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The Law of Communications

Memorandum to Clients

The Webcasters' Next Five-Year Plan

Copyright Royalty Board Announces Webcast Royalty Rates For 2011-2015

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Yo, all you non-interactive webcasters thinking about your budgeting for, say, the next five years: the Copyright Royalty Board (CRB) has announced the rates and terms that will apply to your operations for the period January 1, 2011-December 31, 2015. Check out the table at the end of this article for details of the CRB's "Initial Determination of Rates and Terms in the Matter of Digital Performance Rights in Sound Recordings and Ephemeral Recordings" (*Webcasting III*).

In getting this decision out as quickly as it did, the CRB has managed to do two things this time around that it failed to do in the ratemaking proceeding for 2006-2010. First, it managed to crank out a final result in a timely fashion. (By way of contrast, the decision setting the rates for 2006-2010 ("*Webcasting II*") wasn't published in the Federal Register until May, 2007, at which point it had to be applied retroactively to the preceding 16 months or so.) And second, the CRB appears to have achieved relative consensus. (Again by way of contrast, *Webcasting II* resulted in both a two-year court challenge and an attempted legislative response.)

Royalty rates for non-interactive webcasters are based on a "willing buyer/willing seller" standard

As some psychologists tell us, even a worm can learn. And that adaptive phenomenon may be at work here as well. The CRB's ability to achieve a quick and seemingly harmonious result almost certainly derives from its previous experience. Recall that the Copyright Act mandates that royalty rates for non-interactive webcasters be based on a "willing buyer/willing seller" standard, a standard that calls for rates that "most clearly represent the rates and terms that would have been negotiated in the marketplace". The rate system adopted in *Webcasting II* was attacked as contrary to that statutory mandate. But eventually a series of webcaster settlement agreements were struck among various sectors of the webcasting industry (including both commercial and noncommercial broadcasters), so the heavy lifting was done: those agreements, negotiated by the private parties at arms' length, provided a mutually agreeable resolution between willing buyers and willing sellers.

That's why we weren't surprised to see the CRB use those settlement agreements as its starting point in *Webcasting III*. And we're certainly not surprised that the CRB was able to quickly dispose of the attempts from each side to move the needle by a couple points. It doesn't appear that either the webcasters or SoundExchange (representing the recording artists) is utterly dissatisfied with the final result – we're certainly not hearing the outcry that greeted *Webcasting II*.

For now that's all we're going to say about the proceedings themselves. If you really want to know more, you can take the time to pore over the 137 page decision. But we suspect you won't because, like most people, you don't really want to know how the sausage is made; you just want it on the plate in front of you. So we've compiled the handy chart, below, comparing the royalty rates for the various webcaster classifications for 2011-2015. Two important notes: (1) as in previous years, there is a $500 annual minimum fee per channel which functions similar to a non-refundable deposit against payment obligations incurred under these rate structures; and (2) noncommercial rates apply only if station exceeds 159,140 ATH/month.

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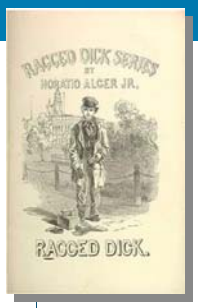

Paging all Ragged Dicks!

Bootstraps Auction Preference Under Consideration

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Holy Horatio Alger!! If you're a modern day Ragged Dick, looking to pull yourself up by the bootstraps through grit, determination, clean living, etc., your kind benefactor may be none other than the FCC. The Commission (or at least one of its Advisory Committees and two of its Bureaus) is considering the establishment of a spectrum auction "preference" for individuals or entities who have "faced substantial disadvantages and overcome those disadvantages".

But don't get your hopes up yet. The idea is in its earliest stages, and raises a host of conceptual and practical problems. Despite that, the Media and Wireless Bureaus have asked for comment on the notion.

The idea was propounded by the Commission's Advisory Committee on Diversity for Communications in the Digital Age, which submitted recommendations to the Commission back in October. According to the Advisory Committee, the suggested preference would "expand the pool of well-qualified applicants for FCC licenses" and, in the case of broadcast services, possibly enable "applicants who otherwise might not be able to obtain FCC licenses to compete in auctions for broadcast licenses and if successful, contribute to viewpoint diversity". As the Advisory Committee sees it, folks who have "faced and overcome substantial disadvantage" have certain "unique strengths" that might be "underrepresented and undervalued" in the Commission's application processes absent some preference program.

If all this sounds just a little vague to you, you're not alone.

What kind of "unique strengths" are we talking about here? The Advisory Committee is not particularly clear on that. It alludes to "perseverance" and "resourcefulness", but fails to note that, in all likelihood, the vast majority of successful participants in spectrum auctions could be said to have exhibited both traits simply by toughing it out through the FCC's processes. The Advisory Committee also cites a study which supposedly found that "'grit' is a better predictor of success than IQ score or conscientiousness". Of course, the FCC has not historically imposed any minimum intelligence standard on its applicants, nor has it routinely inquired into the "conscientiousness" of its applicants. But the Advisory Committee's citation suggests that, if the FCC had to choose, it might want to pick gritty applicants over smart or conscientious ones.

And what kind of "disadvantages" are we talking about? Again, that question is wide open, although the Advisory Committee has provided a "non-exhaustive" list of "disadvantages which, if substantial, would likely qualify an individual for a preference". Those include:

- Psychological disorders which have rendered professional or business advancement "substantially more difficult than for most individuals";
- "Social patterns or pressures" which have discouraged the individual from pursuing education or business opportunities;
- Unequal access to credit due to "substantial economic disadvantage";
- Unequal treatment in "business opportunities".

Call me crazy (which, mind you, might qualify as a "disadvantage"), but the universe of folks who might claim themselves to be subject to one or more such disadvantages could encompass a substantial percentage – maybe even a majority – of the population.

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Focus on FCC Fines

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Mere "bit" or full-fledged "contest"? – The Cleveland AM station called it a "bit". The FCC called it a contest. And since the station's promos for the bit, er, contest, fell short of the FCC's requirements, the station is looking at a $4,000 fine for failing to conduct the contest properly.

The bit/contest at issue was pretty standard stuff: on-air personalities would air the recording of an individual from the sports world; listeners would call or e-mail in their guesses as to the individual's identity; the listener who correctly identifies the individual gets a prize; and the next time around, a different individual's voice is played and the routine repeats itself.

It apparently all went well from early 2007 until the Fall of that year. But at that point the recorded voice to be identified proved unidentifiable . . . for more than 20 months. The announcers would play the recording and invite listeners to guess, but nobody got it.

