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Memorandum to Clients

Broadcast v. MVPD, one more round

Retrans Redux

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It's baaaaack! The issue of retransmission consent, dormant for years only to be awakened this past January when a broadcaster/cable operator dispute made the headlines, has once again popped onto everybody's radar screen, thanks to a front-page dispute between Cablevision and Fox over carriage in the Big Apple. And we have a new dimension thrown into the mix: the threat of Congressional reform of the retransmission consent process.

Could this be the end of retrans consent as we have come to know it?

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As a bit of background, since the Cable Act of 1992, local television broadcast stations have been able to obtain carriage on multichannel video program distribution (MVPD) systems – originally traditional cable, later joined by satellite and phone systems like FIOS – in one of two ways. The local station can either elect carriage under the FCC's "must-carry" rules, which guarantees carriage but without compensation to the station, or the station can elect retransmission consent (or "retrans"). Under retrans, the cable system and broadcaster negotiate for carriage – the cable system cannot carry the signal without the broadcaster's consent, and the parties are left to work out the compensation to be provided to the broadcaster for the right to carry the signal. If no deal is reached, the station doesn't get carried.

For many years, this system has worked, if not well, at least quietly. Retrans agreements have generally been reached without significant controversy. Broadcasters have negotiated for compensation in the form of carriage of affiliated cable channels, advertising avails and the like, but in the early years tended not to receive cash compensation. Recently, however, broadcasters with highly popular programming have begun demanding cash, generally on a per-subscriber basis. MVPDs have been reluctant to go along with these demands.

The result has been increasing contentiousness in retrans negotiations over the last few years. Perhaps most notoriously (at least in terms of national visibility), at the end of 2009 Fox and Time-Warner faced off over carriage of Fox O&O's in Time-Warner's markets. Viewers in those markets faced the very real possibility of losing their cable access to Fox's programming beginning on New Year's Day 2010 (including the popular college football bowl games). A last-minute deal was reached, but the MVPD v. Local Broadcaster war had obviously started, and the Fox/Time-Warner deal was just a temporary lull in hostilities.

In March, negotiations between ABC and New York City-based cable operator Cablevision broke down, and ABC ultimately pulled the signal of WABC-TV from Cablevision's systems in New York for the first 13 minutes of the Oscars® telecast. That led a number of MVPDs to file a petition with the FCC, urging reform of a retransmission consent regime which, in their view, was broken. They called for mandatory arbitration of retrans disputes, and prohibition against stations yanking their programming pending resolution.

The Commission invited comments on the petition. Not surprisingly, broadcast interests opposed the suggested

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Changes on the SV front

STELA Revisions Adopted

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As we reported last August, the Satellite Television Extension and Localism Act of 2010 (you may know it better as "STELA") – the legislation extending local station carriage rights for satellite providers – required the FCC to change certain of its rules relating to "significantly viewed" stations and "unserved households". In response, the FCC dutifully, and quickly, launched proceedings to address those issues.

And now, a remarkably short four months later, the FCC has released three orders implementing the new rules. As a bonus, it has also given us a public notice requesting comments and data for an upcoming FCC report to Congress on the availability of in-state broadcast stations over satellite systems. For the most part, the orders simply put into the FCC's rules the requirements laid out by STELA.

Significantly Viewed Stations Order

One order addresses questions relating to "significantly viewed" (SV) stations. As to eligibility for receiving certain SV signals, the Commission concludes that, in order to be eligible to receive an out-of-market SV network affiliate station, satellite subscribers will be required only to take their carrier's local-into-local service package, regardless of whether that package includes an in-market affiliate of the same network. (Previously, a subscriber was not eligible to receive an out-of-market SV network affiliate unless the subscriber actually received, via satellite, the local in-market station affiliated with the same network.) Additionally, the FCC has modified its stance on situations in which there is no local affiliate of the same network as the SV station. From here on out, a satellite operator may offer an SV network station to a subscriber when there is no local affiliate of the same network present in the local market, even if the subscriber does not receive local-into-local service.

Gone is the old requirement that satellite carriers devote "equivalent bandwidth" to the carriage of the local in-market station as compared to the out-of-market SV station. The new STELA-imposed rules adopt the approach we previously described as the "HD or no HD approach". That is, now a satellite operator may carry a network-affiliated SV station in HD, so long as the satellite operator carries the local station affiliated with the same network in HD whenever such format is available from the local station. (When is HD "available" for these purposes? The Commission has crafted a three-part test to make that determination.) The new rules also require satellite carriage of a secondary HD stream of a local station's multicast signal if that stream is affiliated with the same network as an SV station retransmitted in HD to satellite subscribers in the local market.

Again, most of these changes were imposed on the FCC by STELA, so they should not come as a surprise to anyone. Importantly, the new rules make it easier for satellite operators to bring SV stations into a market. In-market stations will need to take that fact into account when weighing their options vis-à-vis mandatory carriage and granting retransmission consent. It's easy to envision a situation in which an in-market network affiliate elects, unsuccessfully, to negotiate for retransmission consent, only to find an out-of-market SV station with the same affiliation being the sole network affiliate represented in those parts of the market in which the SV station is "significantly viewed".

The new SV rules were published in the Federal Register on November 29, which means that they are set to take effect on December 29.

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Focus on FCC Fines

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March 31, 2010, was probably not a good day for Daniel Smith, the individual licensee of a stand-alone FM in scenic Belle Plain, Kansas (just a hop, skip, and 26-mile jump down the road from Wichita). That's when the folks from the Enforcement Bureau arrived to inspect his station. Seven months later, he's looking at a Notice of Apparent Liability (NAL) that says he owes the guv'mint $25,000.

While that's a healthy fine for sure, closer analysis of Mr. Smith's alleged transgressions and the way the Feds are calculating his penalty provides some interesting, and possibly troubling, insight into the FCC's priorities.

It's safe to say that Mr. Smith was apparently not a stickler for complying with the Commission's rules. Here's what the NAL tells us about the inspection of his station:

The inspection team checked the station's EAS gear (as inspection teams routinely do) and found it wasn't working "because the power cord was disconnected" . . . well, because of that and also because it hadn't worked for some time. How long? Mr. Smith said that his EAS system stopped working "sometime between the year 2000 and the year 2006". Mr. Smith is apparently not a man of precision when it comes to dates . . . or record-keeping, for that matter: he reportedly had no logs indicating the last EAS test his station had sent or when the EAS rig went south on him. (He said he did try to hire an engineer to fix it, but "the engineer was too busy".)

Moving on to the station's public inspection file (again as inspection teams routinely do), the agents found no quarterly issues/programs lists for 2009 or 2010 – an omission that Mr. Smith readily acknowledged.

Stepping outside to eyeball the station's tower, the inspectors observed that the paint was faded and bare in spots. Not surprising, because the tower hadn't been painted (according to Mr. Smith) since it was erected in 1996. And about those three flashing beacons on the tower – that is, the beacons that were *supposed* to be flashing. They were either not flashing or not lit at all. Par for the course, apparently, since "several" of the sidelamps on the tower weren't working either.

The station had no automated system to monitor the tower lights, and Mr. Smith said that the station's staff wasn't checking the lights every day, as required by the rules. He said he knew the sidelamps weren't working, but wasn't aware the flashing beacons weren't on. He had no record of any tower observations, although he did recall having looked at the tower a couple of days before the inspection. However, since that observation occurred during the day when the "the lights were not exhibited", it didn't clue him in that the lights weren't working.

If we assume that the NAL's description of the situation is accurate, a $25K fine would not seem out of the question. But how, exactly, did the Enforcement Bureau get to that number?

It started by identifying four rules which had apparently been broken: (a) failure to maintain operational EAS equipment (Section 11.35(a)); (b) failure to make daily observations of tower lighting (Section 17.47); (c) failure to keep the tower painted and cleaned (Section 17.50); and (d) failure to place quarterly issues/programs lists in the public file (Section 73.3526).

Then it went to the books to find the "base forfeiture amount" for each. Those were: (a) $8,000 for EAS; (b) $2,000 for tower lighting observation; (c) $10,000 for tower painting; and (d) $10,000 for the public file.

Let's take a moment here to contemplate those numbers. If the amount of the "base forfeiture" may be seen as an indication of the relative importance of the underlying rule, then keeping the tower painted and the public file complete are (at $10K each) apparently really important, keeping the EAS gear up and running ($8K) pretty important, and making sure the tower lights are on (a mere $2K) not so much.

Does that make sense? In terms of potential impact on the safety and welfare of the public, shouldn't it be more important to keep your EAS system running? After all, EAS alerts – about, say, the approach of a destructive storm or a dangerous chemical spill or a pandemic – could affect most if not all the station's audience in a very direct and meaningful way. Why, then, are EAS violations treated more gingerly here?

And as between tower painting and tower light observations, why is the former five times more important that the latter? Tower visibility at all times is, of course, important to air traffic. But during daylight hours even a poorly painted tower can often be seen. That's not true of an unlit tower at night, regardless of the quality of its paint job. In view of that, shouldn't attention to tower lighting be encouraged at least as aggressively as tower painting? (Actually, the Commission's menu of standard fines does provide a $10,000 penalty for "failure to comply with prescribed lighting and/or marking", but for some reason the Enforcement Bureau invoked the $10K only with respect to the tower's paint job in Mr. Smith's case.)

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The Swami makes the call

First Amendment Face-Off

The Supremes take on Snyder v. Phelps

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[Blogmeister's Note: The Supreme Court has started issuing its opinions for the 2011 Term, so it's time to let the Prognosticating Swami, Kevin Goldberg, crank up his haruspication and vaticination machine to let our readers know what they might expect from the Court. First case out of the box: Snyder v. Phelps, one of the thorniest First Amendment cases to come down the pike in a while. The Swami sat in on the Court's oral argument in October. Here's his take. Full Disclosure Alert: Kevin, representing the American Society of News Editors, signed onto an amicus brief in support of Phelps (or, more accurately, in support of the First Amendment rights at stake).]

