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Fletcher, Heald & Hildreth
The Law of Communications

Memorandum to Clients

Coming eventually to a white space near you . . .

FCC Okays White Space Devices

By Peter Tannenwald
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The FCC has ruled on 17 petitions for reconsideration of the TV "white spaces" rules. This action allows unlicensed wireless networks and devices – "Wi-Fi on steroids," some call them – to operate on locally vacant TV channels, called "white space" frequencies because they show up as white areas on maps of frequency usage.

The FCC earlier tried to rename the gadgets "TV band devices," or TVBDs, but the white space nomenclature is hard to shake. Whatever the name, companies like Google, Microsoft, and Dell Computer are drooling at the prospect. They have told the FCC to expect a lot of hot spots and campus networks, and they are using all the right technical and political buzzwords. As for us, we're accustomed to dazzling PowerPoints that never materialize into actual products, so we tend to take a wait-and-see attitude.

The FCC's spectrum-exploding train will not be de-railed.

The Big Picture

The technical problems with white space devices center on avoiding interference to TV stations and the wireless microphones that have long used vacant TV channels. The original plan called for each device both to use geolocation – ascertaining its own position using GPS and consulting a database to find locally vacant channels – and also to "sniff" for TV stations and wireless microphones, a process called spectrum sensing. (The FCC exempted from geolocation certain devices under the control of other devices and, separately, allowed for the possibility of some sensing-only devices.)

The new decision confirms the geolocation requirement, with many critical details still to be fleshed out by the Office of Engineering and Technology. But the FCC has pulled back on sensing. When it tested spectrum sensing technologies several months ago, none of them worked well. This result surprised us, as white space proponents had touted sensing as the ultimate safeguard against interference. In some other universe, the agency might insist the promised technology function properly before it allowed deployment. This universe, though, works differently: the FCC's spectrum-exploding train will not be derailed, so they simply dropped the sensing requirement for devices that use geolocation.

Sensing-only devices are still allowed, but only under very rigid technical constraints that will be hard for manufacturers to satisfy. Because database checking will usually be the sole feature for avoiding interference, the FCC promised a rigorous certification procedure to make sure devices handle this function properly. Again, no details.

The FCC struggled, with only limited success, to accommodate users of wireless microphones in broadcasting, theater, movie-making, sporting events, and public gathering places like churches and auditoriums. The FCC will reserve

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Inside this issue . . .

Silence = golden? Not!

Broadcasters Beware: Non-Operation Could Lead To Non-Renewal

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With the start of the next broadcast renewal cycle less than a year away, now would be a good time for broadcasters to start preparations for that octennial exercise. And the first thing each licensee ought to do is make sure that its station is actually operating. It appears that the Media Bureau, troubled by the number of non-operating stations – which is at an historic high, according to one in-the-know observer – is looking into how a station's failure to operate during the preceding license term might be factored into the renewal process.

This is not good news if you happen to be off the air. It's really not good news if your non-operation has dragged on over a significant portion of your most recent license term.

The available stats establish that just under 200 AM and FM stations had reported to the Commission that they were off-the-air as of September 1. And beyond that is the separate universe of stations that have (a) ceased operation but (b) not bothered to tell the Commission (even though the FCC rules – Sections 73.561(d) for NCE FMs, 73.1740(a)(4) for commercial stations – require them to do so).

As some folks at the Commission see it, it's quiet out there . . . too quiet.

The rules, of course, permit stations to shut down from time to time, and there are plenty of good reasons why they might: for examples, equipment problems, emergency conditions (think wildfires or earthquakes or hurricanes or floods, etc.), and – particularly in this period of economic hardship – plain ol' money problems. The Commission itself routinely approves suspension of operation (usually in six-month hits) on a showing of good cause.

Such officially-sanctioned suspensions do not last longer than a year, though, because the Communications Act includes a fail-safe incentive to goose stations back on the air. Section 312(g) provides that any station that "fails to transmit broadcast signals for any consecutive 12-month period" loses its license automatically at the end of that period. (That section does afford the Commission some discretion to breathe the breath of life back into an automatically-expired license, but to date the FCC's staff has demonstrated a decided reluctance to avail themselves of that discretion.)

Some at the Commission believe that, despite the threat of automatic expiration, a number of licensees are turning their stations off and keeping them off for extended periods. Those licensees dodge expiration, apparently, by returning to the air for brief periods so as to avoid a "consecutive 12-month period" of silence and, thus, the Section 312(g) kiss of death. But, having operated for a while, they then go back off the air. (Note that the FCC has never officially addressed the question of how long a station has to be on the air to toll the 12-consecutive-month period for Section 312(g) purposes. In a footnote to a 2003 decision not directly involving Section 312(g), the Commission hinted – but stopped short of formally holding – that 24 hours of operation would do the trick. The Video Division has made clear that transmission of a test pattern does ***not*** do the trick – that is, such operation does not constitute "transmitting a broadcast signal" for purposes of Section 312(g).)

The Commission's staff has signaled that it will consider instances of non-operation during the preceding license term as part of the renewal process. This could entail revision of the renewal application form (FCC Form 303-S) to require each renewal applicant to provide a detailed listing of instances of non-operation during the preceding license term.

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Focus on FCC Fines

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Contracts can make strange bedfellows – Back in 2001 Eddie Floyd got himself an FM translator station in Carson City, Nevada. In September, 2007, six years later, an application to sell that station to somebody else rolled into the Commission. Not much surprising there, right?

Oh, wait, we forgot to mention that, in June, 2007, Mr. Floyd started serving a four-year sentence in federal prison for a variety of offenses, including drug-related money laundering (which we can all agree was a felony).

It turns out that somebody also forgot to mention those particular circumstances in the assignment application (and in a later-filed application for minor modification of the translator's facilities). Such an oversight can be a problem, since both application forms specifically ask whether the applicant has been on the wrong end of any adverse findings in any criminal proceeding involving a felony. And Eddie's portion of each application certified (incorrectly, as we now know) that he had had no such problems.

When the Commission found out about Eddie's conviction, it designated the assignment and modification applications for hearing to determine whether Eddie has the basic qualifications to remain a licensee. (If the answer to that question turns out to be "no", then ordinarily the station's license would be revoked and the applications would be dismissed.)

Asset purchase agreements for the purchase and sale of stations ordinarily include "drop-dead" provisions which permit one or both parties to walk away from the deal if, for example, the FCC hasn't consented to the assignment within a particular time period. After the assignment application was set for hearing, the proposed buyer of Floyd's station figured it might be a good time to invoke the drop-dead clause in its deal. Accordingly, the buyer sent (a) Eddie a letter advising him that the deal was terminated, and (b) the Commission a request that, since the deal was terminated, the buyer be relieved of any duty to participate in the hearing. (Since the buyer was technically a party to the assignment application, it had been made a party to the proceeding in the hearing designation order.)

