last year. Only Class A stations will need to use the analog programming section of the form.

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.

August 1, 2010

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.

EEO Mid-Term Reports - All *television* station employment units *with five (5) or more full-time employees* and located in **California** must file EEO Mid-Term Reports electronically on FCC Form 397. This report must include copies of the two most recent EEO Public File Reports for the employment unit.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Illinois** or **Wisconsin** must file a biennial Ownership Report on Form 323-E. All reports must be filed electronically.

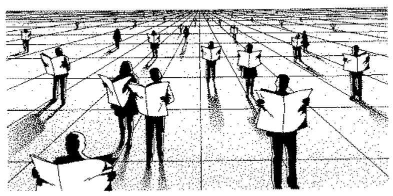
Noncommercial Television Ownership Reports - All *noncommercial television* stations located in **California**, **North Carolina**, or **South Carolina** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

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

Updates On The News

Watts up, Doc? Apparently not! – Well, that certainly didn't take very long. Just last month we reported on a proposal, submitted by self-described "avid listener of AM radio" and radio consultant Richard Arsenault, calling for an across-the-board tenfold power increase for all AM stations – and *already* the Media Bureau has rejected the proposal in no uncertain terms.

Mr. Arsenault's goal was to permit stations to drown out various ambient sources of pesky interference. Conceptually it was a fine idea, although not without considerable practical problems. The Bureau, however, chose not to dwell on the minutiae. Instead, it notified Mr. Arsenault that "your proposal is not in the public interest because it would greatly increase the potential for interference between AM stations and would undermine the Commission's efforts to improve the AM service." Those efforts have been on-going for more than a couple of decades, although it's difficult to gauge their success with any real precision.



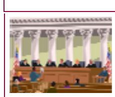
Perhaps the most interesting aspect of the Bureau's terse turn-down is the fact that the Bureau acted at all. The Commission is under no obligation to take any action on proposals for rulemaking. In recent years it has appeared to respond to some such proposals in a sort of passive-aggressive way by inviting preliminary comments on them – thus creating the impression that the Commission may actually be interested in the proposal – but then letting them sit without action, sometimes for years. The result is a de facto denial, even though the proposal technically would probably show up as "pending" or "under consideration". (An earlier proposal by Mr. Arsenault, calling for earlier commencement of presunrise operation by some, but not all, AM stations, may be subject to that approach. While the Commission did request comment on it back in March, nothing has been heard about it lately.)

So the fact that the Bureau has affirmatively, and quickly, denied this proposal is noteworthy. Whether it signals a new approach to rulemaking proposals or just a particularly strong (and negative) reaction to this particular proposal is unclear.

Au revoir, Broadcasting Yearbook – It appears that the 2010 edition of the *Broadcasting & Cable Yearbook* will be its last. Word is that production costs have gotten too high to justify continued publication in the "electronic age". A representative of the publisher has advised that it does not currently have an electronic or on-line alternative, but that there have been some efforts to interest another publisher in the product. For the time being, though, it looks like 2010 will be the end of the line for the Yearbook.

Hurricane season prep – The Commission has reminded one and all that hurricane season is almost upon us – and, with some forecasters predicting "above average" storm activity in the southeast this year, the FCC again offers its assistance to communications service providers needing emergency authorizations or other governmental support. The FCC's 24/7 Operations Center can be reached after hours and on weekends at 202-418-1122 or fccopcenter@fcc.gov. You can also find information about STA's and the like at http://www.fcc.gov/pshs/services/sta.html.

The Commission also urges communications providers to participate in the Disaster Information Reporting System (DIRS), a voluntary web-based system that allows participants to report "communications infrastructure status and situational awareness information" to the Commission during times of crisis. You can get more information about DIRS at its page on the FCC's website (http://www.fcc.gov/pshs/services/cip/dirs/dirs.html).



(Continued from page 7)

vided an important opportunity to get the Supreme Court involved in must-carry again. If you're looking for a definitive determination that must-carry (including its various components, such as market modifications) is unconstitutional, you will eventually have to get to the Supremes with a good set of facts. The WRNN case seemed to provide just that.

For some reason, though, the Supreme Court was not inclined to take the case. Why? It's impossible to tell. In denying Cablevision's petition (technically referred to as a "petition for *certiorari*" or a "cert petition"), the Court offered no insight, as is its custom in such matters. The Supremes' order consists of a heading labeled simply "Certiorari Denied", followed by a nine-page list of a couple hundred entries, each consisting solely of the docket number and case name. The Cablevision case is just one of those terse entries.

Importantly, a denial of a cert petition does not constitute a decision on the merits of the arguments advanced in the underlying petition. No meaning – good, bad or indifferent for any of the parties involved – can be read into the denial of Cablevision's petition. As a result, the *Turner* cases still represent the Supreme Court's primary take on must-carry – and the vulnerability of those cases to effective attack remains just as it was before the denial of Cablevision's cert petition.