This case is a poster child for the notion that the First Amendment exists primarily to protect the fringe elements of society. Rarely has the Swami's crystal ball been so muddied after attending an oral argument at the Supreme Court. But equally rare is a case like *Snyder v. Phelps*.

Few cases in recent years have generated the attention of this one. The day of the argument, protesters supporting both sides were outside the Court, a huge amount of media were lined up more than an hour before the argument started, and I'm told that people had begun lining up to get into the Supreme Court chambers as early as 5:00 a.m. for a 10:00 a.m. argument – including even lawyers seeking to get into the section reserved for Supreme Court bar members.

To take the First Amendment side here is to align oneself with some bad actors.

Before we get too far ahead of ourselves, though, let's look at the facts of the case.

It's not an easy case to follow, let alone to choose sides in or to predict. In the eyes of many (including myself), to take the First Amendment side here is to align oneself with some bad actors who have done some despicable things. It's not easy to support the Phelpses and it's not easy to separate the heinous facts from the principles of law.

One party, Phelps, is a member of the Westboro Baptist Church, which is basically comprised of the Phelps family from Topeka, Kansas. Phelps kin constitute at least 50 of the 60 or 70 members of the church. Their extreme views include a belief that God is punishing the United States – especially the United States armed forces – for the country's "permissive" views on homosexuality. That belief leads them to protest at military funerals with signs condemning homosexuality (whether or not the soldier in question was homosexual).

The other party, Snyder, is the parent of Matthew Snyder, a Marine killed in Iraq in 2006. The Phelpses and their Church demonstrated at Matthew Snyder's funeral. Seven members of the Phelps family arrived with their usual inflammatory signs. (How inflammatory? Very. For example, "Thank God for 9/11", and "Fag troops", and "You're going to hell", and "Thank God for dead soldiers".) They also chanted. But in waving their signs and chanting their chants, they respected local ordinances as well as police requests and orders. In fact, while the rules required that they be at least 100 feet away from the church where the funeral was being held, they were actually over 1,000 feet away – and the funeral attendees never saw the signs or heard the chants. (Matthew Snyder's father testified that he wasn't even aware of the protest until later that evening, when he saw it on a televised news report.)

The Phelpses also published a self-described "epic" on their website (www.godhatesfags.com). Titled "The Burden of Marine Lance Cpl. Matthew A. Snyder", it claimed that the dead Marine's parents "taught Matthew to defy his creator", "raised him for the devil", and "taught him that God was a liar". Again, though, the bereaved father didn't read the "epic" until a few weeks after the funeral, when he found it after googling his son's name.

Albert Snyder (the father) sued the Phelpses, claiming defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress (IIED), and civil conspiracy. His claims were based as much upon the epic as the funeral protest.

The trial court dismissed the defamation and publicity-to-private-life claims because most of the information contained in the epic was opinion, not fact, and the non-opinion portion consisted of factual information already publicly known from Matthew Snyder's published obituary. The trial jury found for the Snyder family on the other three claims, awarding $2.9 million in compensatory damages and $8 million in punitive damages. The judge reduced the punitive damage award to $2.1 million, but otherwise left the jury's verdict and award intact.

The Phelpses appealed to the U.S. Court of Appeals for the Fourth Circuit, which reversed the District Court's judgment award. It concluded that the Phelpses were addressing a matter of public concern and, therefore, that the First Amendment prohibited imposition of liability unless there is a "provably false factual connotation". According to the Fourth Circuit, that prohibition applied not just to the defamation claim but to the IIED and invasion of privacy claims as well, no matter how shocking, outrageous or offensive the speech might have been.

The Supreme Court took the case, identifying four issues for consideration. The issues touched on the interplay of principles involving free speech, freedom of religion, defa-

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mation, tort law and more. So there's clearly a lot going on here . . . and it showed during the oral argument. (I won't summarize the argument – you can read the entire transcript for yourself or go all out and actually listen to it, thanks to the Supreme Court's website.) But here are some impressions and my prediction of the outcome.

First, the Justices seemed to have trouble getting to the heart of the case. As usual, Justice Thomas didn't ask any questions. Justice Kennedy really didn't participate until Margie Phelps was arguing. Newly-minted Justice Elena Kagan jumped right in, much as her fellow native New Yorker and next-junior associate Justice Sonia Sotomayor has been known to do. Justices Scalia, Alito, Breyer and Ginsburg really dug into the attorneys. But even their lines of questioning tended to be shorter and less consistent than other cases, as though the Justices themselves were having trouble getting their heads around it.

Most particularly, the Justices seemed to have trouble resolving how they should treat a situation in which a private person is bombarded with offensive speech on a matter ostensibly of public concern. The tension between the First Amendment, on the one hand, and society's interest in protecting its members from IIED, poses a thorny issue. The Court addressed it in *Hustler v. Falwell*, a case involving a parody ad in *Hustler* magazine that mocked noted televangelist Jerry Falwell. There the Court ruled against Falwell's IIED claim. But its rationale was based largely on the fact that Falwell was a "public figure" and, therefore, the First Amendment would ordinarily have precluded a successful defamation claim. The Court didn't want to allow an IIED claim to permit an "end run" around that preclusion.

I've got it at 5-4, maybe 6-3, in favor of Phelps.

But in *Snyder v. Phelps*, Snyder is a *private*, not a public, figure. Does that make a difference? Should it? What if the speech involves a matter of public concern, such as America's policies regarding homosexuality? And is it possible that some speech might be protected by the First Amendment because it's on a topic of public concern, while other speech is not because it's just an outrageous, hate-filled rant?

On that last point, the key delineator may just be how each Justice feels about the extent to which some speech's "outrageousness" might relieve it of First Amendment protection. The Court addressed that point in *Hustler*, noting the difficulties that such an approach presents:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our long-standing refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

A Justice concerned about the subjectivity inherent in that approach is likely to rule for Phelps. By contrast, less concern about that subjectivity element could lead a Justice to go for Snyder here. The idea there would be that "outrageousness" may properly be discouraged, consistently with the First Amendment, through IIED litigation involving a "private" figure, even if the same may not be true if a "public" figure is involved. Think sliding scales: the more you move from a private figure plaintiff on a matter of purely private concern to a public figure plaintiff on a matter of public concern, the more outrageous the speech must be to entitle the plaintiff to damages.

During the argument, at one point or another each Justice revealed the lens through which he or she is viewing this case. I looked for those moments to help me divine where he or she stands.

With that in mind, let's get to some predicting.

Here's how I break it down.

***Clearly for Snyder*:**

There's no question in my mind that Justices Alito and Roberts will be voting for Snyder.

Alito is the weakest on the current Court when it comes to the First Amendment. He was the only Justice who voted to uphold a clearly overbroad law in *United States v. Stevens;* his concern appeared to center on concerns of morality and proper behavior, rather than First Amendment interests.

Despite some indications that Chief Justice Roberts may not be that bad on First Amendment cases, in the *Snyder* argument he seemed convinced that the tort of IIED could exist even where a matter of public concern exists. One question he asked really stood out. During Phelps' argument, Roberts asked:

> [I]f you recognize that there can be a tort of emotional distress in [in some cases], isn't that, the factual question of whether it rises to that level of outrageousness, which is part of the tort for the jury?

This indicates to me that the Chief Justice is not willing to foreclose as a matter of law the possibility that an IIED claim can permissibly be pursued when a private figure plaintiff is suing based on speech on a matter of public concern.

***Likely for Snyder*:**

Justice Kennedy is also one who is generally favorable to the First Amendment, but he seemed particularly concerned that allowing groups like the Phelpses and their church to escape liability would open the door to everything short of outright stalking and harassment. He described the Phelps position as advocating the ability to follow any citizen around at any point, and noted that "torts and crimes are committed with words all the time". Taking these observations together, I feel that he's wary of giving unfettered rights to inflict insult in all situations.

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EA? EA? Oh!

FCC To Assess Environmental Impact Of Tower Registration Program

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The worm is turning.

Having long required various applicants to undertake "Environmental Assessments" (EAs) in connection with their proposals, the Commission now finds itself in the unenviable position of having to do its own EA relative to the effects of its Antenna Structure Registration (ASR) Program on migratory birds. The Commission has kicked off its EA with a public notice announcing a series of three public meetings and an opportunity to submit written comments.

Not surprisingly, this is *not* something the FCC seems particularly eager to dash into. In fact, its obligation to perform the EA came about when the Commission lost a case in the U.S. Court of Appeals for the D.C. Circuit *nearly three years ago* – and before then, the issue of the impact of towers on birds (or vice versa) had already been a subject of considerable controversy for at least five years. But now, at long last, the Commission is moving forward to comply with the National Environmental Policy Act (NEPA).

Why has the FCC been sucked into the NEPA vortex?

The first step in this process is an EA, which is a preliminary investigation of the likely environmental impact of the ASR program. If the EA indicates that the program will result in no significant environmental effects, the Commission will issue a Finding of No Significant Impact (that's right, a FONSI – not to be confused with Fonzie from *Happy Days*). But if the EA indicates that *any* "significant" environmental impacts might result from the ASR program, then the Commission must carry out a more extensive analysis – the dreaded Environmental Impact Statement (EIS).

Why has the FCC been sucked into the NEPA vortex? Environmental groups have long claimed that towers kill 4-50 million birds per year, and that the Commission should therefore apply NEPA procedures to the ASR program. Tower operators protest that towers kill fewer than that. Previously, the FCC claimed this lack of consensus – and the lack of specific evidence – relieved it of the NEPA-imposed obligation to consider the environmental effects of the ASR program.