As if things weren't interesting enough, they got more interesting at that point when an August, 2010 email from Floyd to the Media Bureau surfaced. According to the email, Eddie hadn't had any contact with the FCC from 2007 until late 2009. He wondered "who is trying to take this license from me" and "who has been using [the station] all this time".

The email raised a number of obvious questions – for example, if Floyd was denying that he had been in touch with the FCC, how did the applications come to be filed? And if he didn't know what was going on with the station, had he really agreed to sell it back in 2007? So the Enforcement Bureau (which is an independent party in the hearing) opposed the buyer's effort to skedaddle out the door before those questions could be explored.

What will happen next is anybody's guess. But there are still some take-home lessons here.

First and probably foremost, when you're doing a deal with somebody, it's good to know something about the other party. While you don't need to be overly nosy, you might want to inquire about, say, why the other guy's in jail. Also, if the other party is not physically signing the contract (as was the case with Floyd – his name was signed by somebody else claiming to have power of attorney), you might want to know a little bit more about those circumstances as well. Ordinarily, a party is responsible only for its own representations in an application. But sometimes – as in Floyd's case – the underlying circumstances might suggest that one party may bear some responsibility for (or at least have some inside knowledge about) the other guy's portion of the application.

Second, you should understand that, even if your contract gives you the right to walk away, the FCC might not be inclined to let you decamp before it's had a chance to get its questions answered.

Ownership change – pro forma to some, $16K unauthorized assignment to the FCC – Whether you're a big, complicated corporate licensee or just a closely-held family operation that happens to own a radio station, you have to make sure that all your FCC licenses are actually held and controlled by the folks the FCC thinks holds and controls them. CNN was reminded of this the hard way.

In 2007, CNN underwent a corporate reorganization. As a result, 49 wireless licenses issued in the name of one subsidiary ended up, as far as CNN was concerned, in the hands of a different sub. Since the licenses were still under the overall control of CNN, apparently nobody focused on the fact that an assignment of the licenses had technically occurred and that prior FCC approval should have been obtained.

Fast forward to 2009. CNN is preparing for a further reorganization and, in the course of its homework, it realizes that its own records show the 49 licenses being held by an entity different from the one shown on the FCC's records. CNN comes clean with the government,

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Poison ivi?

Would-be Internet cable service causes irritating rash among broadcasters and programmers

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A Seattle-based Internet company – ivi TV (ivi) – has popped up with a novel theory: ivi thinks that its online-only service is the functional equivalent of a cable TV system. Relying on that theory, ivi is claiming that it has a statutory right to retransmit over-the-air broadcast programming. Suffice it to say that, if validated, that theory could radically alter the broadcast carriage landscape as contemplated by the Copyright Act.

Coming out of nowhere with a bold stance, a strong message and, it seems, at least moderate funding, ivi has managed thus far to irritate major networks, broadcasters and even sports leagues. Not surprisingly, it has found itself on the receiving end of several "cease and desist" letters.

But rather than fold, ivi has upped the ante. It has effectively gone "all in", asking a Federal District Court in Washington State for a declaratory judgment that ivi hasn't infringed anybody's copyrights and that it is, in fact, entitled to retransmit over-the-air programming.

Even if it wins, ivi may see itself squeezed out of the market anyway.

The real question, though, is whether the company can cash out even if it wins this hand.

According to ivi's court filing, ivi's operation is "permissible under the statutory licensing provisions of the Copyright Act", referring to Section 111 of that Act. ivi's pleading is a tad short on analysis. In fact, it contains no analysis – just the simple assertion that what ivi is doing is "permissible".

Section 111 of the Copyright Act is pretty detailed. Often called the "Cable Compulsory License", it allows cable systems to engage in "secondary transmissions" of broadcast stations' "primary transmissions" in certain defined instances and with payment of the proper copyright royalties. The outer parameters of the license have not been tested too often over the years because the broadcast/cable dynamic has generally worked well, thanks in no small part to the must carry and retransmission consent rules. Those rules have established a framework that, while not perfect, ensures widespread carriage of broadcast stations.

Enter ivi. It is not a cable company in the traditional sense: no headend, no wires, no set top box. ivi streams broadcast stations online in real time (according to its website program listings, it's currently streaming the local network affiliates based in Seattle and New York City).

ivi claims that it falls within the Cable Compulsory License because it is engaging in a secondary transmission of a primary transmission and paying the required royalties. I could try to contrive a detailed legalistic explication of that claim – and who knows, the claim might actually be valid – but since ivi hasn't bothered to provide more detail about its own argument, I'll pass on the opportunity for just now. Section 111, of course, is much more detailed, technical and involved than ivi's terse claim lets on.

Without further details I'm skeptical about how this will all turn out for two reasons. First, ivi isn't the first to test the limits of Section 111 – and prior attempts haven't been all that successful. Second, even if it wins, ivi may see itself squeezed out of the market anyway.

Section 111 of the Copyright Act allows retransmission of a broadcast signal in only very limited circumstances. Other non-cable claimants to the protections which Section 111 affords to cable systems have been notably unsuccessful.

Satellite carriers, for example. Almost 20 years ago, they argued that Section 111 justified their carriage of local broadcast stations. While they got one court to agree with them, the Copyright Office later announced unequivocally that satellite carriers were not "cable systems" under the Act. (Upshot: the satellite guys had to get Congress to enact a separate section of the Copyright Act – through the "Satellite Home Viewer Act" and its progeny, SHVERA and STELA – which cleared the way for satellite carriage of broadcast stations.)

Similarly, ten years ago a Canadian Internet company, iCraveTV, attempted to redefine television viewing by streaming the live broadcast signals of American broadcast television affiliates, from Canada, to anyone accessing its website . . . but not for long. That operation was enjoined by a federal court in 2000, and ultimately caved under the pressure of mounting litigation costs and the prospect of $100 million or more in damages if that litigation went the wrong way in the end. (Interestingly, in 1999 Congress declined to insert into the Copyright Act a provision expressly putting the kibosh on the notion that an online operator might be deemed a cable operator for copyright purposes. That fact doesn't really strengthen ivi's claim now, but it also doesn't hurt it, since it at least suggests that the Act did not preclude ivi's interpretation.)

And the FCC, in a decision issued by the Media Bureau earlier this year, held that provision of about 80 offerings of audio and video programming via Internet Protocol Television (IPTV) is unlikely to qualify the provider as a "Multichannel Video Programming Distributor" because

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FCC Financial Blackout

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Don't be lending the FCC any money if you need to get paid back before mid-October, at the earliest. The Commission has announced that the first 18 days (at least) of the next fiscal year – starting on October 1, 2010 – will be a "financial system blackout period". The Commission is implementing a new financial system, and the down-time will be necessary to ensure that the new system gets properly installed and fully operational.