Maybe the bit/contest got old for the station's personalities. Maybe they preferred to move on to different programming devices. Whatever may have been the case, over those last 20 months or so, the station's announcers became less and less diligent about announcing the contest rules. The station admitted to the FCC that sometimes the on-air talent would only announce the contest rules when listeners asked about them. Additionally, since the prizes were supposedly cumulative – that is, a prize offered on one day and not awarded would be rolled over, to be included with the next prize the next time the bit/contest was played – and since some of those prizes were time-sensitive (*e.g.*, tickets to one-time-only events), a number of announced prizes weren't available to award by mid-2009, when the Feds came calling. (They were notified of the problem by a complainant who had become convinced that the contest was "bogus".)

In response, the station claimed that the bit (which the station also referred to as a "scheme", but *never* a "contest") program feature was really just, well, a bit by the on-air talent, and not a real contest. The FCC disagreed: because the station offered prizes to members of the public who responded correctly, the segment was indeed a contest. (For the record, the FCC's position is consistent with Section 73.1216, which governs station-conducted contests.) As a result, the contest rules had to be fully and accurately disclosed throughout the course of the contest; the station failed to do that in the last year or so. The station was fined $4,000.

Readers are reminded that the FCC requires stations to fully and accurately disclose the material terms of a contest and to conduct the contest substantially as announced or advertised. Among the material terms which must be disclosed, a station must include instructions on how to enter or participate, eligibility restrictions, whether prizes can be won, when prizes can be won, the extent, nature and value of prizes and the method for selecting a winner.

Enhanced underwriting or commercials? – Apparently upset with a noncommercial educational FM station in Connecticut, a listener recorded underwriting announcements which were being aired on the station and sent them to the FCC with a complaint alleging that the station was airing commercial announcements, at least some of which may not have had included the requisite sponsorship identification. The FCC inquired of the station about those apparent commercials. Rather than contest the matter, the station agreed to enter into a consent decree committing it to a number of hefty requirements.

Among those requirements, the station has to fork over $15,000 to the FCC in the form of what the Commission refers to (without apparent irony) as a "voluntary contribution". In addition, the station has to: file annual compliance reports with the Commission; train all of programming personnel about the FCC sponsorship rules; conduct refresher training for those employees once every 12 months; designate a Compliance Officer who will have a long list of duties; set up a hotline enabling employees to contact the Compliance Officer; and advise any potential underwriter of the FCC's rules before the station can accept any contract from the underwriter. These wide-ranging requirements are imposed upon the station for another three years of operations.

The Consent Decree does not shed any light on precisely what types of announcements were aired. Still, the line between a permissible "enhanced underwriting" credit announcement, on the one hand, and an impermissible "commercial", on the other, can be hazy. Care should therefore be taken in the preparation and presentation of any material that even approaches that line ***before*** broadcast, in order to avoid any unpleasant surprises after the fact.

The FCC is NOT going to be ignored – Like Alex Forrest (the character played by Glenn Close in *Fatal Attraction*), the FCC does not like to be ignored. Two radio stations found that out the hard way: in both cases, the FCC inspected the stations, found problems, advised the stations to correct the problems . . . and the stations did nothing. Result? Significantly increased fines.

Back in November, 2009, an FCC agent attempted to inspect a Pennsylvania FM station's main studio, which turned out to be an unstaffed, locked room at a local church. The agent contacted the station's engineer, who

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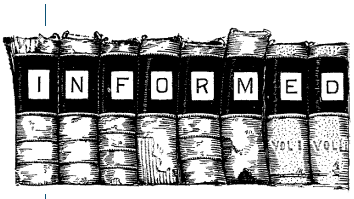

FCC inner workings I

EBATS

A new record-keeping system on the way

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Under the Privacy Act, any agency (including the FCC) that intends to maintain and use any records containing personally identifiable information must publish a document known as a System of Records Notice (SORN) in the Federal Register. The SORN provides details on how the records will be handled by the agency. Prior to adopting or revising a SORN, the Commission must request comment on the proposed system, and whether it adequately protects the information retained in the system.

In December, the FCC published a SORN related to the records retained by its Enforcement Bureau. Basically, the Commission is proposing to combine two databases that it currently maintains – one including information on licensees and others suspected of rule violations and one including information on individuals who have sent complaints to the Commission. While the FCC may be commended for its apparent interest in efficiency, readers will be interested to learn that the proposed revision would mean that the agency will treat everyone, including complainants, the same way it now treats alleged violators.

Generally, the Privacy Act requires agencies to establish and publicize procedures by which individuals on which those agencies keep records can obtain certain information about those records. Specifically, agencies must normally include provisions in their systems of records telling interested persons how they can find out if the agency in fact has records on them, and if it does, what those records contain and how those records may have been disclosed to other persons or agencies. Procedures are also generally required by which someone can challenge the substance of a record the agency maintains on them. (Some exemptions exist. For example, agencies are not routinely required to disclose information that is classified, pertains to national defense, or constitutes investigative material compiled for enforcement purposes.)

As noted, the Enforcement Bureau currently maintains records under two Systems of Records – one for individuals filing complaints (the "Investigations and Hearings" system), and one for individuals, licensees, or others who are the subject of investigations (the "Violators File" system). Under the Investigations and Hearings system, the Commission has not claimed any exemptions for the Privacy Act. As a result, individuals who have filed complaints may be able to obtain information from the Commission about whether their identities have been disclosed, how the information about them has been used, and what information the Commission is holding. (How easy this would be is an open question even now, as the Commission's SORN simply instructs that any inquiries are to be addressed to the Chief of the Enforcement Bureau but does not set out any procedures.)

By contrast, the Commission has claimed that the Violators File system contains investigative material, classified material, and other material that makes that system exempt from the Privacy Act requirements that allow individuals to inquire about the existence, use, or substance of their records.

In its December SORN, the Commission has proposed, in effect, to merge those two currently separate sets of records into a single unified system of records for its Enforcement Bureau – to be known as the "Enforcement Bureau Activity Tracking System", or "EBATS."

EBATS will contain all of the information currently housed in the Investigations and Hearings and Violators File systems. As a result, the Privacy Act exemptions now applicable only to alleged violators would be expanded to cover anyone filing complaints. So under the EBATS system, a complainant would no longer have the ability to ask the FCC to whom the complaint had been disclosed or what other use may have been made of it. Nor could a complainant attempt to correct any errors in the FCC's databases regarding his/her complaint. Indeed, the Commission would no longer be required even to inform someone if the agency's files contain any records about any complaints that may or may not have been filed in his/her name.

Ironically, the new approach could undermine the effectiveness of the FCC's complaint procedures.

Ironically, if this lack of protection were publicized, it could undermine the effectiveness of the Commission's complaint procedures by making individuals more reluctant to provide information to the Commission. Perhaps this is why the Commission itself has made no public announcements of the change, or sought any public comment beyond the submission of the SORN to the Office of Management and Budget (OMB). In the SORN published by OMB, the FCC provides only one sentence of justification for the change, stating that the new EBATS will "improve the Bureau's operations and workflow, increase its reporting capabilities, and improve the reliability and consistency of its data." Will this revision in fact accomplish these goals, and if so are they worth any potential loss of control of personal data? Apparently the Commission thinks so.