In 2008, the D.C. Circuit rejected the Commission's argument. Under Commission's own rules implementing NEPA, if an action "*may* have significant environmental impact, the Bureau will require the applicant to prepare an EA". According to the Court, the Commission's insistence that environmental groups show definitive evidence of significant effects "plainly contravenes the 'may' standard". Furthermore, the squabble over the number of birds killed confirms, rather than refutes, that registered towers *may* have significant environmental impact. Finally, the Court observed, the FCC's refusal to consider the environmental effects of on these grounds goes against the basic intent of NEPA: ensuring that agencies consider environmental impacts *before* they act – that is, before the full ramifications are known – rather than wait until it is too late.

Accordingly, the Court held, the Commission must conduct an EA to determine whether an EIS is called for ***before*** the Commission can refuse to conduct an EIS. Pursuant to the Court's direction, the Commission is, by this Public Notice, doing just that: a Programmatic Environmental Assessment (PEA) of the ASR program to (a) examine the potential effects of that program on migratory birds and (b) determine whether a programmatic EIS is necessary.

What does all this paperwork do for the birds? NEPA does not operate by imposing substantive environmental mandates on federal agencies. Rather, it requires them to explicitly think about environmental issues before they take action. Specifically, preparing an EIS will require the FCC to set out a number of alternative ways to reach its regulatory goals and the environmental impact (*e.g.*, the anticipated mortality rates of migrating birds) of each alternative. The purpose is to ensure that the agency has before it the environmental consequences of each scenario before it chooses which way to go. (The process also informs the public of the environmental aspects of the proposed action.) In this case, even if the Commission concludes from its EA that no EIS is necessary, the Commission has already committed to use the EA process to "consider alternatives to address potential environmental effects".

Although NEPA does not require the FCC to complicate its tower registration program, it may well have that effect. Historically, tower registration has been a simple matter of uploading certain basic information about the tower to the Commission's ASR system, which then automatically generates a registration number with no muss and no fuss. The upcoming EA process will undoubtedly serve as yet another forum for the ongoing struggle between tower owners and environmental

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For six months, at least

FCC Doffs CAP Requirement

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Less than 36 hours before Thanksgiving, the Commission gave us all something to be thankful for: it extended until ***September 30, 2011***, the deadline for all EAS participants to implement the Common Alerting Protocol (CAP) reception requirement. As we reported last month, that deadline originally fell on March 29, 2011, which would have given all affected parties precious little time to make the necessary arrangements. The additional six months provides some breathing room – but whether it will be enough remains to be seen. If you have questions about the CAP requirement, check out our posts on www.CommLawBlog.com from last month and from last April for background and related links.

Interestingly, the Commission says that it is waiving the March 29, 2011 deadline "on its own motion". That's interesting because not only had a bunch of folks questioned the adequacy of the original deadline months ago, but a petition specifically seeking extension of the deadline was filed in October. So how the Commission can seriously suggest that this extension was essentially the Commission's own idea is not entirely clear.

Pretty much everybody and his little brother told the Commission that 180 days wouldn't be enough time.

The initial deadline had been set (in non-date-specific terms) back in 2007, when the Commission adopted new EAS rules, including the CAP reception requirement. The FCC specified back then that the CAP reception requirement would become effective 180 days after FEMA's adoption of CAP, whenever that might occur. Late last year, FEMA announced that it planned to adopt a version of CAP as early as the third quarter of 2010. In anticipation of FEMA adoption, the FCC asked (in March, 2010) for comments on how the FCC's rules might need to be revised to accommodate any FEMA-adopted CAP requirements. In response, pretty much everybody and his little brother told the Commission that 180 days wouldn't be enough time. As summarized by the Commission, the commenters said that:

> a 180-day cycle does not comport with vendors' and EAS Participants' budgeting schedules and, moreover, is insufficient given the relatively small number of manufacturing companies versus the large number of EAS Participants, the need for customer testing and approval (which alone may take more than 180 days), insufficient guidance regarding whether the FCC would require certification of CAP-compliant equipment, FEMA's recently announced conformance testing of such equipment, uncertainty regarding encoder/decoder reactions to an EAN (the national alert event code), and a lack of provision for unforeseen events.

And shortly after FEMA finally announced its own new standards in September, an impressive array of broadcast and cable interests (including, among others, the NAB, the NCTA, 46 state broadcast associations, NPR, PBS) expressly petitioned for a six-month (or more) extension of the 180-day deadline for essentially the same reasons.

So it's passing strange that the Commission is bothering to claim that it is now acting "on its own motion", given the fact that the likely inadequacy of the initial deadline had been raised by multiple parties very early on. But be that as it may, the fact is that implementation of the CAP reception requirement has now been put off until ***September 30, 2011***.

Note that, in its order, the Commission acknowledges that it still has some work of its own to do here: it plans to issue a notice of proposed rulemaking involving a "comprehensive review of the impact of CAP" on the EAS. That, obviously, could have an impact on issues relating to compliance with the CAP reception requirement. And while the Commission, maintaining that good stiff bureaucratic upper lip, advises that it doesn't contemplate any further waivers of the CAP rules beyond September 30, 2011, it still hedges by assuring one and all that it reserves the right to further extend the deadline if it feels like it.

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groups. Any resulting compromise, such as the one put forth last spring, seems likely to add layers of bureaucratic complexity to the ASR system, particularly if the Commission is expected to assess the potential environmental impact of any individual towers (there are over 100,000 towers in the Commission's database).

Comments about the PEA may be submitted by mail, by hand, or electronically through a link on the Commission's PEA website. Or better yet, you can present your comments in person at one of the three "scoping meetings" currently on the schedule. Those meetings are on tap in Washington, D.C. (1:30-4:30 p.m. ET on December 6, 2010), Chula Vista, California (6:00-8:30 p.m. PT on December 13, 2010) and Tampa, Florida (6:00-8:30 p.m. ET on December 15). The D.C. meeting will be held in the FCC headquarters. The Chula Vista gig will be at Civic Center there, and the Tampa confab will be at the John F. Germany Public Library. Come one, come all – but note that seating may be limited.

A hard bargain

NAB Term Sheet: Roadmap To Performance Right?

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The NAB has endorsed a "Term Sheet" which, IF fully adopted and implemented by all concerned (note the big "if"), would establish the existence of a "performance right" requiring radio licensees to pay royalties to musical artists (in addition to composers).

And from that I think it's safe to conclude that, while we have a ways to go before this becomes reality, there will one day be a performance right adopted into copyright law. Despite the NAB's continued insistence that it opposes the concept of a performance right – and despite the fact that the Term Sheet is, at least for the time being, still just a unilateral proposal and not a universally-embraced agreement – I'm convinced that a performance right will happen. This isn't an endorsement or repudiation of the concept. It's just a gut feeling of inevitability. My real questions involve "when" and "how much".

The NAB's Term Sheet, issued and delivered to the musicFirst Coalition on October 25, 2010, is couched as a "take it or leave it" offer to jointly move the Performance Rights Act (*PRA*) through Congress. As I've said before (like in the August, 2010 *Memo to Clients*), taking affirmative steps to resolve the long-running/long-rancorous PRA issue in Congress may not be a bad thing. That's especially true as long as the NAB (a) continues to hold the upper hand on the Hill vis-à-vis the PRA, and (b) takes care to ensure that *all* of its members, big and small, are satisfied that their interests are being adequately protected.

For now, the NAB must feel it does have that upper hand: the Performance Rights Act is not likely to pass in 2010, so if the music industry wants some performance right sooner rather than later, it will have to work with, not against, the NAB. But is the NAB's offer a show of strength or a retreat in the face of inevitability?

Let's take a look at the major provisions of the Term Sheet, which amounts to an outline of performance rights legislation that the NAB (and, if it signs on, musicFirst) would seek to push through Congress.

- Revenue-based royalty payment structure for over-the-air performance of music
  - The NAB proposes that the performance right royalty be calculated as 1% of a station's revenue for commercial stations with at least $1.25 million in revenue. The tiers shown in the box, below, would apply to smaller and/or noncommercial radio stations.

Stations making only incidental use of music (*e.g.*, news, talk or sports stations) would not pay at all for use of copyrighted music. Similarly, no payment obligation would arise from music used in religious *services* broadcast on the radio, although religious *music* stations would still be subject to the rate structure above.

Annual revenues	Payment
< $50,000 (commercial or nonprofit)	Lesser of $100/year or 1% of revenue
$50,000-$100,000 (commercial or nonprofit)	$500/year
> $100,000 (nonprofit only)	$1000/year
$100,000-$500,000 (commercial only)	Lesser of $2,500/year or 1% of revenue
$500,000-$1.25 million (commercial only)	$5,000/year
> $1.25 million (commercial only)	1% of revenue

Note that these royalty levels would be phased in subject to the extent of inclusion and activation of radio chips in mobile devices (*see below*).

- Broadcasters would receive a break on royalties arising from their webcasting/streaming or other non-terrestrial transmissions. Those non-broadcast rates would be tied to the "pureplay" webcasting rates, resulting in a reduction in current streaming rates. This new calculation approach would be effective until 12/31/16, with rates to be adjusted for six years terms thereafter.

