Fletcher, Heald & Hildreth

Memorandum to Clients

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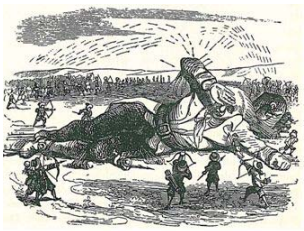

New lo-po's on air soon? Not likely!

Local Community Radio Act - It's The Law!

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The Local Community Radio Act of 2010 has been signed into law. Fresh from his Christmas get-away to Hawaii, President Obama got right back to business by inking the Act and, presto, thousands of new LPFM stations blossomed across the country overnight.

Well, not exactly.

While the legislation was signed on January 4, there's still a long way to go before anyone will be able to tell exactly how much the Act is going to help LPFMs. Despite Chairman Genachowski's commitment to take "swift action to open the dial to new low-power radio stations", the fact is that it's going to take a lot of effort to graft the changes contained in the new law onto the existing regulatory framework. Additionally, there are major league practical factors that will have to be dealt with – not the least of which is a mass of thousands of translator applications that have been cut off and pending for seven years already.

Let's look at some of the more obvious problems.

First, the full Commission still has to act on various petitions for reconsideration relative to its 2007 overhaul of the LPFM rules. Those petitions have been gathering dust since early 2008. While the Media Bureau reportedly prepared a draft order for the full Commission's consideration some time ago, that draft has also been gathering dust – possibly because everyone was waiting to see whether Congress would act.

Now that Congress has acted, the Commission will have to go back to the drawing boards, reviewing all of its LPFM-related rules and pending proceedings and working to conform those rules/proceedings to the changes imposed by the new Act. That will entail, at a minimum, preparation of a new order (or possibly a revision of the reported draft) disposing of the 2008 recons. It's a reasonable guess that this will be among the Commission's highest priorities.

While it's at it, the Commission will also have to initiate a separate rulemaking to get the ball rolling on the rule changes mandated by Congress. Sure, Congress may have spelled out in considerable detail the rule revisions it wants to see, but those rules don't just change themselves. Rather, a notice of proposed rulemaking must be drafted and issued, opportunity for comments and reply comments must be provided, a report and order must be prepared, etc.

Even with maximum prodding (and maximum cooperation) from the full Commission, it would be ambitious to expect all this to be wrapped up much before the end of 2011 – and that's not counting the time (probably in the 12-18 month range, minimum) it would likely take to resolve any appeals that might get filed along the way.

Let's say that the Commission does get all its homework done by the end of 2011 (and, to make things easy, let's also say that no appeals get filed). The next step toward authorizing new LPFM service would be the opening of a filing window. Even if the Commission wants to move super-fast, it would still have to give all LPFM wannabes enough time to prepare for such a window . . . which means that a springtime, 2012, timeframe would probably be the earliest such a window might open. Factor in processing time, construction time, etc., and you're probably not going to be hearing any new LPFM stations actually taking to the airwaves until early 2013, at the earliest.

(Continued on page 9)

Inside this issue . . .

FCC To FM Reallotment Proponents: Hands Off Vacant Channels 2
Focus on FCC Fines 3
Media Bureau Cracks The EEO Whip 4
Travelers Information Service Expansion Under Consideration 5
Webcaster Wake-Up Call! 6
NYPD (Not Too) Blue Moon 10
Size Still Matters To The Feds 11
Quad Review "Consumer Survey" Gets Preliminary OMB OK 12
Deadlines 14
Coming Soon: The Event-Of-Overriding-National-Importance-That-Shall-Not-Be-Named 15
Updates On The News 16

FCC To FM Reallotment Proponents: Hands Off Vacant Channels

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The art of moving FM channels around to achieve a preferable (and, at least for some, more valuable) channel arrangement has suffered a set-back with the announcement of a change in allotment policy. The Commission has withdrawn one of the technical mechanisms used by practitioners of that art: from here on out, with one narrow exception, vacant FM channels cannot be modified or deleted as part of an effort to re-jigger the distribution of channels.

The issue arose in a long-running contest between competing proposals for FM channels in the area of Keeseville, New York (conveniently located just across Lake Champlain from Burlington, Vermont). In 2004 the Media Bureau had allotted a vacant Class A channel to Keeseville. In so doing, the Bureau rejected a counterproposal to move an operating station from Hartford, Vermont, into Keeseville. Unwilling to take "no" for an answer, the Hartford proponent concocted an alternate approach and submitted it as a whole new rulemaking proposal. That alternate approach depended on, among other things, moving the newly-minted-but-still-vacant Keeseville Class A back out of Keeseville.

One of the supporters of the Keeseville Class A allotment (and – full disclosure – an FHH client) opposed that Plan B because it would eliminate the availability of a vacant channel in Keeseville, even though interest in filing for that channel, as a Keeseville channel, had been expressed. Well-established Commission policy provided that, in such circumstances, a vacant channel could ***not*** be moved. Despite that, the Bureau approved the Plan B alternative and yanked the vacant Class A Keeseville channel.

The disappointed Keeseville Class A proponent appealed to the full Commission.

On review, the Commission agreed that the vacant Keeseville channel should not have been moved out since interest in applying for that channel had been expressed. The Commission then proceeded to engage in a creative exercise that ended up leaving *both* the vacant channel *and* the Plan B channel from Hartford in Keeseville.

Despite the fact that the FCC was able to devise a solution that seemingly satisfied the contesting parties, the Commission clearly recognized that there's an easier way to prevent such contretemps from arising in the first place.

Since the primary problem here was reliance (in the Plan B alternative) on moving a vacant channel out of its designated community, the Commission figured the best way to avoid recurrences would simply be not to allow such reliance in the future. Accordingly, it has "discontinue[d] the practice of accepting such proposals [*i.e.*, proposals involving the deletion or reallotment of vacant FM channels] in the context of our FM allotment rulemaking procedures. To the extent that parties wish to pursue competing proposals, they should be timely submitted as counterproposals in the initial allotment proceeding."

There is *one exception* to this policy. Parties may still propose *same-class* channel substitutions in technically related rule making and/or application filings. The rationale for this exception is that FM channels in the same class are deemed interchangeable. So as far as the Commission is concerned, substituting one vacant Class A channel for another Class A channel in a given community does not affect the fair and efficient allotment of radio channels among the states and communities.

In announcing this new policy, the Commission did not allude to other efforts the Commission has made in recent years to slow the movement of FM stations away from smaller rural communities and into major population centers. But the new policy is clearly in synch with those efforts. The ability to use one or more vacant allotments in the design of elaborate channel reallotment proposals often afforded the designers of such proposals considerable flexibility. That flexibility is now gone. While that won't put an end to such proposals, it will impose one more impediment on them.

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Focus on FCC Fines

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This past month the Enforcement Bureau addressed EAS violations in four separate contexts. The take-home message: All stations should pay attention to their EAS obligations or risk a potentially heavy fine.