Also interesting to note – although it does not appear to constitute a change from existing practice – is that the Commission will apparently retain records in EBATS indefinitely. Generally, any System of Records is supposed to include a retention and disposal schedule. For example, files on attorneys who are alleged to have committed misconduct before the FCC are retained for five years after a

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FCC inner workings II

Out For Comment: Re-Creating CORES

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It may be hard to believe, but CORES – the Commission's basic registration system – has been with us for 10 years already. And now, just when we were all starting to get used to it, the Commission is proposing to overhaul it as part of the agency's ongoing effort to transform itself into a "model of excellence in government".

CORES (short for **CO**mmission **RE**gistration **S**ystem) was developed to assist the Commission in keeping track of its financial accounts arising from its various fee collections, auctions, enforcement activities and other accounts receivable. It was inspired by the 1996 Debt Collection Improvement Act, which was passed by Congress to help make sure that all debts owed to the Feds get collected. Through CORES, every person or entity which "does business with" the FCC must obtain an FCC Registration Number, or FRN. The FRN is a unique 10-digit number which is used to identify its holder for accounting purposes across the FCC's various filing systems.

In a Notice of Proposed Rule Making (NPRM) issued in early December, the FCC is proposing to greatly expand CORES's scope and to add uses related to the installation of a new Core Financial System (CFS) and the development of a new Consolidated Licensing System (CLS). (We wrote about the CLS plans in the April, 2010 *Memo to Clients*.) The goal of the CLS will be to streamline and unify many of the Commission's currently disparate filing systems. Ideally, the result will be a single common on-line form which will be used by applicants or reporting entities in all services regulated by the Commission. As matters currently stand, the Commission maintains multiple separate systems, independent of one another, for the licensing of different services. Those different systems – notably, the Wireless Bureau's Universal Licensing System (ULS), OET's Experimental Licensing System, the International Bureau's MyIBFS, and the Media Bureau's Consolidated Database System (CDBS), among others – don't talk to each other. The CLS is expected to combine 11 disparate systems into a single system that will be accessed through CORES/FRNs.

While the NPRM includes a number of proposals likely to affect various aspects of the overall filing system, the lion's share of the proposals relate to FRNs.

First, the FCC is looking to limit FRNs to one-to-a-customer. Although the FRN was intended to serve as a unique identifier, CORES has historically allowed individuals or entities to obtain more than one FRN. As a result, the Commission cannot now easily tie together all the FRNs associated with any particular individual or entity in order to permit efficient examination of that individual/entity's course of dealings with the Commission. To correct that, the Commission is proposing to require that each person or entity doing business with the Commission be defined by a single identifying FRN.

This might be accomplished in any of several ways, all intended to afford businesses some flexibility in organizing themselves along "logical business lines of their choosing". In one option, an entity/individual would be assigned a primary 10-digit FRN, but would retain the ability to add sub-accounts using the primary FRN with a suffix. A second option would electronically link multiple FRNs for an existing entity, or individual, by adding an automatically generated prefix to the primary FRN. The NPRM hints at a third option which would allow the entity/individual to select the primary FRN and then the remaining FRNs would be converted to sub-accounts.

The lion's share of the proposals relate to FRNs.

Other FRN-related proposals: addition of a requirement that a valid e-mail address be provided; allowing the creation of multiple points of contact and custom User IDs for any given FRN; elimination of certain exceptions which currently permit issuance of FRNs in the absence of a Taxpayer Identification Number (TIN) or Social Security Number (SSN); and creating a company dashboard within CORES to allow multiple user access, posting of flags/notifications regarding financial standing, and indications of tax exempt/bankruptcy status.

Interestingly, the NPRM barely touches on the "Special Use FRN" that was created by the Media Bureau in the run-up to last summer's submission of revised broadcast ownership reports (FCC Form 323). (Special Use FRNs were generated by the Media Bureaus' CDBS, not by CORES.) As you may recall, when it revised that form, the Bureau sought – without telling anybody in advance – to require every person or entity with an attributable interest in a licensee to obtain his/her/its own separate FRN. That unprecedented requirement would have imposed a serious burden on many, and would have expanded the FCC's use of FRNs well beyond anything that had previously been contemplated. (Fletcher Heald, on behalf of itself and a number of state associations and broadcasters, took the Commission to court on that, and largely prevailed last summer. As a result of FHH's efforts, ownership reports may be filed with many "attributable interest" holders using only "Special Use FRNs" – *i.e.*, FRNs obtained without the submission of SSNs or TINs.) The NPRM seeks comments on whether Special Use FRNs might be utilized in other limited ownership reporting contexts.

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By-frequency licensing out? Spectrum-sharing in?

FCC Launches Remake Of Radio Spectrum Technology

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In an obscure and largely overlooked Notice of Inquiry, the FCC has begun to overhaul the very foundations of radio communications.

The first practical radio transmitters, early in the 20th century, used a simple "spark gap" technology that spread signals over a wide swath of frequencies. This was not a problem when few transmitters existed, but as their numbers increased, the then-useful part of the spectrum soon became crowded.

Within a few years, engineers were using recently-invented vacuum tubes in conjunction with a circuit that limits a radio signal to a specific frequency. That solved the immediate congestion problem, as each transmitter could be assigned a frequency different from others in the vicinity.

Now, a century later, we still use that same system. Every licensed transmitter, whether flea-powered walkie-talkie or megawatt TV station, is assigned a specific frequency. Over the decades, as more transmitters came into use, the licenses gradually filled up each part of the spectrum. The engineers, though, kept finding ways to use ever-higher frequencies, and thus steadily pushed the supply of spectrum ahead of the demand. Back in 1984, when I started doing FCC work, there were plenty of unallocated frequencies below 1 GHz, open spaces up to 40 GHz, and almost nothing above. Today everything up to 40 GHz and beyond is filled in solid, with active use extending up to 95 GHz.

Worse, the tactic of opening ever-higher frequencies has now run out. Those pesky laws of physics limit the frequencies above 95 GHz to short distances, straight lines, and dry climates. The spectrum is effectively full and there is nowhere else to go, say the supposed experts.

But wait.

Take a scanner radio and tune through the bands. The local AM, FM, and TV stations will show activity, as will the cell phone bands and the amateur radio bands. The rest, though, is mostly empty. Even bands that are heavily licensed, such as those used for two-way radios, are actually used only infrequently, and will show sparse activity at most. To be sure, the scanner radio will miss satellite signals, fixed microwave links, "passive" applications (such as radio astronomy), and a few others. And some users, like a first responder who picks up a microphone to call for backup, see a vacant channel as a good thing. But the fact remains: although small pieces of spectrum are overcrowded, much of it goes unused most of the time.