- The NAB and MusicFirst would push for legislation requiring the inclusion and activation of radio chips in mobile devices, with an acceptable phase-in period and inclusion of HD when feasible. Because the electronics manufacturers would likely oppose such a requirement, the Term Sheet specifies a "market-based phase-in" approach to the royalty rates listed above. That phase-in would apply if the NAB and musicFirst "determine that legislation mandating the inclusion of radio chips on mobile devices is unattainable", and would apply as follows:
  - The percentage rate would be "tied to (mirror) the market percentage of mobile devices that include an enable radio chip", although a 0.25% floor would apply regardless of penetra-

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Beware The Copyright Troll

Aggressive litigants may pose problems for the careless and unwary

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There's a new monster on the prowl, and you or your business could be its next victim. Don't bother looking over your shoulder, because you won't see it coming. The first you'll know about it will be when the threatening letter arrives, or perhaps the notice of the Federal lawsuit, or the subpoena.

And at that point, it may be too late.

We're talking about the Copyright Troll, a recent unfortunate phenomenon of the Internet Age identified several years ago and recently brought into clear focus through the vigilant efforts of the Electronic Frontier Foundation (EFF), in particular, as well as other protectors of our civil liberties.

While there are a number of different species of the Troll, they all tend to prey on folks who aren't taking basic steps to avoid exposure to liability. We have previously written about the need to shore up defenses against potential liability from your use – and your employees' use – of social media on the job. If you haven't acted on our suggestions yet, the increasing Troll population gives you one more incentive to do so.

Trolls tend to prey on folks who aren't taking basic steps to avoid exposure to liability.

The Troll is opportunistic, like a virus. It obsessively seeks out apparent copyright violations and when it finds what appears to be an infringement – possibly the unauthorized post of copyrighted text, possibly the P2P transfer of unauthorized copies of files (like music or movies) – the Troll zeroes in.

One Troll species has tended to focus on printed content taken from online news sites that finds its way onto somebody else's site (such as a chat room, discussion board or blog). Others are able to detect particular films or videos being downloaded to IP addresses through such file-sharing programs as BitTorrent. Once such seeming infringements pop up on the radar screen, the Troll goes to work.

Its first order of business appears to be to file a lawsuit alleging copyright infringement. (Intentionally unnerving factoid: In 2010 alone, more than 14,000 such suits have already been filed.) In many if not most instances, the Troll knows only the IP addresses – *not* the names – of the alleged infringers, but that's not a problem: the defendants are all listed as "John Doe" (along with the various IP addresses) in the initial court papers. (Hence the name "John Doe lawsuits" often given to such litigation.) The Troll isn't really concerned with relatively minor details; it can always sort those out later, when it's got your attention.

That comes next: once the suit is filed, the Troll obtains a subpoena addressed to any and all ISPs or other such services used in the alleged infringement. The subpoena seeks the identifying names and addresses associated with the IP addresses. When those are in hand, the stunned individual defendants are besieged with offers of quick and quiet settlement, for a price. Since U.S. law provides for hefty statutory damages – that is, the plaintiff doesn't need to prove that it has actually suffered any monetary damages in order to score big – and since the cost of litigation can be similarly hefty, there is considerable incentive to pay the nuisance price even if the defendant plainly did not infringe anything. There is even more incentive if the defendant is, or could be, liable for infringement.

Want a more detailed glimpse into the nitty-gritty? Check out reports from the EFF, or Wired, or Ars Technica. It's pretty scary. (Sadly, the core of the Troll operation is reportedly populated primarily by lawyers. Please don't hold that against the rest of us.)

In general, there are three ways that a media entity might get cross-wise with a Troll. Fortunately, we may be able to help you no matter which situation applies.

First, the infringement may occur from content posted on your website – maybe on a discussion board or chat room that allows your listeners, viewers or others to interact. Or maybe you provide the opportunity for visitors to post their own comments on your site. All it takes is somebody, anybody, posting copyrighted content somewhere on your site. Yoo-hoo, Copyright Trolls – Come and get it!!!

(A likely source of such content: reports taken from online news sites, particularly during highly partisan discussions of hot button issues. Perhaps the most famous such Troll operating in this area: Righthaven, LLC, a company that has made a business of purchasing copyrighted news content from the content's creators and then aggressively suing those who post that content without permission. Check out EFF's description of Righthaven's MO at https://www.eff.org/deeplinks/2010/09/righthavens-own-brand-copyright-trolling.)

The good news is that you can get yourself absolute immunity from this kind of infringement claim by taking a few simple steps to obtain the protection of Section 512 of

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tion. In other words, even if no mobile devices included chips, large commercial stations would be on the performance royalty hook for 0.25% of their revenues; they would then increase in a way that mirrors the market percentage of mobile devices until 75% of all mobile devices have a radio chip, at which point the full rates kick in.

- The phase-in approach would apply to small, noncommercial, religious and/or non-music stations as well.
- The discounted rates for webcasting/streaming/non-terrestrial transmission would not take effect until 50% of all mobile devices have a radio chip. But if that 50% threshold is not reached by 2016, any existing streaming rates will continue to apply.

- Broadcasters would report their data using the sample reporting methodology currently used by ASCAP/BMI rather than the more intensive "census" reporting currently submitted to SoundExchange for the webcasting statutory license.
- The NAB and musicFirst would agree to the following "policy" considerations:
  - The Copyright Royalty Board (CRB) would have absolutely no involvement in setting terrestrial or streaming rates.
  - The agreed-to royalty structure would be predicated on the express acknowledgement by *AFTRA that broadcasters have a right to fully simulcast their terrestrial broadcasts on the Internet. In other words, the ongoing dispute regarding the requirement to remove some broadcast commercials from streamed content will be resolved.*
  - The text of any eventual bill would explicitly acknowledge the "value to artists and record labels of promotion on free, over-the-air terrestrial radio".

From a practical perspective, we should also note that, by including the radio chip as an essential element of the deal, the NAB has roped the electronics manufacturers into the process. Ditto for AFTRA, with respect to the provision about streaming commercials. Of course, the presence of these particular additional players is technically not necessary for the resolution of the essential question of whether or not any performance royalty obligation exists. But by increasing the number of parties at the negotiating table, the NAB has almost certainly assured that the negotiation will take considerably longer than would otherwise be the case.

But now that we know what the Term Sheet looks like, the question is: does it make sense for broadcasters?

Hard to say for sure, because different stations will be affected in different ways. Even the smallest station might have trouble paying $100 per year if it's barely meeting expenses anyway. But that same station might find – maybe now, maybe in the relative near-term – that the reductions in streaming royalties more than offset the new royalties for over-the-air broadcasts in the long term. Locking in reduced streaming royalty rates *now* may pay handsome rewards down the line, particularly if, absent some such legislation, the CRB continues its exponential increase of webcasting royalties.

For that reason, you might want to run some numbers yourself. Figure out how much you'd be paying this year, and for the next five years, under the NAB's proposal. (We're happy to help you work through this – though, as lawyers, we can't vouch for the math.) Compare that to what you're paying now. If your overall royalty obligation would go up, would the increase be completely untenable under your current budget (or your anticipated budgets for future years)?

The siege effort that the NAB has waged for years against the PRA has been successful, but costly.

But before you answer, consider a couple of other factors. The NAB's approach would remove the CRB from the rate-setting process, and would ideally substitute a more rational, and predictable, rate-setting mechanism going forward. Nothing wrong with that. Moreover, the NAB Term Sheet would also streamline reporting requirements for webcasting – which could relieve broadcasters of a significant headache and thereby encourage them to stake out a more substantial web presence.

And while the question of performance royalties – or anything relating to your pocketbook – is among the most important issues facing any radio broadcaster, it's not the only issue. It's just one of many legislative and policy matters facing the industry. NAB members expect, and need, the NAB to represent them before Congress and the agencies on *all* these issues. And for itself to survive, the NAB has to be sure that it's doing precisely that. As I noted in an earlier post, the siege effort that the NAB has waged for years against the PRA has been successful, but costly. And unless something happens – like a negotiated settlement – it's likely to continue to be costly for years more, sapping the NAB's, and broadcasters', political capital.

Of course, if you're an unhappy NAB member, speak up about it – especially if your unhappiness derives from a lack of communication from between leadership and membership. That's one of your rights as a member and the only way any final deal will be the best deal for the majority of radio broadcasters.

Love And Money:
A Lobbyist's Look At Telecom In The Next Congress

By Catherine McCullough
Meadowbrook Strategic Government Relations
Guest Columnist

[*Editor's Note: The Memorandum to Clients welcomes back Catherine McCullough, who provides us with the following insight into the upcoming Congressional session. Catherine, who has appeared in these pages before, is a principal in Meadowbrook Strategic Government Relations, LLC and is a specialist in Congressional relations.*]

Welcome to the 112th Congress. Notice anything missing? Like a third of the House Energy and Commerce Dems? Or a Congressional mandate on net neutrality? Or Chairman Boucher? Me too. So let's take a few minutes to figure out what it all means.

Let's start with the larger picture. This year's midterms have put Members on notice that voters are not afraid to fire them. And each party is looking to 2012 to capture complete control of both houses of Congress and the White House.

So in the upcoming Congress look for Members to be feverishly competing for two things: love and money. Love in the form of votes (from an unusually angry electorate, eager to hold officials accountable). And money in the form of, well, money, *i.e.*, the ability to spend government funds on their preferred projects (without, of course, looking fiscally irresponsible).

Both love and money can be found in telecom policy.

As we shall see, both love and money can be found in telecom policy. So it's likely that telecom issues will get considerable attention from Congressional leadership, including precious "floor time" for debate. Here is how I see the 112th playing out.

In the quest for the love of the voters, among the most effective strategies an elected official can employ is legislative attention to consumer issues. Sure, foreign policy and national security and all kinds of other Big Issues are important. But to focus on consumers is to demonstrate that you're thinking of *them* – and what better way is there to get them to think of *you* the next time they happen to be in a voting booth?