Half an EAS operation is not enough – Escondido, California, is home to a pair of co-located and commonly-owned AM stations. One of the benefits of co-location is the ability to share certain costs – like personnel and equipment, including EAS equipment. And sure enough, the Escondido AMs shared a chief engineer and an EAS unit. But that arrangement didn't work out so well, since the unit stopped working for one of the stations and the engineer didn't figure that out until it was too late. The result: a $6,000 fine.

The problem was that, somewhere along the line, the EAS equipment lost its ability to transmit a required weekly test for one of the two stations. This quirk apparently first surfaced in December, 2009 – at least that's what the station's EAS logs indicated. But when the *federales* arrived at the station for an inspection in mid-March, 2010, it still wasn't working.

According to the licensee, the chief engineer duly examined the equipment in December, but initially concluded that the problem was intermittent. When it recurred in February, 2010, the chief engineer was again notified of the problem and, in response, the engineer performed a complete inspection and replaced parts. At the beginning of March the engineer again tested the equipment and replacement parts to resolve the problem. But the problem remained unresolved as of March 18, which happened to be the day the inspectors showed up.

After the inspection, the chief engineer sent the equipment for repair. Diagnosis: defective power supply filter capacitor. Within three weeks of the inspection, the unit had been repaired and placed back in service.

However, because the EAS logs reflected that the unit had been defective for more than 60 days, the station drew a fine. (The standard FCC fine is $8,000, but the Bureau gave the station credit for good faith repair efforts and reduced the hit to $6,000.)

Licensees should know that, when an EAS unit goes down, they have 60 days to get it fixed. Section 11.35 of the FCC rules permits stations to operate for up to 60 days without properly functioning EAS equipment. That gives you time to repair or replace the faulty gear. And that time can be extended in situations where, for example, the station's engineers have identified the problem and are "still working on it". (When a licensee believes that EAS equipment repairs will take more than 60 days, it must submit an informal request for more time to the FCC field office District Director. The request must provide information about what steps have been taken for repairs, an estimate of when repairs will be completed and a description of alternative EAS alert procedures that will be employed.)

So if and when problems pop up with an EAS unit, the first order of business is to get it fixed as soon as possible. And the second order of business is to keep close track of the time that that fixing process is taking, so that, if you start to bump up against the 60-day limit, you can submit a timely request for more time.

In the alternative, you can ignore all of the above, and get set to write an $8,000 check to the government. It's your call to make.

NCEs need EAS, too – Meanwhile, a Minnesota noncommercial educational FM station is also looking at a possible EAS fine. It was on the receiving end of a Notice of Violation from the Enforcement Bureau following an inspection. During the inspection, the T-Man did what T-Men usually do: he reviewed the station's EAS logs, which disclosed that monthly tests for July, October and November had not been received or transmitted. The logs also showed no weekly tests at all in October. What the logs did *not* show was any explanation for the absence of the tests. Additionally, the agents noted that the station was monitoring only a single EAS source. The Bureau has issued a Notice of Violation to the station requiring it to explain these circumstances. If the station has a good story to tell, it may avoid any penalty; if it doesn't, the station can expect to find a Notice of Apparent Liability, specifying a fine, in its mail box before too long.

. . . and so do LPFMs – Low Power FM stations in Nevada and California are in predicaments similar to the Minnesota noncom described above. Agents from the Enforcement Bureau's San Francisco office dropped by an Oroville, California lo-po and a Fallon, Nevada lo-po, and inspected their respective EAS materials. At the Oroville station, the agents found no EAS Handbook. That's a likely violation. What they did find were records (including logs) indicating that the station had been monitoring only a single EAS source, had failed to conduct monthly tests for three months, and had failed to log the reason for those missed tests. Those, too, are likely violations. The Fallon station was written up for monitoring only one EAS source, and not two, as required by the rules. In both cases, the licensees received Notices of Violations, giving them a chance to explain what happened before any Notice of Apparent Liability will be issued.

In each of these actions, the Bureau reminded broadcasters that the EAS is critical to public safety and that the FCC takes any violation seriously. Broadcasters should be vigilant about complying with all applicable EAS rules.

Foul-ups fetch four- and five-figure fines

Media Bureau Cracks The EEO Whip

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The Media Bureau celebrated the end of 2010 (or maybe the arrival of 2011) by serving warning that, for every single full-time job opening – no exceptions – broadcasters must notify multiple recruitment sources that are likely to refer applicants from diverse backgrounds. Exclusive reliance on over-the-air announcements and Internet postings will ***not*** do the trick. Neither will reliance on word-of-mouth or unsolicited walk-ins standing alone. And, of course, all notification activities (and other recruitment minutiae) must be documented in the annual EEO report that stations place in their public inspection file on the anniversary of their renewal application filing.

Happy New Year!

This celebratory heads-up was delivered in Notices of Apparent Liability (NAL) issued to two separate broadcast groups late on December 29.

In one case involving several stations in small Oregon communities, the licensee apparently failed to include its annual EEO public file reports for 2004 and 2005 with its 2005 renewal application. The Bureau wrote to the licensee, asking for those two reports – and oh, by the way, while you're at it, please send along reports for 2006, 2007 and 2008, too. (The Bureau didn't get around to asking for any of these reports until 2009. Time, apparently, was not of the essence when it came to processing the 2005 renewal applications.) And although it didn't ask for the 2009 report, Bureau staffers checked that report out anyway on the licensee's website. (You do remember that you have to post your most recent annual report on your website, don't you?)

Particularly surprising is the Bureau's conclusion that "reliance on Internet sources is inadequate[ ]".

The reports showed that there were 29 vacancies during the 2003-2009 period. For six the licensee relied only on "walk-in/mail-in" applicants. For another seven, it relied exclusively on postings on Internet websites. For 15, it relied strictly on over-the-air-announcements. Conclusion? The licensee violated the EEO rule "because it failed to use recruitment sources sufficient to disseminate information concerning the vacancies as required".

The licensee also didn't have records of (a) the number of people it interviewed for each opening or (b) the recruitment source from which each interviewee learned of the opening. (While not every applicant is willing to disclose where he or she learned of an opening, you must ask. This requirement applies only to applicants you interview, not to all applicants.)

Total fine: $20,000 – $16K for failing to recruit properly, $1K for failing to keep required records, $2K for incompleteness of public file reports, and another $1K for failing to adequately analyze the effectiveness of recruitment efforts.

The second NAL involved a group of stations in small communities in Missouri picked in 2008 as part of the Commission's random audit process. During the reporting periods ending in 2006 and 2007, the licensee had 24 vacancies. For three openings, it relied on walk-in applicants; and for one opening each it relied on, respectively, word-of-mouth, a business referral, and an employee referral. The licensee noted that it broadcast "generic recruitment ads that promote different careers in radio and working at [the licensee]", even when there were no current openings, and walk-in applicants may apply because of these spots. The public file report in one year failed to list job titles of seven vacancies, classifying them as "other".

Total fine: $8,000 – $5K for failing to recruit properly, $2K for incomplete public file reports, and $1K for inadequate analysis of its recruitment efforts.