The FCC has taken early steps toward smoothing out the load – for example, allowing licensees to lease out their excess spectrum to others. Industry engineers have come up with "cognitive radios" that respond to the ongoing state of the radio-frequency environment by changing frequency band, modulation, etc. to make better use of temporarily vacant spectrum. Every Wi-Fi laptop automatically sniffs out quiet channels within the Wi-Fi bands. Radios in another, less-used laptop band test the air to avoid radar devices that share the band. Still another band requires transmitters to share frequencies cooperatively. TV "white spaces" devices, if and when they appear, will either sense the spectrum directly or will check in with a database to find locally vacant frequencies.

The FCC wants to expand automatic spectrum-sharing to help alleviate spectrum shortage.

The FCC now wants to expand automatic spectrum-sharing to help alleviate the shortage. Rather than offer specific proposals, however, it is on a hunt for ideas. The broadly-worded Notice of Inquiry asks for comment on several topics:

The current state of spectrum-sharing radios. Techniques for sharing include detecting and identifying other users' transmitters, exchanging information among users to determine whether a frequency is vacant, and detecting changes in the noise floor to see if there is room for additional traffic. But straight sensing turned out to be an unexpectedly hard problem in the TV white space proceeding. Another hard problem is monitoring the noise floor. The FCC proposed something similar in its former interference temperature proceeding, since abandoned.

Use of geolocation and real-time database for checking frequencies. The white space proceeding will test this idea, if the FCC ever solves the problem of database design. After a two-year struggle, still on-going, an FCC official has informally indicated that a solution may be announced "real soon". Also, geolocation usually relies on GPS, which does not work well indoors.

Building interference suppression into radios. Most experts would agree that good receivers are a key element of efficient spectrum use. Yet the FCC earlier considered the imposition of standards on receivers, only to drop the idea.

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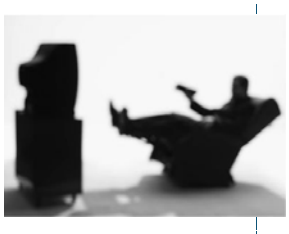
Signed, sealed, soon to be delivered . . .



SHHHH – It's The Law!

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It's official! The CALM Act (S. 2847) – aimed at preventing "loud" commercials – finally negotiated its final legislative hurdles and was signed by President Obama on December 15, so it's now the Law of the Land. Fans of the new law wishing to show their appreciation are encouraged to applaud quietly, with any cheers kept to "indoor voice" levels. Opponents can grimace all they want – just keep the noise down, please.

By voice vote, the House passed the bill with an amendment to correspond to the version the Senate passed back in October. The House was actually the first to act on the commercial-quieting bill a year ago. The Senate didn't get around to it until October, at which point a new section was added. The amended bill then had to schlep back to the House for its consideration of the new section, with which the House apparently had no problems. That wrapped up Congress's work, leaving only the Presidential John Hancock to seal the deal.

Compliance with standards approved by the Advanced Television Systems Committee will be required.

For those of you who have been walking around with cotton stuffed in your ears (to avoid loud commercials on TV) and who may, as a result, have missed out on the background of the CALM Act, you can check out our posts on the matter on our blog (www.CommLawBlog.com – search for "Calm Act"). But don't be throwing all that cotton away just yet. While the Act has now made it through the peristalsis that is the legislative process, that means only that Congress and the White House have dumped the hot potato of loud commercials onto the FCC's lap. It's now up to the FCC to change its rules to incorporate the remedy prescribed by the Act, and then it will be up to video providers to bring themselves into compliance.

Public support for the measure has reportedly been substantial. Broadcasters and multichannel video programming distributors subject to its requirements may not be as pleased, though. The new law will require them all to comply with standards approved by the Advanced Television Systems Committee. Those standards have, up to this point, been characterized as mere "recommended practices"; now that the President has signed the CALM Act (and once the FCC gets around to implementing them), those standards will be The Law.

Complying with the new law may entail acquisition and installation of potentially costly new equipment. That's the bad news. The good news is that the Act specifically provides for "financial hardship" waivers. (Of course, the fact that the prospect of "financial hardship" shows up at all this early in the process may be cause for some alarm, but let's not over-react too quickly.)

When can broadcasters and MVPDs expect to see the new rules in place? The Act requires the FCC to have its rules amended consistently with the Act within one year of the Act's enactment. The new rules in turn will become effective one year after their adoption by the Commission. So round about Christmas, 2012, we can expect all to be CALM. We'll be providing updates on our blog (www.CommLawBlog.com).

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Improving interference prediction. Spectrum-flexible radios will have to avoid causing interference to other users. Effective technical rules must rest on good predictions of how radio signals at various frequencies behave, in different environments. The mathematical models needed for this work have lagged behind other aspects of radio technology.

"*Policy radios*". The next step beyond cognitive radios, these are transmitters programmed with broad policy constraints on spectrum usage. The concept is still in its early stages.

After inviting discussion on these topics, the Notice of Inquiry turns to nuts-and-bolts practical questions. How should the FCC test the new radios for technical compliance? How should it license them? How can it facilitate spectrum sharing between licensees and other users? What frequency bands can make best use of the new methods?

The end result of this undertaking, years from now, will be an utterly different radio spectrum – as different from today's as today's is from the spark-gap era. Transmitters will automatically hop among frequencies, stepping into vacant channels temporarily and then moving on. The result will be vastly more traffic in the same amount of spectrum.

We commend the FCC for reaching out to the public early in the process, even though the agency's own ideas are still embryonic at best. The many people who will be affected by the coming changes – manufacturers, service providers, end users, regulators – will welcome the opportunity to help shape the outcome.

Comments on the Notice of Inquiry are due to be filed by February 28, 2011; reply comments are due by March 28, 2011.

FCC gets down to bid-ness

Auction 91 - The Dates Are Set

144 FM permits up for grabs

By Harry F. Cole
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Auction 91, originally scheduled to crank up next March, has been moved back to ***April 27, 2011***. The delay is attributable to the 2011 NAB Convention, scheduled to begin on April 9. The Commission acknowledged that, if the originally-announced March 29 auction start date were to stick, the auction might drag beyond the NAB's start date – thus "present[ing] a challenge" for some participants. So we all get an extra month to get our auction ducks in a row.

As is customary in the auction process, the FCC has followed up its preliminary request for comments (issued last September) with the issuance of a formal "Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 91" (Auction 91 Notice). We have posted a link to the final list of the permits up for grabs at www.CommLawBlog.com.

With the Auction 91 Notice, the auction process shifts into high gear.

With the Auction 91 Notice, the auction process shifts into high gear.

For the most part the Auction 91 Notice adheres to the procedures which have been used for broadcast auctions over the years. If you (a) are interested in participating in the auction but (b) are not familiar with those procedures, you should start now to get a handle on how FCC broadcast auctions work. The system is not always intuitively obvious, and unwary (and unknowing) bidders are at a very distinct disadvantage when the action starts.