Interestingly, when the House and Senate are split between parties – as they will be in the coming term – consumer issues are even more likely to come to the fore. In that situation, neither side has the votes to ramrod controversial bills through. So there is a natural tendency for the majority party in each chamber to focus on legislation that will win that party the voter's love. Happily, there is a similar tendency for the minority party in each chamber to go along with the majority, because to do otherwise would appear to be obstructionist. And when consumer interests are on the table, obstructionism is a definite voter turn-off.

So, in the world of telecom, issues such as online privacy are likely to be some of the first to be considered. Look for the draft bill floated by Rep. Boucher earlier this year to serve as a starting point. In order to pass a Republican House, the final legislation may not be what consumer groups wish, but in the end I believe there will be a bipartisan White House signing ceremony where all parties will take credit for protecting the privacy of their beloved voters.

(Fair bet: the signing ceremony will take place during the second year of the 112th Congress, possibly in the late Spring, before Members go home to star in their local Memorial Day and Fourth of July parades and start their campaigns.)

As to the less romantic but far more practical question of money, telecom policy is one of the few places it can be found. How? Think spectrum auctions. By providing for the sale of spectrum controlled by the government, Congress can generate revenue that can be used either to (a) "offset" any spending priorities Members might push for or (b) pay down debt.

While a large portion of valuable spectrum has already been dealt off in previous auctions, this term Congress could (if the FCC, the wireless industry and a number of others get their way) promote the sale of a big chunk of spectrum currently used for TV broadcasting.

Some initial steps in that direction have already been taken in the last several months in both the House and the Senate. But if TV spectrum is ultimately auctioned, one of the most politically sticky problems will be how the auction proceeds are to be split. Right now, politicians on both sides of the aisle, whether in the Administration or in Congress, are unusually motivated to make sure that that problem gets resolved quickly. That's because, once the manner of splitting the revenue has been set (even if only approximately), they will be able to calculate how much the government can expect to recoup from any such auction. The auction-related bills which have already been dropped would let the FCC take the first cut at coming up with a revenue-sharing plan – but Congress will be keeping a careful eye on the FCC's approach and will likely be poised to step in with its own formulation if the FCC's is not to Congress's liking.

Therefore, look for an unusually high amount of govern-

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reforms, arguing that the existing retrans regime is not broken, and that the Commission should simply continue to allow the free market to dictate the outcome of negotiations between broadcasters and cable systems. To date, the FCC has taken no action in the matter.

Fast forward to October, when the existing retrans agreements between Fox and Cablevision were due to expire. The parties were unable to reach an extension agreement and, as a result, the signals of Fox's broadcast stations in the Philadelphia and New York City markets were unavailable on Cablevision's systems for about 15 days – during which time Fox's programming included baseball's National League Championship series (featuring the Philadelphia Phillies) and the first two games of the World Series.

Cablevision and, to a lesser extent, Fox took their dispute to the press, the FCC, and Congress. Despite Cablevision's repeated calls for FCC intervention, the Commission declined to step in, reiterating that its authority is limited to enforcing the requirement that companies negotiate in good faith. The Commission didn't entirely sit on the sidelines: it issued consumer advisories instructing viewers on alternative ways of receiving Fox programming, and the Media Bureau requested that both parties provide the Commission with their own respective descriptions of their negotiations.

At this late date, it seems unlikely that Senator Kerry's bill will be considered in this Congress.

The parties presented markedly different accounts. In response to the Bureau's invitation that each provide evidence of the other's lack of "good faith", the parties took divergent paths. Cablevision forcefully accused Fox of negotiating in bad faith, while Fox "respectfully" declined the Commission's invitation, saying that charges of bad faith would not be helpful to resolving the impasse.

Ultimately, Fox and Cablevision reached a deal, and Cablevision subscribers regained their Fox programming just before the third game of the World Series. Cablevision clearly remained unhappy, however: in its press release announcing the deal, it claimed that it had been forced by FCC inaction to agree to pay Fox "an unfair price". The truth of that statement is difficult to evaluate, though, because – as usual for such agreements – the terms were not disclosed.

With local viewers frustrated over the loss of programming, it was not at all surprising that the politicians would become involved. Leading the charge was Senator John Kerry (D-MA). Kerry has drafted legislation aimed at reforming the retransmission consent process and, after the Cablevision/Fox dispute, he pushed for consideration of that bill in the current lame duck Congressional session.

Kerry's bill would, in the event of an impasse between a broadcaster and cable system, prevent the broadcaster from pulling its signal while the FCC evaluates the parties' last offers to determine whether they had negotiated in good faith. If the FCC were to find that one party had failed to negotiate in good faith, the Commission could force agreement on the terms of the other party's last offer. If the Commission were unable to find that either party had negotiated in bad faith (or if it found bad faith on the part of both), it could recommend binding arbitration. During arbitration, the cable system would continue to carry the broadcaster's signal. If either party rejected arbitration, only then would the signal be pulled, with the parties and the Commission together disclosing the terms of each party's final offer in a consumer notice regarding the dispute.

At this late date, it seems unlikely that Senator Kerry's bill will be considered in this Congress. The issue, however, will certainly arise again next year. Senator Kerry indicated his continuing concern by calling a hearing on November 17. Attending were representatives of both Cablevision and Fox, as well as Time Warner, Univision, and Ovation (an independent cable programmer). The hearing broke no new ground, with the parties reiterating positions they have staked out many times before.

Senator Kerry and other Senators at the hearing asserted that they don't want to get involved in private negotiations but they *do* want to protect consumers from losing programming, so they may feel the need to step in. The Senators also focused on the problems of transparency in the existing system. With the terms of agreements kept private, they observed, it's difficult for anyone to know what a fair price is, and for consumers even to know what prices they are paying for various types of programming. Kerry indicated that even if his suggested reforms were not adopted, the Committee could demand the submission of specific pricing information from the industry.

Attributing specific prices to specific channels could, of course, start the ball rolling towards the long-discussed idea of "à la carte" cable pricing, in which viewers select, channel-by-channel, the programming they want from their MVPD. The MVPD industry has long opposed any mandatory à la carte structure, with various parties arguing that it would increase prices for many consumers and lead to the elimination of many less popular channels.

(Interestingly, however, the cable industry has taken some tentative steps towards greater pricing flexibility in recent months. For instance, Time-Warner recently introduced a new budget package called "TV Essentials", featuring about 50 channels, including local broadcast affiliates and a number of basic cable channels. Notably absent, however, would be some of the pricier cable channels, such as ESPN, Fox News, and TNT. Recent reports indicate that Charter Communications is exploring a simi-

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lar package. If consumers in large numbers accept such packages, it will be interesting to see how that affects the rates programmers can command for their more expensive cable channels.)

It's also worth noting that the retrans debate is not limited to broadcasters and cable operators. While spats over broadcast programming may get the most press attention, MVPDs also must negotiate with the owners of *non*-broadcast programming for carriage rights; at times those negotiations can also get contentious. In contrast to the recent high profile TV/cable battles (like Fox v. Cablevision), the MVPD may prefer to drop a channel as a negotiating strategy. In early November, AT&T, which provides the "U-Verse" MVPD service, dropped a number of non-broadcast channels produced by Scripps Networks (including HGTV and the Food Network) when the parties couldn't reach a carriage deal. Scripps offered to let AT&T continue to carry Scripps programming while negotiations continued, but AT&T declined. While this dispute did not garner anywhere near the headlines of the Cablevision/Fox dispute, it illustrates that the retrans issue entails more considerations than the higher profile situations might suggest.

Another front in the retrans wars that warrants attention: the Comcast/NBC Universal merger. Because that merger would combine a dominant cable system owner with a significant program producer and broadcast station owner, it has been rumored that the government (including the FCC and Department of Justice) may impose mandatory arbitration conditions on the combined company. If those rumors play out, the result could provide a test case for how such mandatory arbitration might work if imposed on the MVPD industry as a whole.

The one thing that's clear is that the MVPD industry has developed since the initial formulation of the retransmission consent system nearly 20 years ago – and that development has led to discomfort in certain quarters. The current retrans system, based as it is in private, good faith negotiations, could prove sufficiently elastic to accommodate that level of development, maybe even more. But the complaints of discomfort by some may be loud enough to prod the government to try to "fix" things. While some legislative saber-rattling has occurred, it remains to be seen if the FCC or Congress will in fact alter the existing system, and if they do, what the ultimate effect of such tinkering will be.

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And as between tower visibility generally and EAS problems, again, doesn't EAS have an overall greater potential impact on the public? A plane crash into a tower, tragic as it may be, is a relatively rare occurrence with a relatively limited effect on the public. By contrast, a tornado, wildfire, earthquake, terrorist threat, etc., etc. – *i.e.*, the stuff of EAS alerts that occur all the time – are of direct importance to far more of the public. If we're going to rank such things by their potential for affecting the public, aren't the current fines for EAS, tower lighting observations and tower painting out of whack?

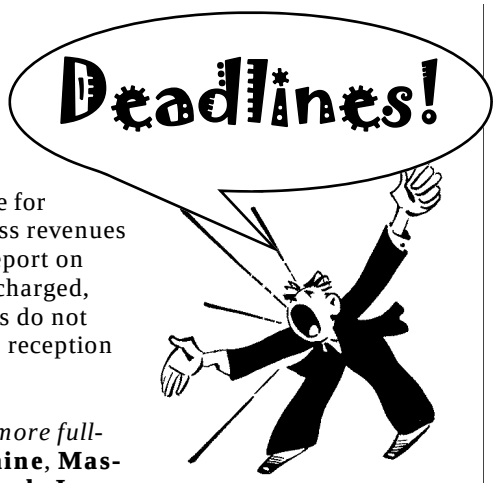
And then there's the public file rule. $10K? Really? Back in 1997, when the Commission imposed its current "base forfeiture" approach, it defended the high "base" fine for omission of issues/programs lists because, supposedly, such an omission "diminishes the public's ability to determine and comment at renewal time on whether the station is serving its community". But historically, the public has demonstrated a nearly wholesale lack of interest in issues/programs lists. (That could be because the public has a more direct and effective way of determining whether a station is serving its community: that is, by listening to or watching it.) It seems clear to this writer, at least, that the $10,000 base forfeiture for omission of issues/programs lists is grossly disproportionate.