This could affect a variety of applicants and licensees, so listen up.

The good news is that, during the conversion period, licensees and applicants will still be able to:

- file applications electronically and make payment on-line via the FCC's "Remittance Over Secure Internet E-Commerce" system (known familiarly as ROSIE);
- use the Fee Filer system to pay their debts;
- mail applications, paper filings, payments of debts, monetary forfeitures, voluntary contributions and Form 159s to the Commission's lock-box bank in St. Louis;
- file applications and other materials (*e.g.*, reports, informal requests, petitions, etc.) with the Commission;
- contact folks in the FCC's financial office and its Financial Operations Helpdesk for questions and concerns.

The FCC's inability to access certain files may slow things down some.

And even more good news. Ordinarily, the FCC's application system is set up to automatically dismiss applications for which the filing fees have not been paid within certain periods (10 calendar days after filing of most applications, 14 calendar days for International Bureau applications). That automatic dismissal process will be suspended until the new financial system is up and running, and applications won't be dismissed until "system operations are returned to normal". (The FCC promises to let us all know when that happens.) But note: this does not necessarily contemplate any "grace" period. That is, once the system kicks back in, it'll be business as usual . . . and if the 10/14 day fee deadlines were missed by an applicant in the meantime, they could get bounced at that point.

The bad news is that time-sensitive filings "may incur processing delays during the conversion period". So while the staff will continue to act on routine applications (including emergency applications and requests for expedited action), its inability to access certain files may slow things down some. The Commission strongly urges that anyone needing to file fees during the blackout should use Fee Filer, either by credit card or Automatic Clearing House payment (although, as noted above, ROSIE should be working, too). Still, everyone should understand that grants of applications may be delayed as a result of the conversion, particularly if the fee is paid by check.

So if you're planning to file a fee-dependent application or request in the near term and you want it to be processed (and, who knows, maybe even granted) *immediamente*, it would be best to get everything filed, and the applicable fees paid, ASAP . . . and keep your fingers crossed.

Applicants aren't the only ones who might be adversely affected. The Commission will ***not*** (its emphasis, not ours) be processing refunds or vendor payments until the conversion has been completed. It does plan to makes sure all its vendor payments are current before October 1, though.

Perhaps the most ominous aspect of the FCC's announcement is tucked away discreetly at the end of the second paragraph:

> We remind applicants that, pursuant to . . . [Section] 1.1910(b)(2), "any Commission action taken prior to the payment of delinquent non-tax debt owed to the Commission is contingent and subject to rescission."

This refers to a dire, but often overlooked, risk inherent in the FCC's "red light" system. The Commission's rules (Section 1.1910(b)(2), to be exact) provide that all grants of any kind are "contingent" until any overdue fees have been paid. In other words, if the staff grants your application but later discovers that you happened not to have paid all your, say, reg fees at some point in the past and were, therefore, delinquent, the staff could rescind that grant. The rule does not include any time limitation, which means that, to some degree, no grant is ever "final" and immune from rescission. (So much for "finality" provisions in contracts . . .) Ordinarily, of course, prospective applicants can check the FCC's "red light" page to see if they happen to have been flagged as delinquent, but there's no guarantee that the "red light" status shown won't be revised after the check. The FCC mentions this now because neither applicants nor FCC staff will be able to access any "red light" status information during the blackout.

The Commission will notify one and all once things return to normal. We'll do the same on our blog (www.CommLawBlog.com).

DTV transition redux

Analog LPTV: The End Is Near . . . Maybe Really Near

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The FCC says it's time to close the lid on the analog TV coffin for good. In a Further Notice of Proposed Rulemaking and Memorandum Opinion and Order (*NPRM*), the Commission has started the ball rolling for the final shut down of all remaining analog Class A, LPTV and TV Translator stations (for convenience, we'll refer to them all simply as "LPTV").

Full-power TV licensees were required to abandon analog and embrace digital no later than June 12, 2009. While the Commission has, since 2004, permitted LPTV stations to convert to digital, it has not made the conversion mandatory. But now that the full-power conversion deadline has come and gone, the Commission believes that LPTV operators should also be herded into the digital corral. So the Commission is seeking comment on a number of proposals for accomplishing that goal.

The proposals include a hard – and fast-arriving – deadline for all LPTV stations to convert to digital operation. Another proposal would impose an equally hard – but faster-arriving – deadline for *all* LPTV stations (whether analog or digital) to clear out of Channels 52-69. (Channels 52-60 comprise the 700 MHz band which was cleared of full-power TV stations and allocated to commercial and public safety wireless services years ago. LPTV stations have been permitted to stay on in that band on a non-interference basis – until now.)

The *NPRM* is light on the specifics of the final mandatory conversion process. As envisioned by the Commission, the Media Bureau would be responsible for devising and implementing the nitty-gritty details. But the Commission has laid out a number of questions for comment.

Digital Conversion Deadline – 2012. However the digital transition for LPTV stations may shake out, the FCC currently thinks that it should be wrapped up sometime in 2012 (*i.e.*, "approximately three years after the June 12, 2009 full-power transition date").

A 2012 deadline for finishing the process? The FCC understands that this deadline may be a problem. But it figures that most, but not all, full-power stations made the transition in only about four-five years, and many LPTV stations have already availed themselves of the opportunity to convert to digital. With knowledge gleaned from that transition experience, the Commission speculates that three years might be enough finish up with LPTV.

Of course, that three-year period would start as of the full-power transition date, June 12, 2009 – meaning that more than one-third of the time has already passed. Telling LPTV stations in September, 2010, that their digital transition countdown started 15 months ago is a bit of a stretch. On top of that, there are some 7,500 LPTV stations compared to only about 1,800 full-power stations. The logistics alone (*e.g.*, equipment manufacture, installation, tower rigging) for all these stations are not likely to permit completion by a deadline barely two years away.

Telling LPTV stations in September, 2010, that their digital transition countdown started 15 months ago is a bit of a stretch.

Further complicating matters is the National Broadband Plan (NBP). Among its various ambitions, the NBP would repack the TV spectrum to free up 120 MHz of TV spectrum for broadband. That would reduce the spectrum available for *all* over-the-air TV considerably – so much so that many LPTV stations may not be able to find suitable new homes. The idea of spending a lot of money to convert to digital, only to have to change channels again or even be shut down a year or two later by broadband, is unsettling, if not terrifying.