If you're expecting to be able to bid on 147 FM construction permits, like the September notice promised, you may be disappointed. The Auction 91 Notice lists only 144 permits. If you had your eye on the Tuba City, Arizona beauty (Channel 250C1, CP No. MM-FM767-C1) or the Union Gap, Washington honey (Channel 285A, CP No. MM-FM859-A), the bad news is that those have been removed. Turns out that neither is vacant and both have been "reserved for other applicant use". (The third CP gone missing is technically still there. The original list, issued in September, included one permit twice: Channel 254C2 in Ennis, Montana, was inadvertently listed as both CP No. MM-FM411-C2 ***and*** CP No. MM-FM807-C2. Since the Commission hasn't figured out a way to sell the same channel in the same community to more than one bidder, the latter, redundant, permit number has now been deleted.)

One other change – the Commission has tweaked the reference coordinates for Channel 255A in Adams, Massachusetts (CP No. MM-FM797-A).

As in last year's Auction 79, with respect to the interaction of the Commission's standard ownership attribution rules and eligibility for bidding credit (as an "eligible entity"), the Auction 91 Notice reminds would-be participants that the definition of "eligible entity" was revised in the Commission's 2008 Diversity Order. Under the revised "equity-debt plus" aspect of that definition,

> the holder of an equity or debt interest in the applicant [is permitted] to exceed the . . . 33 percent threshold without triggering attribution provided (1) the combined equity and debt in the "eligible entity" is less than 50 percent; or (2) the total debt in the "eligible entity" does not exceed 80 percent of the asset value, and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the "eligible entity" or any related entity.

This may give rise to some additional opportunities for some applicants and investors.

On the purely procedural side, the Wireless and Media Bureaus (who administer auctions) have given themselves the power to impose alternative "stopping rules" if they deem such rules to be appropriate. Historically, the Bureaus have used a "simultaneous stopping rule" approach under which all CPs would remain available for bidding until bidding closes on all CPs simultaneously. As a practical matter, that meant that, even after the vast majority of bidding battles had been wrapped up, bidding was still technically "open" as long as even one CP was still being actively contested. While the Bureaus intend to adhere to this standard "simultaneous stopping rule" to start out with in Auction 91, they indicate in the Auction 91 Notice that they may opt to use alternative versions of the stopping rule, with or without prior announcement during the auction, if they think that doing so is appropriate.

Anyone who has any potential interest in participating in Auction 91 should review the notice in detail. While there's still about four months to go before the bidding starts, anyone interested in participating should take advantage of it to perform due diligence about the channels they've got their eyes on. Remember what the Commission has said repeatedly in the past (and has said yet again in the Auction 91 Notice):

The FCC makes no representations or war-

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Let the bidder beware

New FMs May Founder On Old FAA Factors

By Steve Lovelady
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With an auction of new FM construction permits in the pipeline (see related story on Page 8), we offer this word of caution: potential participants should be careful to do their homework *before* they bid. As the FCC makes incredibly clear in its auction announcements, there are no guaranties that actual radio or television stations can be built by the "winners" of the auction.

What's the worst case scenario, you ask? Consider the story of a guy who, in 2004, was the successful bidder for an FM CP in Pacific Junction, Iowa. The bidder paid big bucks ($4.4 million) for the permit, only to discover that the station couldn't be built. It turned out that the proximity of a boatload of air traffic control and navigation facilities prevented use of the primary FM channel, and the number of frequencies used by the FAA in the area precluded use of any alternative channel.

Pre-auction engineering studies for a new station should take into account **all** *possible impediments to actual construction*

We wrote about this hapless bidder's plight in the April, 2009 *Memo to Clients*. Back then the bidder was asking the FCC to refund $4.4 million. As far as we can tell, that refund request is still pending. However, in a potentially hopeful sign for the bidder, the Media Bureau recently ordered deletion of the station's channel from the Commission's records – thereby officially agreeing with the bidder that no station could be built which would meet the FAA's criteria and the FCC's spacing requirements. This could be a step along the path toward a possible refund, but it might also lead to nowhere, since the government is not generally in the habit of refunding auction bids.

The take-away message here is that any pre-auction engineering studies for a new station should take into account ***all*** possible impediments to actual construction of a broadcast station by the winning bidder. Bidders don't always recognize that the FAA is a significant user of radio frequencies and that FAA interference clearance is necessary before a radio or television station can be built.

The FAA has historically tried to assert its jurisdiction over the location of radio frequency transmitters. In a decision released this past summer, the FAA continued to hold fast to its notion that it can impose its own standards on the use of FM channels, but expressly committed to work with the FCC and the NTIA in achieving that goal. (We reported on the FAA's action in last August's *Memo to Clients*.)

So the FAA continues to lurk around the FM band, interested in imposing its RF technical standards on FM applicants, permittees and licensees. Because of that, it would probably be a very good idea to include a study of all FAA-related RF devices in the vicinity as part of any preliminary engineering study of channels you might want to bid on. If there are a lot, there might be a significant risk that a new station's transmitter/antenna won't get the required "Determination of No Hazard to Air Navigation" certification from the FAA. Adjust the amount you are willing to bid for the FCC construction permit accordingly. Trust us, you don't want to be in the position of asking the FCC to refund your winning bid money.

Don't get stuck!!

BRRRRR!!! FM MOD FREEZE ANNOUNCED

With Auction 91 fast approaching, the Commission has frozen, ***effective upon issuance of its public notice on December 3***: (a) all applications proposing to modify the reference coordinates of any of the 144 FM channels scheduled to hit the blocks in Auction 91 (currently slated to kick off next April 27); ***and*** (b) all petitions or counter-proposals that propose any change in channel, class, community or reference coordinates for any of those 144 channels. (Can't remember what channels are up for sale in Auction 91? Go to http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1203/DA-10-2253A2.pdf for the current list.) This freeze will remain in effect until the day after the deadline for Auction 91 long form applications – which will likely be sometime in mid-Summer, at the earliest.

The Commission also announced that it will not accept ***any*** commercial or noncommercial minor mod applications ***between January 31 and February 10, 2011***. That's the filing window for short form (Form 175) applications for Auction 91.

These freezes are standard operating procedure when it comes to broadcast auctions. The goal is to avoid the creation of any conflicts (unforeseeable or otherwise) with auction proposals that could muck up the auction process.

Third adjacent limits largely lifted

Christmas Comes Early For LPFMs

By Harry F. Cole
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With the clock ticking down on this session, and with a newly-elected majority standing in the wings ready to take over come January, the lame duck Congress managed to pass a new version of the "Local Community Radio Act". Like its predecessors – H.R. 1147 and S. 592 – the latest iteration (H.R. 6533) eliminates third-adjacent separation requirements between (1) low power FM stations and (2) full service FM stations, translators and boosters. Unlike its predecessors, both of which stalled out and sat around for months without final Congressional approval, H.R. 6533 sailed through both Houses in a mere two days: it was introduced on December 16 and finally approved on December 18. Now it's on to the White House, where the presidential John Hancock is pretty much a given.