Both licensees used on-air or Internet announcements to get the word out about employment opportunities. These recruitment methods are likely to reach a race- and gender-blind audience, and people who want to work at your station are likely to listen to your station. Indeed, we hear from broadcasters all the time that on-air and Internet announcements are the only methods that produce any results. By contrast, mass mailings to organizations supposedly able to spread the word reportedly do little but use up postage and paper.

But to the FCC, it doesn't matter. You must publicize *every* full-time opening to a variety of specific sources. (Back in 2002, the Commission did acknowledge that in some "exigent circumstances" licensees might be able to avoid full-tilt recruitment efforts for certain positions. While that possible exception is still on the books, the Commission has suggested that it is a narrow exception, at best.) There is no requirement that any of these sources ever refer any job applicants (much less any qualified ones), although consistent non-response is supposed to be a reason to look for new sources. Remember as well that any recruitment source that affirmatively requests to be notified *must* receive notifications of all openings.

Particularly surprising here is the conclusion of the Media Bureau's EEO enforcers that "reliance on Internet sources is inadequately broad recruitment". In view of the Commission's rabid promotion of broadband as a panacea for just about every conceivable economic problem, it's difficult to understand why the Media Bureau is pooh-poohing

(Continued on page 16)

Travelers service or local government service?

Travelers Information Service Expansion Under Consideration

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If you (like most of your fellow citizens) spend much time on the highways and by-ways of our great country – or if you have an interest (commercial or otherwise) in reaching folks on those same highways and by-ways – listen up. The Commission has launched a rulemaking to explore possible changes in the Travelers Information Service (TIS), the AM-based low-power service that provides a constant diet of, um, travelers information along highways and near various travel-based locations. At the request of several associations of government officials and TIS operators, the FCC has issued an Order and Notice of Proposed Rulemaking (NPRM) to consider whether TIS stations should be permitted to air a greater range of information at greater power in a greater variety of locations. The range of possible changes includes, at one extreme, a substantial redefinition of the service itself.

A comprehensive, overhaul or just a tweak here and there ?

The TIS has been around since 1977. TIS stations operate in the AM band, as a primary service on 530 kHz and on a secondary basis on 535-1705 kHz. With maximum power of 50 watts, they are low-power operations designed to reach a narrow audience of travelers passing in the immediate vicinity of each station. The content of their transmissions is limited to "noncommercial voice information" about traffic (including road conditions, hazards, advisories, directions), nearby options for lodging, rest stops and service stations, and descriptions of local points of interest. The strict limitations on the service were imposed out of concern about possible interference and competition with commercial broadcasters.

Citing broad changes that have occurred in the country in the three decades since TIS began, the petitioning associations of government officials and TIS operators suggest that the Commission:

- re-name the TIS as the "Local Government Radio Service";
- eliminate certain site and power limitations; and
- expand the permissible content of TIS messages to include, among other things, alerts concerning the safety of life or protection of property, such as NOAA weather radio transmissions, AMBER alerts and other civil defense announcements.

The key question posed by the NPRM is: "Should the Commission significantly expand the scope of permitted communications by local governments on TIS stations, or should it adopt more limited changes that are consistent with the traditional traveler-related focus of TIS?" In other words, does TIS get a comprehensive, possibly mission-changing overhaul, or should it just be tweaked here and there to preserve its "traditional" focus?

The proceeding started back in 2008, with a petition by Highway Information Systems, Inc., proposing sweeping changes to the TIS. Two months later, the American Association of Information Radio Operators (AAIRO, represented by Fletcher Heald) took a more measured approach: it asked the Commission simply to confirm that the permissible content of TIS stations includes "any message concerning the safety of life or protection of property that may affect any traveler or any individual in transit or soon to be in transit" – a reasonable interpretation of the notion of "travelers information".

But other groups followed up with their own separate, and broader, suggestions. Declining to simply provide the confirmation that AAIRO had asked for in the first place, the Commission now asks whether the permissible content of TIS stations should be expanded to include such matters as NOAA Weather Radio retransmissions, AMBER Alerts, terror threat alert levels, civil defense announcements and the like. (How limited is the FCC's view of existing content limitations? In 2007, the Enforcement Bureau issued a Notice of Violation to the City of Santa Monica for retransmitting NOAA weather broadcasts.)

Other questions up for discussion: If such expansion is permitted, what limits should be imposed? For example, should only non-routine NOAA reports be permitted, or could routine reports be included as well? Would the proposed changes adversely affect commercial broadcasting, as NAB maintains? One proponent goes so far as to suggest that TIS stations be permitted to "any information of a noncommercial nature". Another emphasizes the possible use of TIS for general emergency-readiness information along with announcements about local history, environment and parks.

With respect to the technical aspects of TIS, the Commission is considering a variety of proposals advanced by the petitioners. Should TIS stations be untethered from their current geographical anchors (*i.e.*, roads, highways, public transportation terminals, etc.) and allowed to be located pretty much anywhere? One prominent engineering firm has objected to that proposal, citing its potential adverse effect on nighttime interference in the medium wave AM band. With that in mind, the Commission seeks comments on whether and to what extent interference problems could arise and, if so, how they should be addressed.

(Continued on page 13)

Start 2011 off on the right foot

Webcaster Wake-Up Call!

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The beginning of another year brings renewed obligations for all broadcasters who are operating a *non-interactive* webcast (as opposed to an on-line service that provides interactive downloads or podcasts). That universe is populated by three separate and distinct types of webcasters, each of which has slightly different obligations from the others. Those three types are: (1) commercial webcasters; (2) noncommercial webcasters; and (3) noncommercial educational webcasters.

Important definitional note: For purposes of webcasting royalties, the distinction between "commercial" and "noncommercial" is ***not*** based on the nature of the underlying broadcast license. Rather, it's based on the reporting entity's status under Section 501 of the Internal Revenue Code. If a webcaster is exempt from taxation under Section 501, it is deemed to be ***NON***commercial when it comes to webcaster royalty matters. And if a noncommercial webcaster's operation is substantially staffed by students, it is a *noncommercial educational* webcaster.

*The distinction between "commercial" and "noncommercial" is **not** based on the nature of the underlying broadcast license.*

*If you are engaged in the any commercial or noncommercial (whether or not educational) webcasting of one or more streams, your first filing of the new year – primarily consisting of an annual minimum fee statement of account with payment of $500 per channel – is due on **January 31, 2011**.* But your obligations continue throughout the year with statements of account and playlist reports of use required on a monthly basis.

The following is a guide to the filing obligations for each of the three types of webcasters (*i.e.*, (1) commercial, (2) noncommercial and (3) noncommercial educational). Note that links to all the SoundExchange forms described below are available at www.CommLawBlog.com.

Commercial Webcasters

Any ***commercial*** webcasting service operating as a broadcaster (that is, operating an FCC-licensed AM or FM station simulcasting at least one channel on the Internet) will fall into one of the two categories outlined below.