The FCC is not oblivious to these problems, but it may be a bit unrealistic about possible solutions. For example, the *NPRM* mentions an NTIA grant program to help pay for the cost of digital transmitters. But it fails to mention that: NTIA is limited by statute to funding rural stations; grant maximums are $6,000 and $20,000, far below the cost of a digital transmitter; and grants are made only after the grantee has shelled out its own cash to buy the equipment. (The *NPRM* does solicit comments detailing the anticipated practical considerations – including particularly conversion costs – that LPTV stations are likely to face.)

The Commission also wants to know what kind of community outreach efforts it should plan for the LPTV transition. How many of the bells and whistles imposed *ad nauseam* during the full-power transition (*e.g.*, audience-education efforts, call-in centers, re-scanning instructions) should be dusted off and re-deployed?

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And the FCC invites comments on whether the deadline should be later, perhaps 2015, and whether exceptions should be made in hardship cases or communities where LPTV is the only available over-the-air TV service.

However much LPTV stations may be quaking in their boots at this point, the fact remains that more than half have already applied to the FCC for some kind of digital conversion, and the current pace of digital applications is pretty brisk. The real question is how many stations still feel that there is any audience for their analog signals and, as a result, want to postpone conversion to continue to serve that analog audience. Some suggest that minority and niche audiences and rural residents often served by LPTV stations still have a lot of analog receivers, but statistics are not plentiful.

700 MHz Band Clear-Out Deadline – December 31, 2011. Turning to Channels 52-69, the FCC says that enough is enough. Whether or not those channels are being put to use by their non-broadcast licensees, it's time to clear out the broadcast hold-overs – all of whom happen to be LPTVs. Now that the full-power transition has come and gone and full-power stations are no longer taking up two channels each, channels in "the core" (*i.e.*, below 52) are as easy to come by as they are going be.

There may be some practical problems with the FCC's ambitious schedule.

Accordingly, the FCC proposes to require all LPTV stations on Channels 52-69 to apply to move to lower channels by June 30, 2011, and to move there by December 31, 2011.

There may be some practical problems with that ambitious schedule. Can the FCC process all these applications in six months? How fast can the FCC resolve conflicts if two stations apply for the same channel? The answer, we suspect, is that those who wait until the last day to file applications will pay the price: earlier filers will have more time to work out kinks in their FCC applications and get grants, leaving them time to build; and since applications are processed on a first-come, first-served basis, conflicts should arise only if two stations file on the same day.

Additionally, the NBP repacking plan could gum up the works here as well. The scope of the repacking proposal might be clear before June 30, 2011, but then again it might not – in which case the process of picking a lower channel, and then obtaining authority to use it, may turn out to be risky business.

The Freeze Is On. Effective immediately, no more applications will be accepted for new analog LPTV stations on any channel. Existing stations on Channel 52-69 may no longer request analog modifications except in extreme hardship cases (think involuntary loss of transmitter site), and no new digital companion applications will be accepted on Channels 52-69, even if no lower channel is available.

"Minor" Change? The FCC proposes to limit transmitter site changes in "minor" change applications to 30 miles. Currently, a proposed change is "minor" if there is any overlap between the old and new service contours. By proposing a smidgen of overlap, some stations have succeeded in moving long distances into new markets, including urban markets. As proposed in the *NPRM*, moves of more than 30 miles would be deemed "major" changes, which are currently forbidden in urban areas. (The FCC says it plans to remove geographic restrictions on first-come, first-served applications for new stations and major changes – although it doesn't say when.)

VHF To The Rescue? With the likelihood of NBP-induced spectrum scarcity in mind, eyes are turning to VHF channels, which aren't suitable for broadband (and not ideal for digital television, either). The FCC nevertheless asks whether VHF channels may become a good home for digital LPTV stations, and it offers the carrot of a power increase above the present 300-watt limit. VHF LPTV stations, particularly those on Channels 7-13, have been clamoring for more power for several years, and the door may now be open to meet that need. In fact, the FCC invites comments on whether power increases and/or changes in interference standards are needed for *all* digital LPTV stations.

Channel Surrender. Analog LPTV stations with companion digital channels have, as a matter of policy, been permitted to terminate analog operation and either keep their companion digital or move their digital operation to their analog channel. The FCC proposes to make that policy permanent. In the past, Class A stations have not enjoyed the same degree of choice, because their companion channel was not afforded Class A spectrum priority. Now the FCC proposes to give Class A stations the same ability to choose to operate digitally on their analog channel or their companion channel, and whichever channel they select will be granted Class A status. This change will be of significant benefit to Class A stations whose analog channels are not suitable for digital operation and who thus have little choice but to stick with their companion channel and need a way to retain Class A status.

Vertical Radiation Patterns/Emission Masks. LPTV antennas do not always have the same horizontal and vertical radiation patterns, but FCC interference studies are based on only the horizontal plane and assumed vertical characteristics which may not accurately depict actual operation. The FCC now proposes to require vertical pattern information in applications for new

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Meet the new annual fee, same as the old annual fee . . .

Déjà Vu All Over Again

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The Copyright Royalty Board (CRB) has announced that noncommercial webcasters must pay a $500 per channel annual minimum fee to perform copyrighted sound recordings during the 2006-2010 rate term. Big deal? Not really. Why not? Several reasons:

The 2006-2010 rate term is ending in about three months, with a ratemaking proceeding ongoing to determine the rates applicable to webcasting during 2011-2015 rate term. So this "new" annual per channel minimum may change sooner rather than later (though we actually doubt it).

We've put "new" in quotation marks above because the original decision of the CRB, adopted back in 2007, set the annual minimum fee for both commercial and noncommercial webcasters at $500 per channel per year – so it's not like anybody should really be surprised at the concept of such a fee.

When the CRB's 2007 decision was challenged in federal court, the only aspect of the decision remanded to the CRB for more consideration was the amount of the annual minimum payment – at which point we predicted that the CRB would simply reinstate the $500 per channel annual minimum fee.

*The $500 fee is not merely a component of the royalty obligation for most noncommercial webcasters – rather, it **is** their royalty obligation.*

Before the CRB could validate our prescience, SoundExchange (representing the copyright owners) entered into settlement agreements with several types of webcasters – and each of those agreements provided for a $500 per channel annual minimum fee. This is important not only because it made the most recent CRB ruling easy to predict but also because it means that, technically, that ruling applies *only* to those noncommercial webcasters who hadn't already entered into one of the three noncommercial webcasting settlement agreements.

When the CRB did wrap up the initial phase of its post-remand chores – relative to the fee to be applied to commercial webcasters – it reinstated the $500 per channel annual minimum.

So the re-imposition of the $500 fee for noncommercial webcasters is not really an earth-shattering or completely unexpected surprise. In fact, its actual impact may be extremely limited, since most noncommercial webcasters probably assumed they were on the hook for a $500 annual minimum payment for each channel anyway, budgeted for it accordingly, and made the 2010 payment without a second thought.