It's not entirely clear what magic language managed to open the door to passage. For the most part, H.R. 6533 is identical to the earlier versions. But H.R. 6533 does include a new section which straddles the question of first- and second-adjacent separations, albeit somewhat awkwardly.

Protection from third-adjacent LPFMs is, for most purposes, a thing of the past.

The bill first prohibits the FCC from reducing first- and second-adjacent separations. That's the good news for full service licensees.

But it then authorizes the Commission to grant waivers of the second-adjacent spacings when the LPFM applicant can establish that its proposed operation won't cause interference. (Rolling up its legislative sleeves and getting its legislative fingernails dirty, Congress goes so far as to specifically permit the use of "terrain-sensitive propagation models" and other interference prediction methods for such showings.) That's the bad news for full service licensees.

But it then provides that any LPFM station operating pursuant to such a waiver must suspend operation "immediately upon notification by the [FCC] that it is causing interference" to a full service station, "without regard to the location of the station receiving interference" . . . and it has to stay off the air until the interference is eliminated or the LPFM guy can demonstrate that the interference isn't its fault. That's the good news for full service licensees.

And more good news – the Commission is required to issue such notification "upon receipt of a complaint of interference". The bill does not appear to require any "proof" of interference – just a complaint.

Full service FM licensees in densely-populated states also get something of a break. (In this context, a state is densely populated if it has total population of more than 3,000,000 and a population density of more than 1,000 people per square mile – like, f'rinstance, New Jersey.) In such situations, H.R. 6533 requires the FCC to apply the interference remediation requirements currently applicable to translators and boosters to complaints of interference from new LPFMs on third-adjacent, second-adjacent, first-adjacent and co-channels. (The existing translator/booster remediation process is set out in Section 74.1203 of the Commission's rules.) Under the new law, it matters not whether the complaints occur inside or outside the protected contours of the interfered-with station. However, interference arising outside the relevant distance specified in Section 73.807(a)(1) will ***not*** require remediation.

In another interesting addition to the earlier bills, H.R. 6533 includes a sentence providing that

> FM translator stations, FM booster stations, and low-power FM stations remain equal in status and secondary to existing and modified full-service FM stations.

There was never really much doubt about that. But that new sentence may be intended to counterbalance language, held over from earlier versions of the bill, that might indirectly signal (to some, at least) that LPFM stations should be elevated over translators and boosters in the overall hierarchy of secondary FM services.

The new law requires the FCC to undertake an "economic study on the impact that low-power FM stations will have on full-service commercial FM stations" and to report its findings back to Congress in a year. That little chore will not, however, affect the licensing of new LPFM stations in the meantime, according to a new subsection.

The LPFM industry and its cheerleaders have been lobbying hard for this legislation for years, and they are likely to be pleased that it has finally negotiated the Congressional maze. Whether the new remediation provisions of H.R. 6533 will disappoint them remains to be seen.

But a big, if unheralded, winner here is the radio reading services (RRS) industry. The act expressly provides that existing distance separations – including, presumably, third adjacent separations – will still apply to all full-service FM, FM translator and FM booster stations that provide RRS by analog subcarrier. That provides a sig-

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(Continued from page 8)

ranties about the use of this spectrum for particular services. Applicants should be aware that an FCC auction represents an opportunity to become an FCC construction permittee in a broadcast service, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular service, technology, or product, nor does an FCC construction permit or license constitute a guarantee of business success.

(And yes, the Commission itself made that ominous advisory even more ominous with the **boldface** emphasis. *See* the related article on Page 9 if you have any doubts.)

Here are the important dates established in the notice:

January 31, 2011 – 12:00 noon ET - Short-Form Application (FCC Form 175) Filing Window Opens

February 10, 2011 – prior to 6:00 p.m. ET - Short-Form Application (FCC Form 175) Filing Window Deadline

March 21, 2011 – 6:00 p.m. ET - Upfront Payments (via wire transfer)

April 27, 2011 - Auction Begins

One more warning: with the filing of the Form 175s (due by January 31), the anti-collusion rules kick in, and they don't go away until after the deadline for the winner's down payment after the auction. And get this – the anti-collusion rules apply to all folks tendering a 175, even if they don't participate at all in the bidding.

The Commission is also offering an online auction tutorial, which should be available as of January 31, 2011. (Look for an "Auction Tutorial" link on the FCC's Auction 91 webpage.) It's for newbies or folks who want to re-gain their auction chops. (The online tutorial replaces the bidder seminars which the Commission offered in the run-up to previous auctions.)

Additionally, the Commission will conduct a "mock auction" on April 25, 2011, again to permit folks to dust off any cobwebs and be ready to jump right in when the bidding starts for real on April 27.

(Continued from page 3)

dutifully appeared within 30 minutes and to open the room. The G-man warned the engineer that the main studio must be staffed during regular business hours. Several weeks later, another FCC agent showed up at the main studio – and what do you know, it was ***still*** locked and unstaffed. The FCC fined the station, starting with the $7,000 standard fine for a main studio violation and then "adjusting" that amount upward by $3,000 because the station ignored the first warning. Total damage: $10,000.

On the other coast, FCC agents slapped an Oregon AM station with a $6,000 fine for failing to reduce nighttime power. An agent posted himself near the station's transmitter at sunset on two days in April, taking measurements before and after sunset. The data established that the station's power was not being reduced at sunset, even though the station's license required a substantial reduction. The station owner admitted that the equipment required to reduce the power was too expensive to maintain so he opted not to reduce power. The standard fine for exceeding power limits is $4,000 per violation. However, the FCC dusted off its files and, looky-here, it turned out that the station was a repeat offender: it had been warned about exceeding power limits 10 years ago. As a result, the fine was hiked up by 50%, and the station is on the hook for $6,000.

The moral here is simple. If the FCC advises you that you're in violation, get cracking right away and fix it. Failure even to try to do so is only likely to make matters more expensive in the end.

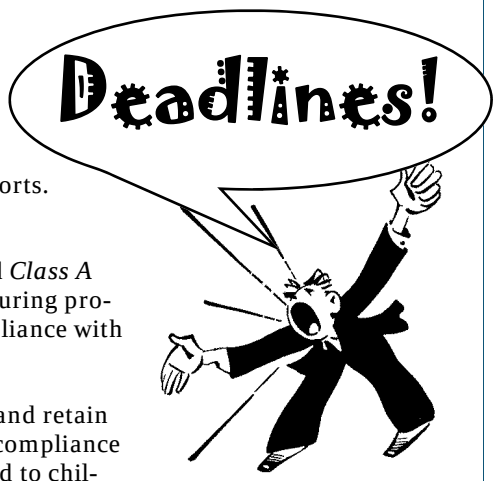
(Continued from page 10)

nificant incentive for full-service licensees, in particular, to make room on their SCAs for RRS. Of course, the downside of this is likely to be increased reporting requirements to the Commission. Presently, licensees aren't required to let the FCC know what they're transmitting on their subcarriers. If the content of their SCAs will now affect the level of protection to which they're entitled – as H.R. 6533 clearly provides – the Commission will presumably have to develop some mechanism for keeping track of SCA content going forward.