A. Commercial broadcasters, whether or not participating in the Webcaster Settlement Agreement between the NAB and SoundExchange:

There used to be a distinction between (a) those broadcasters who had chosen to participate in the settlement agreement (*NAB/SoundExchange Agreement*) between the National Association of Broadcasters and SoundExchange and (b) those who had not signed onto that agreement. However, the recent *Webcasting III decision* of the Copyright Royalty Board (*CRB)* has eliminated any such distinction on the commercial side. (We wrote about the *Webcasting III* decision in last month's *Memo to Clients*.) As a result, all Commercial Webcasters who are (a) FCC licensees of an AM or FM radio station and (b) simulcasting at least one channel on the Internet, have these obligations in 2011:

Annual Minimum Statement of Account Form and Fee – File an annual minimum fee of $500 per channel by ***January 31, 2011*** using the 2011 Broadcaster Minimum Fee Statement of Account form. (Note: The form refers to the *NAB/SoundExchange Agreement* but that is of no consequence because the *Webcasting III* decision eliminated all distinctions between the rates and terms specified by the CRB and those laid out in the *NAB/SoundExchange Agreement*. As a result, all commercial webcasters who are also broadcasters are now created equal for copyright royalty purposes.)

Monthly Statement of Account Form and Fee – File any fees incurred beyond the $500 annual minimum already paid by using the 2011 Broadcaster Monthly Liability Statement of Account form. You must file this form even if you're not actually paying because your cumulative fees for the year have not yet exceeded $500. Each Statement of Account is due within 45 days of the end of the month to which it pertains.

Playlist Reports of Use – Playlist Reports of Use must be filed on a monthly basis. SoundExchange prefers that you adhere to the template report for filing (in Excel format). Each Playlist Report of Use is also due within 45 days of the end of the month to which it pertains.

Notice of Election – There is no requirement to file a notice of election unless you are not currently participating in the *NAB/SoundExchange Agreement* and wish to do so (although as far as I can see there is absolutely no benefit to joining that agreement now).

(Continued on page 7)

(Continued from page 6)

B. *SMALL* commercial broadcasters who *HAVE* elected to participate in the Webcaster Settlement Agreement between the NAB and SoundExchange:

A select few broadcasters who are simulcasting on the web also qualify as "Small Commercial Broadcasters" and are treated differently, mainly because they can be exempted from filing Playlist Reports of Use.

This distinct classification applies *only* to those broadcasters who: (1) elected to participate in the *NAB/ SoundExchange Agreement*; ***and*** (2) had fewer than 27,777 Aggregate Tuning Hours (ATH) in the previous year. These Small Commercial Broadcasters have one additional step to complete before January 31, but they will save a lot of time in the future because they do not have to file playlist reports of use on a monthly basis. Operators qualifying as "Small Broadcasters" have these obligations in 2011:

Notice of Election – File a Notice of Election by ***January 31, 2011*** on the 2011 Notice of Election for Rates and Terms for Small Broadcasters Form. This Notice of Election must be accompanied by a $100 "proxy fee".

Annual Minimum Statement of Account Form and Fee – File an annual minimum fee of $500 per channel by ***January 31, 2011*** using the 2011 Small Broadcaster Minimum Fee Statement of Account form.

*Some noncommercial stations do **not** have to file forms with SoundExchange.*

Monthly Statement of Account Form and Fee – File any fees incurred beyond the $500 annual minimum already paid by using the 2011 Small Broadcaster Monthly Liability Statement of Account form. While it is extremely unlikely that a small broadcaster's cumulative fees for the year would exceed $500, you must file this form every month whether or not any payment is due. Each Statement of Account is due within 45 days of the end of the month to which it pertains.

Playlist Reports of Use – Of course, the benefit of this classification is that you can opt out of filing Playlist Reports of Use. If you do not choose this option, the reports must be filed on a monthly basis. SoundExchange prefers that you adhere to the template report for filing (in Excel format). Each Playlist Report of Use is also due within 45 days of the end of the month to which it pertains.

NONCOMMERCIAL WEBCASTERS

Noncommercial webcasters (unlike their commercial and educational counterparts) have several decisions to make. The eligibility requirements described below should be reviewed carefully.

A. Noncommercial webcasters who have *NOT* elected to participate in any major webcaster settlement agreement

There is absolutely no distinction on the noncommercial side between a webcaster that operates a broadcast station and one that does not. But there *is* a distinction between an entity that elects to participate in the general noncommercial webcasters settlement agreement (the "*General Agreement*") and one that does not. (Note: Participation in that agreement offers significantly better terms, in my view.) Fortunately, you can elect that status even if you have not done so before. (Helpful reminder: even if you *have* previously elected that status, you *must* "re-up" every year.)

For reasons discussed in Section C below, I strongly recommend that the *General Agreement* option be chosen, if at all possible. However, if you cannot or decide not to participate in the *General Agreement* or any other webcaster settlement agreement, your obligations are:

Annual Minimum Statement of Account Form and Fee – File an annual minimum fee of $500 per channel by ***January 31, 2011*** using the 2011 Noncommercial Webcaster Minimum Fee Statement of Account form. A separate form must be filed for each channel or station.

Monthly Statement of Account Form and Fee – File any fees incurred for exceeding the 159,140 ATH maximum, along with the 2011 Noncommercial Webcaster Monthly Usage Statement of Account form. You *must* file this form *even if no fees have been incurred*, marking "zero" in the "excess performances" column. Again, a separate form must be filed for each channel or station.

Playlist Reports of Use – Playlist Reports of Use must be filed on a quarterly basis using the template report for filing (in Excel format), unless you exceed 159,140 ATH in a given month during 2010 or 2011, in which case you file on monthly basis. Also note that you may be able to opt out of this requirement if you qualify as a Noncommercial Microcaster (*see* Section D below for details).

Notice of Election – No notice of election is required.

B. Noncommercial webcasters who *HAVE* elected to participate in the webcaster settlement agreement between CPB (on behalf of *PUBLIC RADIO STATIONS*) and SoundExchange

As in previous years, some noncommercial stations do ***not*** have to file forms with SoundExchange. Entities subject to this exemption include station that are: CPB-supported; NPR members; National Federation of Community Broadcasters members; or part of American Public Media, the Public Radio Exchange or Public Radio International. Under the terms of the separate CPB/SoundExchange settlement agreement, NPR's Public Radio Interactive is making

(Continued on page 8)

(Continued from page 7)

those payments. Stations participating in the CPB/SoundExchange agreement will be contacted by Public Radio Interactive with regard to their obligations.

C. Noncommercial webcasters who *HAVE* elected to participate in the *General Agreement* and are *NOT* considered Microcasters because they have an average of at least 44,000 ATH per year

While *Webcasting III* sets the default royalty rates and related terms for non-interactive webcasters, those rates and terms vary somewhat from rates and terms specified in the *General Agreement*. If you are a party to the *General Agreement* (and I recommend that all eligible entities take this option), you are still subject to certain obligations. (As mentioned in Section A, above, you must renew this classification each year.) Those obligations include:

Notice of Election* –** File a Notice of Election by ***January 31, 2011 on the 2011 Notice of Election for Rates and Terms for Noncommercial Webcasters Form.

Annual Minimum Statement of Account Form and Fee – File an annual minimum fee of $500 per channel by ***January 31, 2011*** using the 2011 Noncommercial Webcaster Minimum Fee Statement of Account form. A separate form must be filed for each channel or station.