Why bother to cover the CRB's decision here then? Because it does provide a couple of points to consider.

First, the decision may be a reliable indicator of the future. It's clear that the CRB is likely to rely on the current state of affairs in setting rates and terms for webcasters during the years 2011-2015. So when the CRB eventually establishes 2011-2015 rates, don't be surprised if noncommercial (and commercial) webcasters will get tagged again with this same $500 per channel annual minimum.

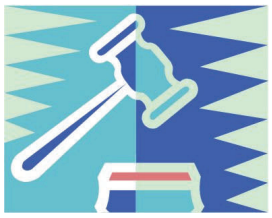
Second, the CRB's decision provides a glimpse at some interesting data. According to the decision, SoundExchange claimed that it cost about $803 per channel per year to administer the webcasting statutory license. If that's really the case, then SoundExchange is losing money – to the tune of $303 a pop – on the majority of noncommercial stations.

Interestingly, the CRB's decision indicates that approximately 730 webcasters paid royalties to SoundExchange in 2009. Of those, about half (*i.e.*., 363) were noncommercial. Yet payments by noncommercial webcasters constituted only about one percent of all royalty payments. Why? Because 305 of the 363 reporting noncommercial webcasters – almost 85 percent – paid only the annual minimum of $500 per channel because they never exceed the monthly aggregate tuning hour maximum of 159,140 ATH.

This fact demonstrates the important practical reality of this particular proceeding. For the vast majority of noncommercial webcasters currently reporting to SoundExchange, the minimum $500 annual per channel fee is the ***only*** royalty which they will have to pay to SoundExchange. From that perspective, the $500 fee is not merely an interesting (if minor) component of the royalty obligation. Rather, it appears that for most noncommercial webcasters, it ***is*** their royalty obligation.

Of course, it's not entirely clear how reliably representative the CRB's figures are. After all, those figures reflect a total of only 363 noncommercial webcasters, which is not a lot, given the number of licensed noncommercial radio stations in the country – almost ten times that number (3,223) as of June, 2010, according to the FCC. We don't know why the other stations aren't accounted for. They may have chosen not to webcast because even the $500 fee was too much; or maybe they *are* webcasting, but just not complying with reporting requirements; or maybe they just don't feel like webcasting, whatever the royalties might be. Still, it's interesting to contemplate the possibility that noncommercial webcasters' obligations to SoundExchange may turn out, in practical effect, to be limited to $500 per year per channel.

Taking care of bidness



Auction 91: 147 FM Allotments On The Block Next Spring

By R. J. Quianzon
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703-812-0424

Start saving your nickels and dimes. The FCC has announced that it will auction 147 FM permits next Spring. You can find a link to a list of the allotments coming up on the block at www.CommLawBlog.com.

Although the auction (dubbed "Auction 91") isn't scheduled to open until March 29, 2011, connoisseurs of the Commission's auction processes know that there's plenty of paperwork to get out of the way before the bid paddles start going up and the gavel starts coming down. The first step? A request for comments on proposed procedures, upfront payments and minimum opening bids. Comments are due by ***October 13, 2010***, replies by ***October 27, 2010***.

The procedures the Commission has put out for comment do not contain anything different from past FCC broadcast spectrum auctions. Perhaps most notably, the FCC's notice includes the standard four-paragraph disclaimer warning potential bidders that the government cannot guarantee that the spectrum at auction will actually work. While such disclaimers are regrettable – hey, if the government's going to sell you spectrum to use for a broadcast station, shouldn't you be able to assume that the spectrum will in fact serve that purpose? – *caveat emptor* is the way to go here: you don't want to end up like the guy in Auction 37 who spent more than $4 million on a permit in scenic Pacific Junction, Iowa, only to discover that the spectrum couldn't be used because it would interfere with nearby FAA communications. Oops.

In light of that consideration, potential bidders should roll up their sleeves now and investigate thoroughly any permits they may have their eye on. And there are a lot to look at this time around: a list of 147 FM frequencies, ranging from Class As to Class C3s, spread out over 39 states and one territory (Guam). (Veterans of last year's Auction 79 may recognize 37 of the allotments, which went unsold back then and are now being trotted out again.)

Proposed starting bids go all the way from $1,000 to $100,000. The vast majority (80%) of proposed openers come in at $25,000 or less, and 33% start at less than $10K. Don't assume, though, that the final bids will necessarily be in the same ballpark as the opening bids: it only takes two determined bidders to goose the price of any permit skyward.

The FCC's release doesn't mention bidding credits for new entrants, but the smart money figures that such preferences will be awarded in this auction as they have been in virtually all other auctions. Generally, a 35% bidding credit is available to bidders who own no other broadcast stations and a 25% credit is given to bidders who own three or fewer stations (provided that none of those stations is in the same market as the target auction permit).

Check back on CommLawBlog for updates.

FHH - On the Job, On the Go

On September 8, **Frank Montero** attended the Joint Meeting of the Boards of Advisors and Directors of the Mid-Atlantic Hispanic Chamber of Commerce. (**Frank**'s a member of the Board.)

And coming up on November 5, **Frank M** is slated to give the keynote speech at a conference entitled "Enhancing Emergency Communication Strategies" at Texas State University in San Marcos. The conference will be hosted by the Center for the Study of Latino Media & Markets of the School of Journalism & Mass Communication. He'll be speaking on "Multilingual Emergency Alert Announcements: Advancements and Pending Challenges".

Meanwhile, **Frank Jazzo,** will provide a "Regulatory Update" at the annual convention of the Alaska Broadcasters Association on November 4 at the Anchorage Hilton.

At the recent NAB Radio Show in Washington, **Kevin** (*Mr. "I give good quote"*) **Goldberg** appeared on a copyright panel with (among others) a representative from SoundExchange. He graciously observed that SoundExchange's approach to problem negotiation had improved lately, analogizing that "the bookie doesn't want to kill you. He just wants to get paid."

How do I love thee? Let me count the links. Adding to its increasing net-presence, our blog (www.CommLawBlog.com) was linked this past month on such varied sites as aetherczar.com, blogs.techrepublic.com, Benton.org, dslreports.com, stevencrowley.com, openspectrum.info, tvtechnology.com, mediabiz.com, tallion.org, spectralholes.blogspot.com, unwantedemissions.com and wispa.org.