While the Act has now been passed by both Houses of Congress, it won't be implemented until the President signs it and then the FCC takes the necessary steps to turn legislative language into regulatory action. But at this point, any uncertainty is limited to when, not whether: protection from third-adjacent LPFMs is, for most purposes, a thing of the past. And with the passage of the bill, we may also look for movement on the FM translator front. Recall that there remain several thousand translator applications still pending from the 2003 window. They have been caught in the on-going tug-of-war between LPFM and translator interests which has stalled out most LPFM *and* translator activity for years. The new act will likely provide the Commission with incentive to resolve the years-long impasse in the relatively short term. But the resolution may entail the compelled dismissal of many translator applications sacrificed at the altar of LPFM service.

Stay tuned for further developments.

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.

January 24, 2011

In-State Broadcast Programming Inquiry - Comments are due in response to the STELA-mandated inquiry with regard to the availability of in-state broadcast programming to viewers located in DMA's centered in another state.

February 1, 2011

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

February 22, 2011

In-State Broadcast Programming Inquiry - Reply Comments are due in response to the STELA-mandated inquiry with regard to the availability of in-state broadcast programming to viewers located in DMA's centered in another state.

February 28, 2011

Spectrum Technology Remake Inquiry - Comments are due in response to the *Notice of Inquiry* regarding spectrum technology and the foundations of radio communications.

March 28, 2011

Spectrum Technology Remake Inquiry - Reply Comments are due in response to the *Notice of Inquiry* regarding spectrum technology and the foundations of radio communications.

(Continued from page 1)

If you're paying attention, two things jump out from the table below. First, the CRB has taken the royalty rates found in the major WSAs and more or less applied them across the board to webcasters meeting the definition for the relevant class, whether or not the webcaster originally opted into an available WSA. (For webcasters who opted into a WSA, the WSA still takes precedence.) And second, there are fewer and fewer differences between the various classes of broadcasters.

When you think about it, this makes sense, since the ultimate goal here is to figure out the going market rate for a performance – which suggests that there ***should*** be little to no difference across each class, although it still seems appropriate to offer a benefit (in the form of the first 159,140 ATH free) for noncommercial webcasters.

Of course, that's not the end of the meal. A heaping helping of mandatory playlist reports still sits on your plate and, frankly, many webcasters find them pretty hard to swallow. But you don't have to worry about them right now. We figure you're just about full after everything you've already digested, so we'll put those away and reheat them in the very near future when we offer a refresher course on the required filings you'll need to make throughout 2011.

Check back with our blog (www.CommLawBlog.com) in January, in advance of the first deadline of 2011 (*i.e.*, January 31, the deadline for the filing of notices of elections and annual minimum payments).

PER PERFORMANCE RATE CHART FOR 2011-2015
(Values in U.S. Dollars)

	2011	2012	2013	2014	2015
Commercial Broadcasters ***WHETHER OR NOT*** they opted into WSA	.0017	.0020	.0022	.0023	.0025
General Noncommercial Webcasters (including noncommercial broadcasters) ***NOT IN*** WSA	.0019	.0021	.0021	.0023	.0023
General Noncommercial Webcasters (including noncommercial broadcasters) ***IN*** WSA	.00057	.00067	.00073	.00077	.00083
Noncommercial Educational Webcasters ***WHETHER OR NOT*** they had opted into WSA	.0017	.0020	.0022	.0023	0025

(Continued from page 4)

case is closed and case files related to Freedom of Information Act requests are generally retained for two years from the date of reply. In the recent EBATS notice, the Commission noted that no retention schedule had yet been established and, as a result, no records would be destroyed until such a schedule was approved by the National Archives and Records Administration. When could we expect such a schedule to be developed and approved? Well, it's a little hard to tell, but it could be a while. The SORNs for the Commission's two existing Enforcement Bureau systems, both published in April, 2006, contain precisely the same language and do not appear to have ever been updated to reflect any disposal schedule.

If any of this is at all troubling to you, you can file comments with OMB (not directly with the FCC) no later than January 13, 2011.

(Continued from page 5)

The Commission is planning to convene a public forum on the CORES overhaul. (The date has not yet been announced as of this writing; neither have the deadlines for comments and reply comments in response to the NPRM.) In view of the nature and extent of the proposed changes and the overriding goal of achieving a maximally efficient and comprehensive electronic licensing system, it would obviously be in everyone's interest – the Commission's, the regulated industries', and the public at large – to encourage the broadest range of input at the earliest possible time. And while you're at it, you might also let the FCC know what you think of its CLS proposal. (You can do that by filing comments in MD Docket No. 10-73.)

(Continued from page 2)

Of course, entitlement to the preference would require that the applicant have "overcome" the disadvantage (however the term "disadvantage" might ultimately be defined). But precisely how one might be said to have achieved that status is also left way up in the air. The Advisory Committee is willing to go only so far as to say that the preference would be available to those who "can show that they have entered into or made some advancement in the professional world or a comparable context."

While that criterion ("some advancement in the professional world") would leave would-be preference claimants a lot of room to maneuver, they'd have to be careful not to over-sell their case. The Advisory Committee would deny the preference to anyone who had overcome disadvantage so successfully that he/she has already managed to acquire "considerable financial resources". But if "perseverance" and "resourcefulness" (and, maybe, "grit") are the desirable traits, wouldn't the ***really*** successful folks – *i.e.*, the ones who had succeeded in amassing "considerable financial resources" – be the most likely to have those traits? You'd think so – but the Advisory Committee figures that those really successful folks would be able to participate in spectrum auctions without help. But if perseverant, resourceful folks are already able to participate without the need of a preference, how can the Advisory Committee say that such applicants are "underrepresented" and "undervalued"? Indeed, what does "underrepresented" mean here, anyway? What level of "representation" needs to be achieved to avoid "underrepresentation", and how will we all know when we get there?

The proposal is so amorphous and inchoate that it makes little if any sense at all.

The Advisory Committee and the Bureaus also acknowledge that administration of such a preference would entail a variety of practical questions. Since claims for the "overcoming disadvantage" preference would be assessed on a case-by-case basis, and since we can reasonably expect that most claims would feature factors more or less unique to each separate claimant, the process of assessing those claims would be cumbersome, to say the least. And that doesn't even begin to address the problem of whether – and if so, how – an *individual*'s success at overcoming disadvantage could or should be allowed to benefit an *entity* in which that individual has some interest. The need to consider and resolve each such claim *before* the auction would almost certainly slow the auction process down and introduce a dangerous level of uncertainty to that process.