Monthly Statement of Account Form and Fee **–** File any fees incurred for exceeding the 159,140 ATH maximum, along with the 2011 Noncommercial Webcaster Monthly Usage Statement of Account form. You *must* file this form *even if no fees have been incurred*, and you must calculate and insert your total ATH in the appropriate columns even if you do not exceed the maximum. Again, a separate form must be filed for each channel or station.

Playlist Reports of Use – Playlist Reports of Use must be filed on a quarterly basis using the template report for filing (in Excel format), unless you:

© exceed 159,140 ATH in a given month during 2010 or 2011, in which case you file on monthly basis; or

© do not exceed 44,000 ATH in the entire year 2010, in which case you can pay $100 for the right to be exempted from this requirement altogether, as per Section D, below.

D. Noncommercial Webcasters who *HAVE* elected to participate in the *GENERAL AGREEMENT* and *ARE* considered Microcasters because they had fewer than 44,000 ATH last year.

This section applies to extremely small noncommercial webcasters who have signed onto the *General Agreement*. As we have explained in years past, these webcasters can be exempted from the playlist reporting requirement and, by definition, will not be paying royalties because they will never exceed 159,140 ATH in any given month. Again, to be eligible, you must have elected to participate in the *General Agreement* in previous years and renew that election this year.

If you choose this category, your obligations are:

Notice of Election – File a Notice of Election by ***January 31, 2011*** on the 2011 Notice of Election for Rates and Terms for Noncommercial Microcaster Form. If you wish to avoid filing Playlist Reports of Use, you must file a $100 proxy fee with this form.

Annual Minimum Statement of Account Form and Fee – File an annual minimum fee of $500 per channel by ***January 31, 2011*** using the 2011 Noncommercial Microcaster Minimum Fee Statement of Account form. A separate statement of account must be filed for each channel or station.

Monthly Statement of Account Form and Fee – By definition, a station in this classification will not exceed 159,140 ATH, so no monthly statement of account is required.

Playlist Reports of Use – Of course, the benefit of this classification is that you can opt out of filing Playlist Reports of Use. If you do *not* choose this option, the reports must be filed on a monthly basis; SoundExchange prefers that you adhere to the template report for filing (in Excel format). Each Playlist Report of Use is also due within 45 days of the end of the month to which it pertains.

NONCOMMERCIAL EDUCATIONAL WEBCASTERS

Remember, these are noncommercial webcasters affiliated with educational institutions whose webcasting operations are substantially staffed by students. Here's a list of the routine filing obligations facing a noncommercial educational webcaster:

Annual Minimum Statement of Account Form and Fee – You must file an annual minimum fee of $500 *per channel* by ***January 31, 2011*** (or within 45 days of commencing webcasting). The fee must be

(Continued on page 9)

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And we haven't even focused on the pending translator applications yet.

The disposition of those translator apps looms large. Back in its 2007 LPFM overhaul, the Commission figured that one way to thin the herd of pending applications would be to impose a ten-application cap. That meant that any applicant with more than ten pending applications would have to select which ten it wanted to preserve; the rest would then be dismissed. But barely a month after the cap process was set in motion, it screeched to a halt. Since a number of folks sought reconsideration of the imposition of the cap, the Commission concluded that it should hold off on the culling process until the recon petitions had been disposed of. Those petitions are the same ones described above (the ones that the FCC still hasn't gotten to, but probably will now) – in other words, the mass of pending applications remains as it has for the last three-four years.

And that mass is not likely to go anywhere until the Commission disposes of the recon petitions. Once that happens, the winnowing of the pending applications could go forward (using one or more available devices, including caps, or settlements, or engineering amendments, etc.). That, in turn, would facilitate the final processing and disposition of the remaining translator applications, which would facilitate the preparation of LPFM applications once the LPFM window opens.

But what about the fact that grant of the pending translator applications would severely limit the spectrum available for new LPFMs? The LPFM folks may object that it would be inappropriate to grant a boatload of new translator applications because of that potential preclusive effect. The trouble there is that (as we have previously noted) the new Act expressly states that translators and LPFMs are "equal in status". That would seem to prohibit the Commission from holding up grant of pending and cut-off translator applications just because of possible LPFM preclusion, since any such hold-up would suggest that LPFMs are somehow higher on the spectrum pecking order than translators – and Congress has unequivocally nixed that notion. Of course, if Lo-Po folks attempt to challenge any effort by the Commission to move the translator applications through the processing mill, that would only further complicate, and prolong, the ultimate resolution of an already prolonged, and complicated, morass.

The bottom line here is that the Commission and the Bureau have their work cut out for them, with no quick and easy solutions in sight. Any high hopes that the new Act might automatically and instantaneously clear things up would be unrealistic, to say the least. But the Act does provide much-needed impetus to get the Commission moving . . . and that's something. Check on our blog (www.CommLawBlog.com) for updates.

(Continued from page 8)

filed along with the 2011 Noncommercial Educational Webcaster Minimum Fee Statement of Account form. A separate form must be filed for each channel or station.

Monthly Statement of Account Form and Fee – You must also file the 2011 Noncommercial Educational Webcaster Excess Monthly Liability Statement of Account form. If you exceeded the 159,140 ATH maximum, you must submit any resulting fees along with the form. You *must* file this form *even if no fees have been incurred*, and you must calculate and insert your total ATH in the appropriate columns even if you do not exceed the maximum. Again, a separate form must be filed for each channel or station.

Playlist Reports of Use – Playlist Reports of Use must be filed on a quarterly basis using the template report for filing (in Excel format), unless you:

© exceeded 159,140 ATH in a given month during 2010 or 2011, in which case you file on a monthly basis; or

© did not exceed 55,000 ATH in any given month in 2010 and do not expect to exceed that level in the year 2011 – in which case you can file the proper Notice of Election form (*see below*) and pay $100 for the right to be exempted from this requirement altogether.

Notice of Election – There is no need to file a Notice of Election unless you qualify for exemption from filing of Playlist Reports of Use. If you never exceeded 55,000 ATH in any month in 2010 and choose to pay a $100 "proxy fee" in lieu of filing reports, you may elect to do so by filing a Notice of Election. You do that by filing the 2011 Noncommercial Educational Webcaster Notice of Election form. If you do not meet the eligibility standards, or if you choose not to seek an exemption, you need not file the form.

Remember, regardless of what type of webcaster you may be, your annual minimum statement of account forms and payments (and Notice of Election, if applicable) are due by ***January 31, 2011***. You ***cannot*** file these forms electronically, and there is a penalty for late payment (or worse consequences, for late-filing a Notice of Election), so if you haven't gotten started yet, now would be a good time.

Citing Fox, Second Circuit tosses fine

NYPD (Not Too) Blue Moon

By Harry F. Cole
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The U.S. Court of Appeals for the Second Circuit has handed the FCC another set-back on the indecency front. A unanimous panel of the Court has issued a Summary Order vacating the $1.2 million in fines that the Commission sought to impose on ABC and its affiliates for a 2003 episode of *NYPD Blue*. According to the Court, the FCC effectively conceded away its case.