Yes, we know that **Kevin**, **Frank M**, **Harry Cole**, **Anne Crump**, **Dan Kirkpatrick**, **R.J. Quianzon** and **Peter Tannenwald** all got ink in the trades this past month (**Peter** got in twice!). And yes, **Mitchell Lazarus**'s article about impending spectrum scarcity is featured in this month's IEEE *Spectrum* magazine (check out our blog for a link to his piece). But when it comes to media splashes, what made the biggest waves this month? What else? The debut of the redesigned Fletcher Heald & Hildreth website at www.fhhlaw.com, of course. (*See* related story on Page 15.) If you haven't taken a gander at it, now's the time – so you can understand why the new website is our *Media Darling of the Month*!

(Continued from page 1)

two TV channels in each geographic area for wireless microphones, which it thinks will accommodate 12-16 microphone voice channels. Some parts of the country will also have other channels closed to white space devices and available for wireless microphones. Large productions, though, often use 100 or more. Microphone operators may request to have specific events entered into the white space database, which should (if all goes according to plan, that is) automatically keep white space devices away. Requests to protect unlicensed microphones must show that the channels free of white space devices cannot do the job. These requests will be subject to public comment, which requires 30 days advance notice. Without a database entry, and in the absence of spectrum sensing, the microphones will have no protection against white space devices on the same channel.

In the end, the FCC believes wireless microphones should move to more efficient digital technology. But it did not address the difficult engineering problems that so far have barred this option.

The FCC did not address the difficult engineering problems that so far have barred more efficient digital technology for wireless mics.

The question of using vacant TV channels for backhaul links in rural areas has been deferred for the time being.

The Fine Print

Careful reading turns up a couple of issues in the white spaces order that merit the attention of TV broadcasters.

To assure the required protection of TV broadcast signals, white spaces devices will consult a database to determine which TV channels can be safely used at the device's location. The devices may have to change channels as necessary from time to time. Since the selection of vacant channels will be a dynamic process, the FCC wants to make sure that only channels actually in use by TV stations are marked as off-limits. So the new rules provide that the white spaces database need recognize only ***granted or pending license applications*** for both full and low power TV stations.

Whoops. What about Special Temporary Authorizations (STAs)?

STAs are not a rarity. They are routinely issued to, say, stations that suddenly lose their transmitter sites or that suffer equipment damage during a storm. LPTV stations may well need STAs during the process of transitioning from analog to digital operation – a transition that the FCC is proposing to make mandatory. An STA allows the station to continue to operate – possibly from an alternate site or with facilities other than those specified in its license (or license application) – until it can either (a) return to its authorized site/facilities or (b) obtain permanent authority for its modified site/facilities.

The Commission's failure to include STAs in the white spaces database appears to be a serious slip. Operation pursuant to an STA is Commission-authorized broadcast operation which should be protected from white spaces devices to the same degree as "licensed" operation. This error seems to us to merit a petition for reconsideration by the TV industry.

Another important issue involves TV translators, LPTV stations, cable systems and other multichannel video programming distributors (let's call them, collectively, "retransmitters"). As might be expected, retransmitters retransmit other stations' signals, signals which are generally received by the retransmitter over-the-air. If a white spaces device cranks up near the point at which the retransmitter ordinarily picks up the signal, the retransmitter's ability to effectively operate is threatened.

The Commission recognizes this problem. In the 2008 version of the white spaces rules, the Commission permitted some (but not all) retransmitters to register their over-the-air receive sites in the white spaces database – but ***only if*** those sites were (a) within 80 kilometers (50 miles) of the originating station's service contour but (b) outside that station's protected contour. Now, however, at the suggestion of a number of parties, the Commission has expanded the area in which receive sites may be registered. That expansion, though, is not gotcha free.

Under the newly-announced revisions to the rules, all (not just some) retransmitters with over-the-air receive sites *more than* 80 kilometers from the edge of the received station's protected service contour may submit waiver requests seeking to have those receive sites registered. The Commission will then issue a public notice soliciting comments on such waiver requests. After reviewing everything that comes in, the Commission will decide on a case-by-case basis whether or not to include each such site in the database.

Existing operators who may wish to take advantage of this potential registration opportunity should be particularly alert. Starting with the effective date of the new rules, *such operators will have 90 days in which to submit their waiver requests*. (Retransmitters who commence operations in the future will have 90 days from the date on which they start up.) The Commis-

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The general idea goes back to a 2001 Commission decision involving a Pocomoke City, Maryland AM station that was off the air for nearly four consecutive years in the early 1990s (*i.e.*, before Section 312(g)'s automatic expiration provision was inserted into the Act). The Commission, responding to an objection about the licensee's failure to operate for most of the license term, concluded that renewal was appropriate. BUT – and it's an ominous "but" – the decision was based on the facts that: (a) historically, the FCC had been "particularly lenient" in granting "stay silent" STAs; and (b) the licensee in question had not been warned that continued silence might "put [its license] at risk".

FCC to broadcast industry: you have now been warned.

The Pocomoke City decision took care of that latter factor, in spades. The Commission wrapped up its decision by pointedly stating that:

> we take this opportunity to caution all licensees that as a result of the clarification provided herein, a licensee will face a very heavy burden in demonstrating that it has served the public interest where it has remained silent for most or all of the prior license term.

FCC to broadcast industry: you have now been warned.

A focus on the renewal applicant's performance during the preceding term is squarely within the chores assigned the Commission by Congress. Section 309(k)(1)(A) of the Act specifies that, before it can grant an unconditional broadcast renewal, the FCC must first determine that, during the immediately preceding license term, the licensee "has served the public interest". It's difficult to imagine how a station could logically be said to have served the public interest when it wasn't operating at all.

Whether the renewal form will in fact be revised remains to be seen. After all, the 200 or so radio stations off-the-air as of September 1 represent only about 1% of all AM and FM stations – not a huge chunk of the industry. Does it really make sense to impose an across-the-board reporting requirement when such a small percentage is being targeted? And bear in mind that at least some, if not many or even most, of those 200 stations may be off-the-air for valid technical reasons, with no intent to stay off longer than necessary to fix the problem and crank back up. In other words, if a chronic off-the-air problem does exist, it may be isolated to considerably less than 1% of the industry. Does the Commission really need to get its Big Guns out?

If the staff does plan to revise the renewal form to include a question about instances of non-operation, it will have to start the ball rolling soon. Form revisions generally require that the public be given the opportunity to comment, both at the FCC and before the Office of Management and Budget. With the next round of renewals starting soon (the first batch is due by June 1, 2011), the Commission has significantly less than nine months to have the form ready to go. Check at www.CommLawBlog.com for updates.

(Continued from page 3)

asking it to correct the licenses and reissue them as part of the latest reorganization. The FCC agrees, but not without further investigation into the 2007 oversight. Bottomline: the FCC hits CNN with a $16,000 fine.