Getting back to Mr. Smith's case, the Enforcement Bureau could simply have added up the base amounts for the violations it had identified, which would have produced a $30,000 fine. But the Bureau got fancy. It reduced the public file component of the fine from the maximum of $10K to a somewhat more reasonable $4K because the station's public file "contained a portion of the items required." (This is arguably consistent with the Media Bureau's recently announced policy of dealing out $10K fines to licensees missing 12 or more lists – although where the MB folks came up with the "12 or more" break point is not clear. Equally unclear is why a licensee missing five lists, as in Mr. Smith's case, should be liable for a $4,000 fine, as opposed to any other dollar figure. There appears to be no obvious "per missing list" multiplier at work here.)

That reduced the total to $24,000. But the Enforcement Bureau then tacked on another $1,000 to the EAS violation because Mr. Smith, as it turned out, had a record of violating the EAS rules back in 1997.

Wait a minute. He was specifically alerted to the EAS rules in 1997, and yet by 2000 (or maybe as late as 2006), his EAS gear wasn't working and he did nothing about it? For at least four, maybe as many as 10, years? And the Bureau thinks that that warrants a mere $1,000 uptick in the fine?

It's possible that there are a whole host of other factors, not apparent in the NAL, that affected both Mr. Smith's conduct here and the Enforcement Bureau's response. But from the NAL alone, the Bureau's (and, ultimately, the Commission's) priorities are plainly subject to question. Nevertheless, the one message that comes through loud and clear here is that the Enforcement Bureau is still actively engaged in the enforcement business, even if its calculations may be dubious.



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.

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.

January 10, 2011

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the fourth 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 that the FCC now requires the use of FRN's and passwords in order to file the reports. We suggest that you have that information handy before you start the process.

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.

February 1, 2011

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Ar-**

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ment cooperation – between parties, between the House and Senate, and between Congress and the Administration – when it comes to creating a formula during the next year.

Reform of the Universal Service Fund (USF) is an issue that represents *both* love *and* money for Congress. While some may view USF reform as a wonky issue of marketplace structure, it can still be sold to the voting public as a consumer issue because reform could lead to lower bills. (The Democratic-led Senate Commerce Committee's focus on consumer issues could bolster support for this theme.) In addition, USF reform can also appeal to the pragmatic interest in "money" by generating real savings through the elimination of waste and fraud.

Again, look for the work Representative Boucher and his staff did in the 111th Congress to have some influence in the 112th. The Boucher/Terry bill introduced in July 2010 likely should serve as a starting point for future debate on the issue. In fact, much work to be done in the 112th Congress will be influenced by the work of the 111th, even though the ranks of House Energy and Commerce Democrats were so thinned by the election.

Reform of the USF is an issue that represents both love and money for Congress.

Telecom policy is somewhat unusual in Congress. Commerce Committee leadership from both parties work together in a reasonably cooperative, collegial way – which is not the case in many other Committees. Having worked as a Counsel on the Senate Commerce Committee, I can attest to the consistent efforts of the Chairmen and Ranking Members and the staffs to resolve differences and come up with bills that provide the FCC and its regulated industries clear guidance. From my observation, changes in leadership and Committee makeup have less effect on the development of telecom legislation than they do in other areas.

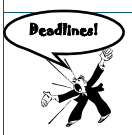
That being said, there will be changes in the House and Senate Commerce Committees. The changes on the Senate side will be small: the Chair and Ranking members will not change. Because the number of Senate Republicans has increased (and, logically, the number of Senate Democrats has decreased), the Republican-Democrat balance on the committees (known as the "ratio") will likely shift slightly – there will probably be one more Republican slot on the committee.

On the House side, changes will be stark. Representative Barton is waging a campaign to keep his seat as top Republican on the Energy and Commerce Committee. However, he is subject to an internal "term limit" of sorts: Republican conference rules prohibit a Member from holding a committee leadership slot for more than three terms. Since Barton has maxed out his tenure under that rule, he is seeking a waiver. His argument: during a part of his tenure the Republicans were in the minority, so he should be given a chance to head up the committee while it has majority power.

If Barton does not get his waiver, the seat will likely go to Rep. Stearns (R-FL-6th), the current head of the telecom subcommittee, Rep. Upton (R-MI-6th), or Rep. Shimkus (R-IL-19th). If Stearns leaves telecom to head up the full committee, it is possible that Rep. Walden (R-OR-2nd) will take the chair of the telecom subcommittee. Walden has a background in radio broadcasting and has expressed interest in the position.

On the Dem side of the House, Rep. Bobby Rush (D-IL-1st) is campaigning to head the telecom subcommittee now that Rep Markey (D-MA-7th) has declined to take back that subcommittee position. Also said to be interested in the plum position are Rep. Eshoo (D-CA-14th) and Rep. Doyle (D-PA-14th). We should know who will win these leadership posts after Thanksgiving; each conference is scheduled to vote on their leadership shortly.

Certainly the development of telecom policy is being watched closely by the Obama Administration. Less than 24 hours after polls closed across the country on election night and results began to be known, FCC leadership was summoned to a meeting at the White House. In my view, this underscores the Administration's keen understanding of the role telecom policy plays in buoying our economy – and an understanding of how the new Congress' pursuit of love and money is likely to impact the White House's own chances to be re-elected in 2012.



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kansas, **Kansas**, **Louisiana**, **Mississippi**, **Nebraska**, **New Jersey**, **New York**, and **Oklahoma** 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 **New Jersey** and **New York** must file EEO Mid-Term Reports electronically on FCC Form 397.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Kansas**, **Nebraska**, or **Oklahoma** 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 **Arkansas**, **Louisiana**, **Mississippi**, **New Jersey**, or **New York** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

(Continued from page 2)

Signal Prediction/Signal Measurement Orders

The FCC's other orders deal with the technical requirements involved in the carriage of distant signals to "unserved households". Satellite operators are permitted to provide a distant network-affiliated station to subscribers who are unable to receive an adequate over-the-air signal from the local affiliate of that network. And conversely, households which *do* receive an adequate over-the-air signal from the local affiliate are generally *not* eligible to get the distant signal by satellite (apart from SV stations, of course). Determining which households are "unserved", of course, requires methods for predicting and measuring signals.

STELA required the FCC to develop a "point-to-point predictive model for reliably and presumptively determining the ability of individual locations, through the use of an antenna, to receive" a digital TV signal of specified strength. (An analog model is already in place but, in this post-DTV transition world, it's useful only for the remaining analog LPTVs and TV translators.) Additionally, STELA required a resolution to the long-pending-still-unresolved proceeding to establish a procedure for on-site measurement of actual DTV signal reception.

For the most part, the orders simply put into the FCC's rules the requirements laid out by STELA.

Following STELA's commands, the Commission has adopted a point-to-point predictive model for determining the ability of individual locations to receive an adequate over-the-air digital television broadcast signal through the use of an antenna. As expected, a new digital Individual Location Longley-Rice (ILLR) model will be used to determine whether individual households are eligible to receive the signals of distant network-affiliated digital television stations (including TV translator and low power television stations) from their satellite carrier.

The FCC has also continued the use of the "F(50,90) specifications" in the digital ILLR model. For those that don't speak fluent geek, those two values – *i.e.*, 50 and 90 – refer to location and time variability factors of evaluating signal strength. That is, within the area encompassed by an F (50,90) contour, at least 50% of the locations can be expected to receive a signal that exceeds the field strength value at least 90% of the time. This was the "old" standard in the analog world and the FCC found that it continues to be the appropriate standard for digital television. The new standard provides no special adjustment or procedure in the model for network signals carried on multicast program streams. The FCC's assumption here is that if a household is predicted to receive a station, then all of that station's program streams would be received equally.

A minor controversy arose from the STELA-mandated definition of the term "unserved household". The STELA-imposed definition did not specify the use of a "conventional, stationary outdoor rooftop antenna"; instead, it simply referred to the use of "an antenna". Some suggested that this change meant that signal predictions must assume the use of a less effective indoor antenna, drastically increasing the potential number of "unserved households". The FCC acknowledged that the revised definition did afford the FCC more flexibility in determining the types of antennas that might be used. Nevertheless, the Commission ultimately found that an approach that specifies an outdoor antenna at six meters above ground for one-story structures and nine meters above ground for taller structures was most consistent with the DTV signal strength prediction model required by STELA.

The new prediction method will become effective 30 days after they are published in the Federal Register. No word yet on when that publication is likely to occur.

Occasionally, of course, an individual might dispute the signal strength predicted by this new digital ILLR model. The third of the FCC's STELA orders revises the signal strength measurement procedures used to determine the actual – as opposed to the predicted – DTV signal at any specific location. A viewer denied distant signals on the basis of the *predicted* signal strength can ask for the actual signal strength to be measured using the amended procedures. If the measured signal strength shows the location is "unserved" then the viewer is eligible for distant signals. The FCC largely continued the use of prior procedures, tweaking them as necessary to address the differences between analog and digital TV signals.

Digital signal measurement procedures now include new provisions for the location of the measurement antenna, antenna height, signal measurement method, antenna orientation and polarization, and data recording. As with the predictive model, the FCC disagreed with those insisting that STELA required the use of an indoor antenna in conducting signal strength tests. Rather, the FCC continues to mandate the use of outdoor antennas in such tests. In addition, the new procedures measure only stations located within the same DMA as the satellite subscriber's household.