As indecency *cognoscenti* will recall, the FCC got its knickers all in a twist about the show's opening scene, which featured the comely Charlotte Ross disrobing in a bathroom as she prepared to shower. The scene included shots of Ms. Ross's buttocks for slightly less than seven seconds, total. But that was enough for the FCC, which determined that the "lingering shot" of her derrière was "shocking, pandering and titillating". (The Commission was not, however, similarly disturbed by the fleeting image of the side of one of her breasts.) The penalty? A $27,500 fine against each of 44 ABC affiliated stations.

The scene featured the comely Charlotte Ross disrobing in a bathroom as she prepared to shower.

ABC appealed the action to the Second Circuit, which had in 2007 invalidated the Commission's indecency policy on non-constitutional grounds in the *Fox* case. Action on the *ABC* appeal was put on hold while the *Fox* case headed to the Supreme Court (in 2008) only to get bounced back to the Second Circuit (in 2009), which then held the policy to be unconstitutional in July of last year. (The FCC asked the Second Circuit to reconsider its *Fox* decision, but in late November the Court declined the opportunity, as most of us expected it would.)

In pleadings filed in the *ABC* case, the FCC acknowledged that the 2010 *Fox* decision "invalidated the [FCC]'s indecency policy in its entirety." That is, there was nothing left of the indecency policy after *Fox*. And while there may be some arguable factual distinctions between the *Fox* case and the *ABC* case – for example, *Fox* involved mere unscripted language, while *NYPD Blue* involved "scripted nudity" – the FCC effectively conceded that those were immaterial because the legal principle announced in the *Fox* case didn't depend on any particular factual distinctions. (For what it's worth, the *ABC* Court expressly rejected the notion that there were in fact any significant distinctions between *Fox* and *ABC*.)

Since the *ABC* case involved the FCC's application of its indecency policy, and since that policy had already been held to be unconstitutional (in the *Fox* case), the Second Circuit had little difficulty in concluding that the *NYPD Blue* fine should be vacated.

According to a brief notation in the decision, the Summary Order does not have any "precedential" effect, which means that the *ABC* decision itself will not be binding on the Court in any other cases that may arise. But that probably doesn't make much difference, because it's clear that *Fox* ***is*** binding. And given the *ABC* panel's emphatic affirmation of the broad reach of the *Fox* decision, the FCC should not expect any different result out of the Second Circuit any time soon. So while the *ABC* decision may not add any new dimension to the indecency debate, it certainly suggests that the Second Circuit remains solidly committed to the rationale set out in *Fox*.

Where do we go from here? There are now three separate cases – *Fox*, *ABC* and CBS's continuing saga relative to the Janet Jackson/Super Bowl matter – that could go to the Supreme Court sooner rather than later. While *CBS* is not yet teed up to go straight to the Supremes, both *Fox* and *ABC* are. In view of its total reliance on *Fox*, it seems unlikely that the FCC would attempt to take *ABC* up by itself, so the real question appears to be whether the Commission will ask the Supremes to take another look at the *Fox* case. The Commission has until February 22 (and possibly longer, should the FCC request an extension) to ask the Court to take the case. Given that, it's unlikely that any Supreme Court decision on the merits of the case (assuming that (a) the FCC asks for review and (b) the Court grants it) could be expected before 2012.

Whether the issue of the FCC's indecency policy is ultimately brought back to the Supreme Court – and, if it is, whether the Supremes will agree to look at it – is anybody's guess. But if the issue does make it up there, we could end up with a decision that fundamentally changes FCC jurisprudence as we have known it for decades: not just the law of indecency, but the extent to which the FCC may permissibly regulate any broadcast content.

Stay tuned.

New antitrust thresholds announced

Size Still Matters To The Feds

By R.J. Quianzon
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Broadcasters and telecommunications operators contemplating possible deals for the coming year should remember that, as far as the federal government is concerned, there may be such a thing as Too Big. The Feds will step in to review an anticipated deal for potential antitrust problems if the deal exceeds certain threshold dollar amounts. The law mandates that those threshold amounts be revised every year for inflation. The 2011 thresholds were announced at the end of January, and will take effect on ***February 24, 2011***. If your deal exceeds one of the revised thresholds, you should plan on increased government scrutiny, with all the additional hassle, expense and delay that such scrutiny entails.

Under federal antitrust law, certain mergers or acquisitions which exceed the specified thresholds must be submitted to the Federal Trade Commission (FTC) and the Department of Justice for Uncle Sam's review *before* the transaction can be consummated. (The theoretical basis for federal concern here: any transaction big enough to exceed the thresholds is presumably big enough to affect interstate commerce.) The government's internal process for adjusting these thresholds – based on the traditional measure of the gross national product – has been on the books for decades.

The newly-adjusted thresholds require pre-transaction notification if either:

- the total value of the transaction exceeds $263,800,000; or
- the total value of the transaction exceeds $66 million ***and*** one party to the deal has total assets of at least $13.2 million (or, if a manufacturer, has $13.2 million in annual net sales) and the other party has net sales or total assets of at least $131.9 million.

When negotiating deals, all parties would be well-advised to bear these thresholds in mind. Once those lines are crossed, the prospect of additional time, expense and hassle to navigate the federal review process is a virtual certainty.

FHH - On the Job, On the Go

On January 27, **Kevin Goldberg** appeared as a "special guest" in a webinar conducted by SoundExchange. **Kevin** discussed "frequently encountered problems or questions" that he hears about from webcasters across the country.

And speaking of webinars, on January 13, **Harry Cole** presented a webinar on contests and promotions to the Texas Association of Broadcasters, while on January 26, **Dan Kirkpatrick** presented a webinar on "Surviving the Renewal Process" to the Maryland-District of Columbia-Delaware Broadcasters Association.

On February 5, Jeff Gee will be co-teaching a session of the NAB Educational Foundation Broadcasting Leadership Training in Washington.

As reported last month, 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.

And if you were watching C-SPAN's "The Communicators" on January 8, you doubtless heard the moderator's opening question, which started "You wrote in a recent blog on **CommLawBlog.com** . . ." Yes, that would be our blog he was referring to. Sure, viewership of a wonky talking-heads show might not rank up there with the Super, er, Big Game, but we're talking street cred here, and that's something our blog's got in spades — which is why **CommLawBlog.com** is our *Media Darling of the Month*.

. . and statistics."

Quad Review "Consumer Survey" Gets Preliminary OMB OK

By Harry F. Cole
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Attentive readers of our blog (www.CommLawBlog.com) may recall a couple of posts there last November, describing a "Consumer Survey" that the Commission had sent over to OMB for its approval. The FCC had commissioned a survey which would generate data to be "used to examine the impact of local media market structure on consumer satisfaction with available broadcast radio and television service". It's all part of the Commission's 2010 Quadrennial Review. (We wrote about the Quadrennial Review back in the May, 2010 *Memo to Clients*.)