Readers contemplating reorganizations or other adjustments (*e.g.*, estate planning) that could affect the identity of either (a) licensee or (b) the party/parties who control a licensee should be extra cautious to think through the potential FCC ramifications of their plans ***before*** those plans are implemented. The Commission can be persnickety when it comes to such things, even in situations (like CNN's) where, as a practical matter, any change in ownership or control was at most purely *pro forma*.

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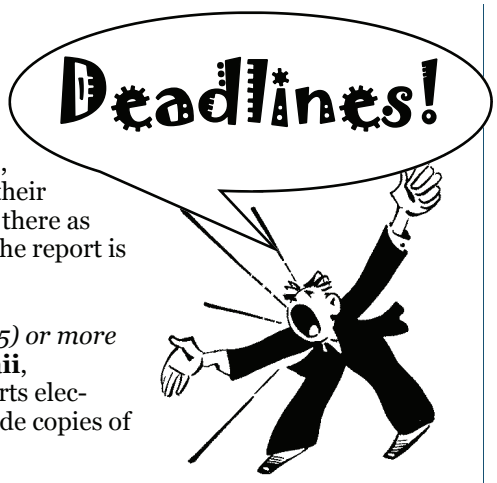
sion has not provided a time frame during which its resolution of such requests can be expected.

The effective date of the new rules has not yet been announced, and won't occur (at the earliest) until 30 days after the new rules have been published in the Federal Register. Additionally, it seems unlikely that the Commission will invite new registrations (or registration waiver requests) until a number of practical questions relating to the white spaces database have been resolved. For example, who will manage the database, how will registrations and the like be submitted, how will the database be implemented? Obviously, there is still much to be done before white spaces devices are likely be unleashed on us all.



October 1, 2010

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** 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 **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, and **Washington** must file EEO Mid-Term Reports electronically on FCC Form 397. For such employment units, this report must include copies of the two most recent EEO Public File Reports.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Iowa** and **Missouri** 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 **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, or **Washington** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

October 11, 2010

Children's Television Programming Reports - Analog and Digital - For all *commercial televisio*n and *Class A television* stations, the third 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.

December 1, 2010

DTV Ancillary Services Statements - All *DTV licensees* and *permittees* must file a report on FCC Form 317 stating whether they have offered any ancillary or supplementary services together with its broadcast service during the previous fiscal year. If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report on Form 317 specifically asks for a list of any ancillary services, whether a fee was charged, and the gross amount of revenue derived from those services. Ancillary services do not include broadcasts on multicast channels of free, over-the-air programming for reception by the public.

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alabama**, **Colorado**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **Minnesota**, **Montana**, **New Hampshire**, **North Dakota**, **Rhode Island**, **South Dakota**, and **Vermont** must place EEO Public File Reports in their 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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or modified stations. Existing stations not making changes may either: (a) file their vertical pattern or (b) continue to rely on the old assumptions.

The FCC also proposes to allow the use of a full-power TV digital emission mask by LPTV stations, in addition to the previously authorized simple and stringent masks. Because the full power mask exceeds the performance of a stringent mask, it will allow more digital LPTV stations to avoid predicted interference to first-adjacent channel stations, opening a door for some applications that were previously stymied.

Ancillary/Supplementary Services Fee. Digital stations – LPTV and full-power – are permitted to provide the same subscription-based, non-broadcast ancillary services on their spare digital capacity as their full-power colleagues. Since 2004, digital LPTV licensees have, just like full-powered licensees, had to pay the same annual fee of 5% of the gross revenue derived from such services. But in 2007, the Commission expanded that fee obligation on the full-power side to include *any* authorized DTV stations, not just "licensees" (in other words, stations operating pursuant to an STA would be subject to the fee as well). The Commission now proposes to close the loop by extending that tweak to LPTVs as well.

And finally, the *NPRM* notes that a petition asking that LPTV licenses be made secondary to "White Spaces" unlicensed broadband use of vacant TV channels was denied in the separate White Spaces rule making.

Comments will be due 60 days after the *Notice of Proposed Rule Making* appears in the *Federal Register*, with replies 30 days later. We will post the deadlines on our blog at www.CommLawBlog.com when they're announced. Of course, by the time the comment cycle has been completed, and a decision is reached, there will probably be less than one year left in the FCC's theoretical three-year transition period if the proposed 2012 deadline sticks.

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each stream of programming did not clearly constitute a "channel" – at least as the Bureau uses the term "channel".

None of these is exactly on point with ivi's situation, but each represents an attempt by a new video distribution service to classify itself as a cable system for Section 111 purposes – and each of those attempts failed.

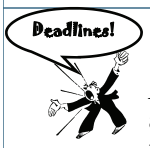
But, more importantly, what if iviTV does win? Will the broadcasters and cable systems take this lying down? Hard to envision that. Frankly, this might be one of those "litigation isn't fair" situations where the richer, more powerful broadcasters and cable companies bleed ivi dry by dragging this out in court. They definitely feel threatened and will almost certainly act to defend their still-lucrative turf. And sure enough, that defense has started: the four major commercial TV networks and PBS have filed their own lawsuit, in New York, alleging that ivi has infringed their copyrights.

Even if ivi were to prevail in the end, the cable companies would then take advantage of the ivi-identified loophole. Through sheer size and usual enhancements (such as bundling), an existing cable operator could offer, to a ready-made subscriber base already in place, the same service as ivi but at a lower price.

So winning one round might result in ivi being killed with its own sword.

It's also easy to imagine that the Copyright Office might step in again, as it did with satellite television. In fact, it might not be a bad idea for the Office to get involved sooner rather than later, maybe even now. Online television viewing is only growing and it's probably in everyone's best interests to have the agency with the most expertise on copyright law address the topic. Could all this lead to yet another new section of the Copyright Act applicable to online carriage of broadcast television?

It's unclear whether ivi can or will win its fight. Given their unwillingness thus far to flesh out their legal theory, I find it hard to believe they'll succeed. But there's nevertheless something curiously inspiring about their effort. ivi identified a potential loophole and has tried to exploit it as fast and as far as it could. They may be going down one way or another but, man, they'll probably be going down in a blaze of glory.



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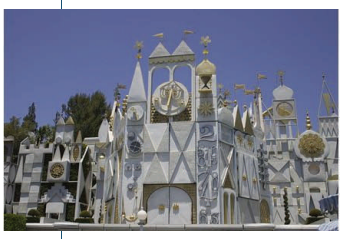
EEO Mid-Term Reports - All *television* station employment units *with five (5) or more full-time employees* and located in **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** must file EEO Mid-Term Reports electronically on FCC Form 397.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, or **South Dakota** 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 **Alabama**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, or **Vermont** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.



It's a small world, after all . . .

联邦通信委员会, 在洛杉矶亚裔美国人和太平洋岛民的论坛会, 将公布全国宽带亚洲语言翻译计划概要.