The revised measurement method will not become effective until they have been approved by OMB. Check back here for updates on that process.

In-State Broadcasting Public Notice

Finally, the FCC issued a public notice seeking information that may be incorporated into the STELA-mandated report on issues relating to satellite carriage of "in-state" broadcast stations. Motivated by claims that some satellite subscribers are wrongfully denied satellite access to broadcast stations located in the same state because the station and subscribers are in different DMAs, Congress required the FCC to investigate the issue and submit a report to Congress by August 27, 2011. To develop the basis for such a

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the Digital Millennium Copyright Act. With a few tweaks to the Terms of Service of your website, the filing of a form with the United States Copyright Office and a minimal amount of vigilance on your part – enough to respond to the occasional Takedown Notice sent to your Designated Agent – you should be good to go. Sure, there's a $105 filing fee for that Copyright Office form, but that's peanuts compared to the potential statutory damages that are in play for copyright infringement. (If this sounds familiar, it's because we've written about it here before; so have the folks at Wired at http://www.wired.com/threatlevel/2010/10/dmca-righthaven-loophole/#ixzz13fPJXsz4.)

Another target of the Trolls: illegal downloaded/sharing of movies and the like. If somebody on your staff does this using your equipment, your IP address will likely show up in the Trolls' search and, bingo, here comes the infringement claim against you. Once this happens, it may be Too Late to apply any easy fixes, so the trick is not to let it happen in the first place. We've spoken before about adopting guidelines for use of social media in the workplace. (Check out the March, 2010 *Memo to Clients*, for example.) This is one situation that those guidelines would address.

The $105 filing fee is peanuts compared to the potential statutory damages that are in play for copyright infringement.

Yet another Troll trick: If you're an Internet service provider (or a cable or telephone company bundling or reselling service), you might receive a subpoena asking you to identify the subscriber found at a particular IP address. In some of these cases, you might have a responsibility to forward the subpoena to the subscriber so that he/she can challenge the subpoena himself. We can walk you through the process of notifying a subscriber, challenging a subpoena or responding to the subpoena with the required information.

If you do happen to get sucked into any kind of Troll-initiated infringement action, first take a deep breath, then take heart. The EFF has already identified a few arguments that might counter the Trolls in some cases. For example:

© Trolls often join all the defendants in a given case in a single lawsuit filed in a single District Court, which may entail constitutional due process problems.

© Trolls often sue based on the IP address of the computer used to download/share the copyrighted work. But the owner of that computer might not be the same person who actually committed the copyright infringement at issue.

© There is a First Amendment right to anonymous speech which might outweigh the need identify the speaker/defendant.

© In fact, if there's one upside to the increase in Copyright Trolls, it's that that increase has spawned a pretty solid body of materials aimed at countering such suits – so filing the required motion to quash isn't nearly as difficult or expensive as it used to be.

Still, an ounce of prevention is worth a pound of cure – so tighten up your social media policies and, if nothing else, act now to GET YOURSELF UNDER THE SECTION 512 UMBRELLA!!!

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report, the public notice seeks input from the public on a variety of factors, including the methodologies, metrics, data sources and "levels of granularity" to be used in the report.

According to the public notice, the report will: (1) analyze the number of households in a state that receive the signals of local broadcast stations assigned to a community of license located in a different state; (2) evaluate the extent to which consumers in each local market have access to in-state broadcast programming over-the-air or from a multichannel video programming distributor; and (3) consider whether there are alternatives to DMAs to define "local" markets that would provide consumers with more in-state broadcast programming. Through this process, the FCC believes it will identify counties and associated populations within specific states that have limited access to in-state broadcast programming.

Comments in response to the public notice will be due 45 days after it is published in the Federal Register; reply comments will be due 75 days after Federal Register publication. Check back here for updates.

It is unlikely that new rules will immediately result from the FCC's investigation and report. Still, stations located in DMAs that cross state lines should pay particular attention to this item, as satellite and cable operators have been arguing for some time that they should have the right to bring distant, but same-state, signals to their subscribers in the name of providing programming that is "local" to those subscribers. In particular, broadcasters will need to consider the FCC's inquiries into whether there should be some alternative to the use of DMAs in determining carriage or whether the existing DMAs should be modified to better conform to state lines. Such changes would have a significant impact on stations' advertising and programming operations, ownership restrictions, carriage rights and network exclusivity.

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***Clearly for Phelps*:**

Justices Ginsburg, Kagan and Sotomayor seem firmly in the Phelps camp.

Ginsburg was "up in the grill" of Snyder's attorney, Sean Summers, from the get-go (the term is in quotes because, oddly enough, Margie Phelps used that term three times in her oral argument to describe the difference between, on the one hand, protected speech and, on the other, unprotected IIED or "fighting words"). Ginsburg especially seemed unconvinced that protesters who complied with every time, place and manner restriction put upon their speech could later be held liable.

Justice Kagan highlighted the portion of *Hustler* quoted above. I think she is concerned about subjectivity and I think she's not willing to impose liability in this case.

Justice Sotomayor also seemed skeptical about the public figure/private figure distinction. She noted at one point:

> [U]nder what theory of the First Amendment would we do that? What [Supreme Court decision] would stand for . . . the proposition that public speech or speech on a public matter should be treated differently depending on the recipient of the speech?

***Likely for Phelps*:**

Justice Breyer is a little tougher. Despite being tagged as a "liberal" member of the Court, he isn't rock solid on First Amendment protections. But he's still pretty good. For me, the key moment occurred when he seemed to be seeking a way to protect this speech by allowing some liability but not where matters of public concern are involved. (You can find this moment at pages 45-46 of the transcript.)

But Scalia was the real revelation to me. As usual, he was an active questioner, launching into both attorneys. But everything crystallized – and I think the case might have tipped to Phelps – in this exchange during Summers's rebuttal:

> MR. SUMMERS: The court – the district court would have to look at the signs, as the district court did in this case, and determine which one he believed were directed at the family and which ones were not. There was a comment earlier that all the signs were presented. Well, all the signs were presented by the Respondents, not by Mr. Snyder. So we –
>
> JUSTICE SCALIA: I guess that that kind of a call is always necessary under – under the tort that you're – that you're relying upon. The conduct has to be outrageous, right?
>
> MR. SUMMERS: Correct.
>
> JUSTICE SCALIA: That always requires that kind of a call, unless the tort is unconstitutional, as applied to all – all harm inflicted by words.

I'm sensing that Justice Scalia is concerned that Snyder's position requires consideration of the message's content in determining whether there is outrageousness. He's always been concerned with regulating speech based on a particular viewpoint, yet that's what Mr. Summers seems to be advocating. There's no way that Scalia will agree with this. If I'm right, he definitely provides what could be the crucial vote for Phelps.

***Unknown*:**

Justice Thomas. The guy didn't ask a single question (again). Sometimes he loves the First Amendment, but sometimes he comes way out of left field, especially in cases where he can view himself as the protector of a "weak" constituency. (Check out his concurring opinion in the "Bong Hits for Jesus" student speech case in which he went so far as to advocate a return to the 19th Century, when schools basically governed every aspect of their students' lives.) His paternal streak might say that the government should step in where funerals are involved.

It's my uncertainty about Thomas's vote that keeps me from a conclusive prediction as to the vote split – 5-4 or 6-3 – but, if my other big guess (that would be Justice Scalia) pans out, the Swami sees a victory for Phelps and, more particularly, the First Amendment.

FM Allotments Adopted – 10/21/10-11/19/10

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
AK	Fairbanks		224C2	10-81	TBA
AK	Fairbanks		232C2	10-81	TBA

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.

Late-Breaking News!!!

TV Spectrum Re-Purposing Out For Comment

By Lee G. Petro
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That muffled sound you might have heard on November 30 was the opening barrage in the long-anticipated struggle to revamp the TV spectrum. More than a mere warning shot but still well short of a coup de grâce, the FCC's Notice of Proposed Rulemaking (*NPRM*) is certain to shake the foundation of the television industry – an industry which is still re-building itself in the wake of the DTV Transition tsunami that crested in 2009.

The FCC's goal in the *NPRM* is to "lay important groundwork" (in Chairman Genachowski's words) toward the ultimate goal of permitting fixed and mobile broadband use in the TV band. Such use is thought by the Commission to be necessary to deal with the all-but-certain "spectrum crunch" which is expected to result from burgeoning mobile broadband demands.

The FCC's ultimate game plan appears to include coaxing existing TV broadcast licensees off their current channels in order to free up blocks of prime spectrum which would then be auctioned off for broadband use. While the Commission does not have the authority to "incentivize" broadcasters through, *e.g.*, the sharing of the proceeds from such auctions, a couple of bills pending in Congress would provide such authority. The *NPRM* is intended to put the Commission in a position to move as quickly as possible toward effective spectrum repurposing if and when Congress gives it the power to share auction proceeds with displaced broadcasters.

The *NPRM* proposes feature three significant changes to the FCC's rules.

First, the Commission is proposing to include fixed and mobile wireless services as potential uses in the VHF and UHF spectrum blocks currently reserved primarily for television. This involves a simple amendment to the Table of Frequency Allocations (the Table), which can be found at 47 C.F.R. §2.106. The Table is the official master list of authorized uses of the spectrum. Spread over more than 40 pages of the FCC rule book, it consists of a chart reflecting (a) all of the blocks into which the radio spectrum has been divided and (b) the specific permitted uses for each of those blocks. The Commission is proposing to include "Fixed Mobile" as an additional use for the spectrum currently assigned for television services.