You may also recall that, in sending it over for OMB's thumbs up, the Commission urged that the survey be approved by November 22, 2010 because the results were needed for a study that was due to the Commission by January 31. (Less than two weeks after pleading for expedited treatment, the Commission advised OMB that, oops, it had mis-stated when the various studies were due to be completed – but it still wanted the OMB to approve the survey by November 22.) According to the FCC, "[a]ny delay in administering the survey will make the contractors' already tight deadlines unworkable."

Good news!! OMB approved the survey . . . on January 13, not quite two months beyond the Commission's outside deadline.

It appears that OMB had a number of concerns about the survey as it was initially presented. The materials available for review at the OMB website reflect a major league overhaul of the Commission's "Supporting Statement" along with a number of tweaks to the survey itself.

The Supporting Statement now consists of 23 pages, split up into two separate sections. That's in contrast to the original version of the Supporting Statement filed back in November – which weighed in at a meager four pages. (Oddly, the original version appears to have gone missing from the OMB website. No worries – we kept a copy; we've included a link to it on our blog.) The first section (presumably from somebody at the Commission, although it's unsigned and unattributed) now waxes eloquent about "competition" and "diversity" and "localism". According to the Commission, the survey will, among other things, "collect information on consumers' perception of the quality and quantity of the local content provided."

But the only survey question focused on "localism" reads

> A media environment with *low localism* provides very little or no information on local news and events. With *medium localism*, there is some local information, and it reflects some of the interests of your community. With *high localism*, the information reflects many of the issues and interests of your community.
>
> Consider the sources of information from your media environment. Please indicate their level of localism [on a three-level scale, *i.e.*, "Low", "Medium" or "High" localism].

Later questions solicit the respondent's "satisfaction" (on a five-point scale) with the level of "localism" which he/she perceives to be available. The concept of "satisfaction" is not defined in any discernable way. Neither is "localism" or "local content" (other than through a reference to "examples" like reports on "school sporting results", "city/county elections" or "neighborhood crime"). The words "quality" and "quantity" don't appear in the survey at all.

With all due respect, it's difficult to see how that survey question (even with follow-ups about the undefined notion of "satisfaction") could possibly produce any useful information at all about "consumers' perception of the quality and quantity of local content" available to them.

And are consumers' "perceptions" a meaningful consideration in any event? If "localism" really is a valid regulatory concern, shouldn't the Commission be focused on the nature, amount and source of "local" programming actually available? (With respect to the Commission's self-serving description of the regulatory significance of "localism", readers might want to take a look at some Comments and a law review article for a different perspective on the subject of localism. Links to both can be found on our blog.)

The second part of the new-and-improved Supporting Statement appears to have been prepared by the non-FCC folks who drafted the survey. To say that it's technically challenging is an understatement. Be sure to have a dictionary on hand if you try to read it. (Sample terms: "cross-sectional regression analysis", "exogenously", "collinearity", "dichotomous", "bivariate probit", "computationally intractable".) It's also got a boatload of stuff like:

> A linear approximation to the household conditional utility function is:
>
> $U^* = \beta_1 COST + \beta_2 ADVERTISING + \beta_3 DIVERSITY + \beta_4 LOCALISM + \beta_5 MULTICULTURALISM + e$
>
> where U^* is (unobserved) utility, β_1 is the marginal disutility of COST, β_2, β_3, β_4 and β_5 are the marginal

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utilities for the media environment features, ADVERTISING, DIVERSITY, LOCALISM and MULTICULTURALISM, and *e* is a random disturbance.

We can all agree from the get-go that I am not a probs/stats jock, so you won't find me criticizing this end of things. But even if we assume the fancy math is all exactly right, doesn't the validity of the results depend ultimately on the validity of the data being fed into all those fancy equations?

In addition to the Supporting Statement (Parts A and B), the OMB website now also includes a "Response to OMB Review" apparently submitted by somebody on the survey design team who seems to have been responding to more or less specific OMB questions. The interesting point here is that it looks like OMB actually did critique the original version of the survey in some detail.

Not that it did much good.

Oh sure, at OMB's suggestion, the original reference to "*USA Today*" (at Question 42, about "diversity") has been changed to "*The Wall Street Journal*". And where, in the same question, the original version parenthetically assigned political values to "CNN news (more liberal)" and "Fox news (more conservative)", those parenthetical descriptions have gone away in the new version. Another change – in Question 48, the following "example of multiculturalism" has been deleted:

> [N]ews outlets that, rather than only reporting negative news from African American or Hispanic neighborhoods, such as robberies and shootings, provide a balanced story of "what is going on" in these neighborhoods.

But when OMB questioned the "vagueness of the features of the media environments" or the use of "Low", "Medium" and "High" as descriptives for levels of, *e.g.*, "localism" and "multiculturalism", the survey designers simply declined to make any changes.

And with those changes and non-changes, OMB has approved the survey. Kind of. The survey has been cleared only for "the focus group and pre-test portions", meaning that when those preliminary hurdles have been crossed, any additional changes will have to be sent back to OMB for further review. OMB also imposed several technical conditions.

Notwithstanding the conditions and possible further review, though, it appears that OMB is not going to stand in the way of the deployment of the Consumer Survey. It will be interesting to see whether the FCC and its contractors ever get around to administering the survey. After all, back in November, the Commission took the position that any delay in administering the survey "will make the contractors' already tight deadlines unworkable." OMB *still* hasn't fully approved the survey, we're now through January, and it's hard to imagine that those deadlines that were "already tight" two-three months ago have become any more "workable".

But where there's a will, there generally turns out to be a way. Ostensible reliance on extended fact-finding is something agencies like to trot out when their rulemaking actions are appealed. Cynical observers might suggest that the survey is just an effort to generate a nice batch of seemingly scientific statistics to cite in support of whatever conclusions the Commission would like to reach. The near total absence of useful definitions of crucial terms, together with other obvious shortcomings (*e.g.*, an apparent failure to clearly delineate "broadcast" from "nonbroadcast" sources of video programming), does nothing to dispel such musings. It'll be interesting to see how this plays out – but don't be surprised if you hear a lot more about the survey when the FCC tries to move forward with its Quadrennial Review.

(Continued from page 5)

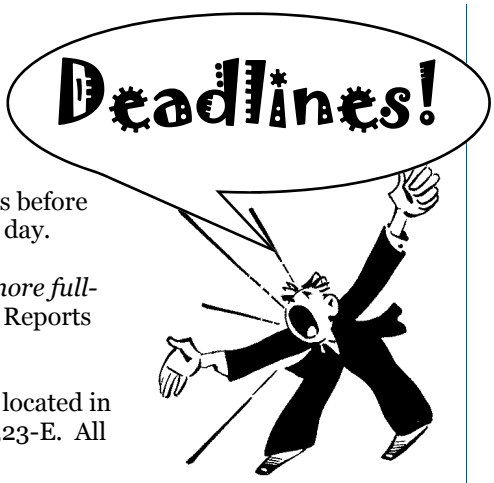
Along the same lines, should TIS stations be given greater potential power to expand their service areas? One possible rationale for a power increase: because of higher speed limits since 1977, vehicles are within TIS service areas for shorter durations, thus allowing only 90 seconds for transmission including station ID.