By Christine E. Goepp
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Puzzled by the headline? So was I last month, when the Commission issued a public notice bearing the header "FCC TO RELEASE ASIAN LANGUAGE TRANSLATIONS OF NATIONAL BROADBAND PLAN SUMMARY AT LOS ANGELES FORUM FOR ASIAN AMERICAN AND PACIFIC ISLANDER COMMUNITIES". The particular "communities" for which translations have now been issued are "Chinese (Simplified), Samoan, Tagalog, Korean, Thai, and Vietnamese".

What puzzled me was not that the translations were being made available – that, after all, was consistent with the Commission's full-court, no-holds-barred effort to "raise awareness of broadband".

No, what puzzled me was that the FCC's public notice was issued only in English.

Maybe I'm missing something, but if folks can't understand English enough to read the National Broadband Plan in its original form, how are they going to understand an English language public notice alerting them to the availability of non-English versions? Wouldn't it make more sense to issue the public notice in, say, Chinese (Simplified), or Samoan, or . . . well, you get the picture.

Once the government starts down the road of offering translations into some languages, it doesn't take long for the slope to get steep and slippery.

So as a public service, we translated the FCC's headline into Chinese (Simplified), and used it for the headline when we posted this article at www.CommLawBlog.com. That at least should clue some members of the FCC's target audience into the gist of the Commission's public notice – assuming, that is, that they happen to be surfing the Internet and come across our post through a Google search. (All you English-reading surfers should feel free to pass the link along to appropriate friends and acquaintances.)

And as a further public service, we provided links to the various foreign language versions of the NBP, *i.e.*, 简体中文翻译 (Chinese (Simplified)), Samoan, Tagalog, 한국어 번역(Korean), ภาษาไทย การแปล (Thai), and Việt dịch that (Vietnamese).

(There's also a Spanish-language version available at the NBP download site and a Braille version available for download from the FCC's "accessibility" page.)

Now that we've done our share, we're hoping that somebody else will come up with Samoan, Tagalog, Korean, Thai and Vietnamese translations of the public notice's headline.

Something else puzzled me about the notice. How were these particular languages selected, and why were others not? According to the 2000 U.S. Census, of the main languages spoken by individuals older than five, French, German and Italian outrank Samoan, Thai and Korean. And yes, I understand (from a blog posted by one of Chairman Genachowski's Senior Advisors) that some Asian American and Pacific Islander (AAPI) populations "have lower-than-average median household incomes (Korean Americans)" or have members who "live in rural areas (Hmong Americans)", but the same could presumably be said of a number of non-AAPI populations speaking other languages. Ditto for the notion that many AAPI populations may be "linguistically isolated".

I'm not saying that providing translations of the NBP is necessarily a bad idea. But once the government starts down that road, it doesn't take long for the slope to get steep and slippery. By offering translations into some languages but not into others, the government is, after all, engaging in a form of discrimination. It may be viewed as benign discrimination, but the exercise clearly involves selecting one or more nationalities for a particular beneficial treatment which is not provided to other nationalities – in other words, discrimination based on, well, nationality. And that's the kind of thing that the government should ordinarily try to avoid.

So here's hoping that the AAPI language versions just released are only the start of the project. Perhaps versions in French, Italian, German, Russian, Polish, Arabic, Japanese, Hindi, Persian or Urdu (all languages which ranked higher than Samoan or Thai in the 2000 Census) will be issued in the near future. What about versions in the various Native American languages? Or any African languages?

And ideally, when all those are ready to roll out, the public notices announcing their release will not be exclusively in English.

A New Fletcher Heald Website? Yes Way.

Fletcher Heald & Hildreth, P.L.C., has unveiled its new brand image and website. Check it out at www.fhhlaw.com.

The outside marketing consultants wanted us to issue a press release with all kinds of extravagant, eye-catching, ALL CAPS brags about cutting-edge this and state-of-the-art that. You know, like an ad for a RONCO product, but tasteful (because we are a law firm, after all).

No thanks.

We think the new website is slick, attractive, easy to navigate, informative, and all the good things that a law firm website should be. But deep down inside, it's just a website. It introduces us, and lets you know who we are and what we can do.

You can read about each of our current team of lawyers and the firm's history. (We've been around for 74 years, almost as long as the FCC itself.) On the home page we've included interesting (we think they're interesting) factoids about each of us. One factoid per view – just hit refresh to see a different one. Once you get started, it's hard to stop – like eating peanuts.

It's got nice photos of us all. We debated what the photos should look like. Should we pose in faux meetings or courtroom dioramas, looking brutally hard-nosed yet supremely reasonable? Should we emphasize our softer side, dressing up in recreational garb (wetsuits? cycling outfits? camo?)? Should we pose in non-office settings, looking tanned, rested, and ready? We went with down-to-earth, the way we really look. (Except in person we are in full color.)

The website has links to our blog and our informative publications, the Memo to Clients and FHH Telecom Law. The front page also includes the headlines from our most recent blog postings, in the unlikely event that you haven't seen them elsewhere.

In the interest of presenting a uniform (and uniformly pleasing) sense of design throughout the FHH publication universe, we also took this opportunity spiff up the look of our blog (www.CommLawBlog.com), as well as the Memo to Clients (as if you hadn't already noticed) and FHH Telecom Law.

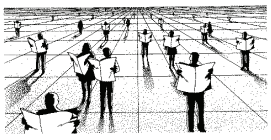
Oh, and you'll notice right away that the motif is blue. Really blue. Our old site was predominantly purplish red. That was OK for the 1990s. Not any more. Some of us thought green was the way to go this time around. But we went with the blue.

So if you want to know about Fletcher Heald – or if you're just curious about our new site – stop by and take a look. We'd like to know what you think. Unless you're lobbying for green. That discussion is over. We're sticking with blue.

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

Updates On The News

Raise your right hand and say "Cheese" – Interesting news from the Judicial Conference of the United States, which is the "principal policy making body" of the federal courts. The Conference has announced a pilot project to evaluate the effect of cameras in federal district courtrooms *and* the public release of digital video recordings of some civil proceedings. The project will be national in scope and will last up to three years. The details of how it will work have yet to be announced, but participation will be at the discretion of each individual trial judge.



Historically, cameras have not been welcomed with open arms in the federal courts. Electronic coverage of criminal proceedings has been expressly prohibited for more than 60 years. While camera coverage of proceedings in the federal courts of appeals has been permitted since 1996, only two Circuits (Second and Ninth) currently allow such coverage – which suggests that we might want to temper any expectations of widespread voluntary participation in the latest go-around.

But while the extent to which the latest pilot project will really open the courtroom doors remains to be seen, at least it could be a step in the right direction.