With all due respect to the Advisory Committee, its recommendations are difficult to take seriously. The Advisory Committee seems to have concluded that it would be nice to hand out a preference to those who have "overcome disadvantage", and it is now attempting to justify that some way, somehow. But the Advisory Committee offers no demonstration that the ranks of FCC applicants currently do not include – and historically have not included – perseverant, resourceful, gritty applicants. And even if such a showing could be made, the breadth of the notion of "disadvantage" envisioned by the Advisory Committee would likely make its approach unworkable – even before you factor in the wholesale subjectivity of that notion along with the problem of identifying success in "overcoming disadvantage" (not to mention the related problem of identifying "too much" success).

According to its webpage, the Advisory Committee's "mission" is to make recommendations that will "further enhance the ability of minorities and women to participate in telecommunications and related industries". From the 1970s into the 1990s, the FCC adopted and implemented a number of policies expressly designed to promote broadcast ownership by minorities and females. While those policies were initially upheld by the Supreme Court in the 1990 *Metro Broadcasting* decision, that decision was overruled five years later in the *Adarand* case. As a result of *Adarand*, the FCC's – and, in general, the government's – ability to engage in race- or gender-based decision making is narrowly circumscribed. That, in turn, limits the range of constitutionally-permissible options available to the Advisory Committee in the advancement of its mission.

That may explain the Advisory Committee's recommendations here. The recommendations could be read as an effort to devise an ostensibly non-race-, non-gender-based preference system which could, in practice, be implemented to benefit primarily minorities and women. (The recommendations include a somewhat defensive section addressing "why the [proposed] program would meet legal tests", in which *Adarand* and other cases are discussed – which suggests that this reading may not be far-fetched.) But the end result is a proposal so amorphous and inchoate that it makes little if any sense at all.

And on a historical note, let's not forget that for decades the Commission engaged in elaborate processes designed to permit comparisons of the personal qualifications of broadcast applicants. Those processes included preferences for minorities and females. In the 1993 *Bechtel* decision, the U.S. Court of Appeals for the D.C. Circuit held that those comparative processes were arbitrary and capricious. Following the decision, the Commission reportedly sought to redesign its comparative policies to accommodate the Court's criticisms – but then *Adarand* was issued and the Commission was unable to come up with a comparative approach that could constitutionally afford preferences to minorities and females. Ultimately, the Commission abandoned the effort, opting instead for a simple auction process to dole out broadcast licenses.

The Advisory Committee's recommendations would in effect return the Commission to the old comparative days, at least to the extent that they would call for examination of the particular and peculiar qualifications of individual applicants. Unless the Commission is prepared to do now

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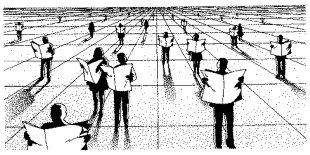
Stuff you may have read about before is back again . . .

Updates On The News

Having apparently satisfied itself that its ample statutory authority encompasses such spectrum-centric matters as childhood obesity, the Commission took the next logical step this past month. It extended its gnarly regulatory hand into the areas of teen-age "cyberbullying, sexting and addictive behavior" by presenting a "forum" entitled *Generation Mobile*. Headlining the affair was Chairman Genachowski, although the real star power was (according to the FCC's public announcement), "Jane Lynch, LG Text Ed Council". Ms. Lynch was also described as an actress and comedian "currently staring *[sic]* in the TV show, Glee". Oh, and by the way, the notice also repeated (presumably to make sure that we didn't miss it) that she "serves on The LG Text Ed campaign". Another presenter at the forum was also identified as "Member LG Text Ed Council".



The Commission seems to believe that it has some responsibility for the behavior of teens because, um, well, they use telephones a lot and, er, the FCC regulates phone companies. The precise nexus between anything in the Communications Act and, say, cyberbullying is not entirely clear. In the wake of last April's *Comcast* decision, in which the D.C. Circuit reminded the Commission that its authority to act is far from limitless, you might have thought that the FCC would be a bit more skittish about seeking more worlds to conquer with its regulatory clout. You would, apparently, have thought wrong.

But what was particularly striking about the FCC's public notice was its repeated references to the "LG Text Ed Council" and related "LG Text Ed Campaign". The LG Council/Campaign is an activity sponsored by LG, which manufactures mobile phones. It seems likely that LG was actively involved in the planning of the forum, since Ms. Lynch (associated with the Council/Campaign) got star billing, and the other LG rep was a co-moderator (with the Chairman) of one of the two panels. But the precise role (if any) that LG played in the forum was not described in the Commission's public notice.

In recent times the Commission has – in connection with inquiries about sponsorship ID's and video news releases, for example – expressed overriding concern that the public be informed of any possible involvement by commercial entities in the presentation of information. The Commission, of course, is not itself subject to the sponsorship ID rules. But if the FCC is going to present a forum and publicize that forum in a detailed press release, might not the public want to know what role (if any) a telephone manufacturer played in that forum – especially if (a) that manufacturer is mentioned multiple times in the press release, and (b) that manufacturer's commercial interests could be affected by FCC regulatory actions? And if a TV station happened to run portions of the forum on, say, its evening news, and the station mentioned the LG Text Ed Council/Campaign without saying more, would that trigger an inquiry from the Enforcement Bureau? Or is this just one of those Emersonian consistencies that needn't bother us? We don't know the answer to those questions, but we thought we'd ask.

FHH - On the Job, On the Go

On January 11, **Frank Montero** will appear on an FCBA-sponsored brown bag lunch panel in Washington on foreign ownership and investment issues in broadcasting.

On February 27-March 1, **Harry Martin** and **Peter Tannenwald** will attend the National Religious Broadcasters Convention and Exposition in Nashville. **Harry** will appear on a panel addressing a wide range of radio-related matters, including the upcoming renewal cycle, copyright questions and LPFM issues, among others. **Peter** will be on a TV-related panel (optimistically titled "Spectrum: Resurrection or Renaissance") which will explore Big Questions surrounding the future of over-the-air television in the face of the FCC's plan to take back spectrum for broadband use. Scheduling Alert!!! Both panels are slated for the same time slot (9:00-10:30 a.m.) on February 28.

After the NRB, **Peter** will jet on down to Delray Beach, Florida, for the Hearing Industries Association Annual Meeting from March 2-4. There he'll be making a presentation on FCC involvement with radio-based advances in hearing aid technology and expansion and enforcement of hearing aid compatibility requirements for wireless and wired telephone handsets.

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what it was either unwilling or unable to do in the wake of *Bechtel* and *Adarand* – that is, devise a non-arbitrary and non-capricious mechanism for assessing the individual attributes of applicants – the Commission may want to think long and hard before chasing this concept down the rabbit hole.

The recommendations are now open for comments and reply comments. Comments are due by ***February 7, 2011***; reply comments by ***February 25***.