This change by itself would not mean that broadband uses would automatically flood that spectrum. Rather, it would mean that the Commission *could* authorize such uses in that spectrum. Of course, the conventional wisdom is that the FCC *will* authorize such uses once it gets the rest of its ducks in a row. In order to facilitate that eventual process, the Commission is proposing to take this initial reallocation step now.

The conventional wisdom is that the FCC will authorize broadband operation in the TV bands once it gets its ducks in a row.

Second, the Commission is proposing rule changes to permit two television licensees in the same market to "share" one of their 6 MHz channels, thereby freeing the second channel for broadband uses. (Under such a sharing arrangement, two stations would share a single transmitting facility – although each station would be separately licensed and, in principle, independent of the other.) Historically, each TV station has had a full 6 MHz channel to use. Analog operation generally consumed the entire 6 MHz for a single program service, but the advent of DTV service has allowed multiple program streams by a single station over a single 6 MHz channel. The Commission apparently views this arrangement as inefficient. If every station were willing to share channels, that would free up 50% of the spectrum currently devoted to television – leaving that freed-up spectrum available for broadband.

Such channel-sharing would entail a number of complexities, many of which are addressed in the *NPRM*. Most obviously, the rules would have to be revised to permit such sharing in the first place. But beyond that, channel-sharing raises a host of questions. For example, as envisioned by the Commission, the proposed channel-sharing approach would provide TV licensees who agree to share channels the same MVPD carriage rights they currently hold. Licensees who agree to share channels would not be removed from cable, satellite, or other MVPD systems (*e.g.*, FIOS) for helping out the government.

The Commission is also seeking comment on other nitty-gritty details of sharing: Should commercial and noncommercial stations be permitted to share common facilities? Should a potential for loss of service by stations seeking to share transmission facilities be considered in determining whether that sharing proposal should be permitted? Ironically, on this last point the Commission suggests that its policy for dealing with service loss is one of flexibility, with the Commission happy to consider "any counterbalancing factors" a licensee might advance. But it doesn't take a particularly long memory to recall a completely different Commission approach during the DTV Transition, when the Commission routinely denied minor changes to DTV facilities where more than 1% of the population would lose service.

Finally, the Commission is proposing rules to "maximize"

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the usage of the VHF spectrum. During the DTV Transition, many concluded that the VHF spectrum was not as well-suited for DTV use as UHF. As a result, most full-power stations elected to move to the UHF band to ensure uniform coverage within their service areas. But the UHF spectrum is particularly good for broadband operation, which means that the Commission would now like to wrangle as many TV stations back into the VHF band as possible.

To make such a move more palatable, the FCC is proposing VHF power increases and other revisions to improve the performance of indoor antennas. The goal is to try to offset any disadvantages, perceived or real, in VHF operation. In particular, the Commission is seeking comment on the adoption of the baseline standards for indoor antennas based on the 2009 ANSI/CEA-2032 standard, which establishes testing and measurement procedures for indoor antennas. By taking these steps, the Commission would squeeze more television stations back into the VHF spectrum bands, and free up a larger contiguous block of spectrum adjacent to the 700 MHz A Block which was previously auctioned for wireless uses.

The deadlines for comments and reply comments on the Commission's various proposals will not be set until the *NPRM* is published in the Federal Register. Comments will be due 45 days after publication, reply comments will be due 75 days after publication. Check back here for updates.

While the *NPRM* clearly sets the stage for TV repurposing, it's only the first step in what will likely be a complicated and contentious process. After all, the repacking of large numbers of TV operations into a tighter chunk of the spectrum will present thorny issues, including the development of a New And Improved DTV Table of Allotments.

Here again the recent DTV Transition experience provides a glimpse of things to come. Back in the early days of the DTV Transition, the adoption of the first DTV Table of Allotments led to many a battle over which channel would be assigned to which station. Such struggles will likely be even more problematic in a repacking process because that process contemplates a reduced number of channels overall. With fewer options from which to pick, we can expect considerable competition for channels which may be perceived as somehow "better". How the Commission plans to manage, and resolve, such competition is still a mystery.

Another concern about repacking: Thousands of Low Power TV stations, Class A TV stations, and television translators are operating on channels not included on the current DTV Table of Allotments. They will face certain displacement during this repacking effort. While some of these stations may be able to take advantage of the proposed channel-sharing rules, or perhaps participate in the incentive auction, the devil will be in the details.

One thing that sticks in this author's craw is the suggestion – expressly advanced by Chairman Genachowski and Commission Copps – that the television industry has been sloth-like in taking advantage of the digital spectrum. Genachowski laments that some stations are not "seizing the opportunity to offer multicast streams or mobile TV". Copps says that he "would have little interest" in a repacking process if only TV spectrum had been put to "positive use" through the provision of "public interest multicasting".

Such perceptions conveniently miss several important points.

First, the DTV Transition is still relatively recent. The transition required the acquisition of billions of dollars of new equipment by broadcasters, who also took extensive steps to educate the public on the new technology. They universally accepted, and rose to, that challenge.

To say that the TV industry has come up short and blown its chance is, to me, demonstrably wrong.

But to create a second or third program stream, a broadcaster has to create, in effect, a second or third station. To be sure, the transmission plant is already in place, but what about the studios, production facilities, staff – and advertising support – for the new program streams? These do not come pre-packaged, available for instant deployment. Quality programming requires extraordinary effort under any circumstance. That is even more the case here, where the new multi-cast streams would not be based on existing network fare (since most network programming is already committed and, thus, often not available for such additional streams).

Additionally, the development of such additional programming is expensive. Let's not forget that the recession which has plagued the U.S. economy got its start in 2007 and hit hard in 2008, mere months before the government-mandated DTV Transition.

And if you're talking about supposedly inefficient use of spectrum, what about the fact that other portions of the wireless spectrum for new wireless broadband services (700 MHz D block, for one) lay unused. The current state of multi-cast broadcast television may not meet the halcyon expectations of Copps, Genachowski and others, but at least the television industry built out a nationwide digital television service with the spectrum available to it.

To say that the television industry has somehow come up short and blown its chance is, in my own personal view, demonstrably wrong. To rely on that misperception as justification for a new repacking initiative strikes me as regrettable.

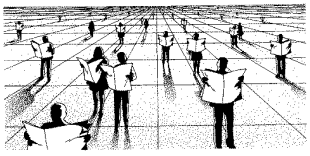
Be that as it may, the battle call has sounded and the FCC has made its first move. It's time to fall in and prepare for the long haul. This is likely to be an extended engagement.

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

Updates On The News

Sirius XM Says "Come On Down!" — It's official! Sirius XM has posted the necessary forms, agreements, instructions, background, etc., etc., for anyone looking to lease one or more of the channels set aside for "qualified entities". If you're looking for a piece of that action, get out your fine-print reading glasses and head on over to http://www.siriusxm.com/qualifiedentity, where everything is laid out in considerable detail.

We reported last month that the FCC had (after more than two years of cogitation) finally come up with a decision establishing the regulatory limitations it would place on the implementation of the set-aside process. With that guidance in hand, Sirius XM has crafted a Request for Proposals (RFP) and a couple of related agreements (including a "channel lease agreement" and a second item, bearing the deceptively simple title "Agreement") for interested folks to slog their way through. The RFP spells out the information would-be channel lessees will need to lay out.



That information ranges over (but is not necessarily limited to) no fewer than 13 separate and discrete categories. The applicant's owners, managers, financial plans and resources and, of course, proposed programming need to be disclosed, as well as a detailed explanation of how the proposed programming will contribute to diversity. (That last category entails eight – count 'em, eight – separate sub-categories.)

Completed proposals in response to the RFP are due in Sirius XM's hands by 5:00 p.m. ET on January 7, 2011. Look for a reasonably quick turnaround: Sirius XM must notify the FCC of the chosen programmers by March 2, 2011, and lease agreements are supposed to be signed by April 17.

But bear in mind that a Petition for Reconsideration or Clarification of the FCC's October order has been filed by the Minority Media and Telecommunications Council (MMTC). MMTC is asking the Commission to "clarify" its definition of "qualified entity" by directing Sirius XM to consider "diversity-promoting applicants whose qualifications are not defined by race". (It suggests that Historically Black Colleges and Universities, Hispanic Serving Institutions, Asian American Serving Institutions, and Native American Serving Institutions would all fill that bill, because each is "based on mission, not race".) MMTC would also have the Commission specify that its definition of "qualified entity" is "confined to the unique facts" of the Sirius XM proceeding.

It seems doubtful that the MMTC petition will affect the deadline for RFP responses – or the contents of such responses – but you just never know.

FHH - On the Job, On the Go

Scott Johnson will present a program on FCC regulatory issues and the license renewal process for the South Carolina Broadcasters Association during their Winter Convention being held January 13-14 in Columbia.

Harry Cole will present a webinar on contests and promotions for the Texas Association of Broadcasters on January 13.

Dan Kirkpatrick will present a webinar on the license renewal process for the Maryland-D.C.-Delaware Broadcasters Association later in January.

Readers may tip their hat to **Lee Petro**'s editorial stance at the close of his piece on the FCC's TV re-purposing NPRM (*see* Page 19), but it was **Peter Tannenwald** who conjured images of Tiananmen Square when he appeared with an op-ed piece in *TVNewsCheck* (http://www.tvnewscheck.com/article/2010/11/30/47355/grant-tv-stations-more-spectrum-freedom), throwing his body (metaphorically, of course) in front of the advancing tank that is the TV repacking plan. Takin' it to the streets, speaking Truth to Power, tellin' it like it is — that's the way to be, **PT**. You can editorialize for us anytime, because you're our *Media Darling of the Month!!!*

We wish you the happiest of holidays and peace in the new year.

Fletcher, Heald & Hildreth