The Commission also addresses a proposal to allow networks or "ribbons" of TIS stations along a highway. It asks about the nature of the system proposed and how it would operate. On the one hand, such systems could be useful in, for instance, directing evacuation efforts along certain routes; on the other, they might attract travelers away from commercial stations with superfluous or redundant information.

The potentially far-reaching nature of the changes under consideration is revealed in the seemingly simple proposal to change the name of the service from the "Travelers Information Service" to the "Local Government Radio Service" (or some variant along those lines). While some might invoke Shakespeare ("What's in a name?") to suggest that a mere name change would have little effect, the proposed change here reflects the fundamentally different view of the service envisioned by some of the petitioners. After all, a "travelers information service" by definition provides *information* to *travelers*. A "local government radio service", on the other hand, would appear to re-focus the goal of the service away from its intended beneficiaries (*i.e.*, travelers) and toward its operators (*i.e.*, local governments). While local governments might still be inclined to provide travelers information, they might also be inclined to expand the content far beyond that traditional limitation.

The Commission does not appear to have developed strong preferences on any of these issues yet, so if you're inclined to drive into the TIS debate, now's your chance. Comments are due by February 18, and reply comments by March 7. Check for updates at www.CommLawBlog.com.

Meantime, be safe out there.



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.

April 1, 2011

License Renewal Pre-Filing Announcements - *Radio* stations located in the **District of Columbia**, **Maryland**, **Virginia**, and **West Virginia** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on April 16, May 1, and May 16.

EEO Public File Reports - All *radio* and *television* station employment units *with five (5) or more full-time employees* located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** 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 **Delaware** and **Pennsylvania** must file EEO Mid-Term Reports electronically on FCC Form 397.

Noncommercial Radio Ownership Reports - All *noncommercial television* stations located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, and **Tennessee** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Television Ownership Reports - All *noncommercial radio* stations located in **Texas** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

April 10, 2011

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A tele-*

(Continued on page 15)

The NFL may be watching you . . .

Coming Soon: The Event-Of-Overriding-National-Importance-That-Shall-Not-Be-Named

By Kevin M. Goldberg
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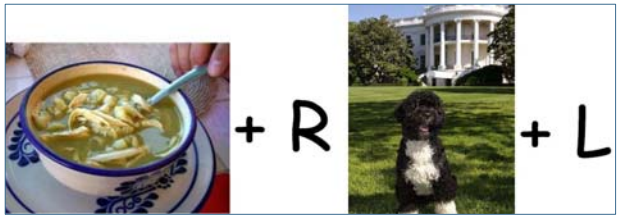
It's time for that most evergreen of January stories: the annual reminder that you have to be careful about using the words "super" and "bowl" together in any way. That's because the NFL is on the look-out for "unauthorized" uses of its registered trademarks, and one of those trademarks happens to be "Super Bowl®". We put "unauthorized" in quotation marks here because the No Fun League has a somewhat (how can we say this delicately?) expansive view of its own ability to prevent anybody from uttering those two words – a view which is not universally shared.



The League's position, as far as we can tell, is that pretty much any non-news use of the Two-Word-Phrase-That-Shall-Not-Be-Spoken necessarily implies an affiliation with the NFL. To the NFL, this in turn apparently means that the NFL is absolutely entitled to control who can utter the Unutterable Phrase and when It can be uttered. Whether that view is supported by, say, the law is far from clear. (But, as Gene Pitney once cogently observed, in some instances "a law book [does] no good.")

However the law might stack up on this, it's probably best to view the NFL as you would the obnoxious loud-mouth jerk down at the other end of the bar who's had a few and is loudly insisting that his knowledge of sports trivia is superior to everybody else's. Maybe he's right, maybe he's not – but who wants to bother to find out?

So here's what you need to know.

The NFL has registered several trademarks, many of which you might feel inclined to use when you're referring to the Event-Of-Overriding-National-Importance-That-Shall-Not-Be-Named. These include: the expressions "Super Bowl®", "Super Sunday®", "National Football League®", "American Football Conference®" "National Football Conference®", "NFL®", "AFC®", "NFC®". The NFL also holds a registration on the Super Bowl logo, and all team names, uniforms and logos.

With that in mind, one should NOT use any of these terms or images in a way that falsely connotes any connection to the league, the game or the teams, especially if that occurs in conjunction with the promotion of any event, contest, or other activity not sanctioned by the league.

On the other hand, one MAY use those terms and images in a legitimate news story, factual recitation or commentary about the game, before or after it occurs. One MAY also use other, generic terms which have not been registered as trademarks, including the all-time favorite alternative, *i.e.*, "The Big Game" (although several years ago the NFL® took an unsuccessful stab at registering "The Big Game"). One MAY also use the names of the cities whose teams are competing in the game (without using the team nicknames).

Enough lawyering, though. Let's enjoy the Big Game (as we twiddle our thumbs awaiting March Madn – wait, that's trademarked by the NCAA. Oh well.)

(Continued from page 14)

vision stations, the first 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.

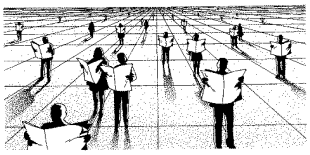
Website Compliance Information - *Television* station licensees must place and retain in their public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

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.

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

Updates On The News

Return to Pacific Junction – Last month we reported on a development in the long-running saga of the Channel That Could Not Be Used. That would be the FM channel in Pacific Junction, Iowa, which was purchased in a 2004 auction for a cool $4.4 million, but which has gone unbuilt since because of unanticipated (and, according to the purchaser, unforeseeable) FAA problems. As reported last month, the FCC's Media Bureau deleted the channel and the related construction permit. The purchaser had participated in the rulemaking and had supported the deletion. But what have we here? A petition for reconsideration on the deletion, filed by the purchaser. It seems that the purchaser's support was based in large measure on its belief that the channel and CP deletion would be part of a package which would include reimbursement of its $4.4 mil. But since the Media Bureau does not normally get involved in reimbursing auction payments, it wasn't the Bureau's job to worry about that factor in its order – and as a result, the order did not say squat about reimbursement. That left the purchaser in the unenviable position of having neither (a) a permit nor (b) its money back, so it did the only rational thing and waded back in for reconsideration. Stay tuned, but make yourself comfortable – this could take a while.



Court ixnays ivi effort – Last Fall we reported on ivi TV, a Seattle-based Internet company claiming to provide an on-line service that is the functional equivalent of cable television – and, therefore, is entitled to retransmit over-the-air broadcast programming just like a cable system. Anticipating resistance from some quarters, and recognizing that the best defense is a good offense, ivi got to the courts first. It filed (in Federal District Court in Seattle) a request for a declaratory ruling that ivi's view of its rights is correct. Late this month the Court rejected that request. Since the Seattle court was the first to get the issues (thanks to ivi's quick action in filing its suit), that court plainly had first crack at the issue, if it wanted to take it. But the court appears to have been unfavorably impressed with ivi's effort to forum shop, so it was not inclined to reward that forum shopping with a substantive ruling. That leaves the issue to a Federal Court in New York, where the broadcast networks (among others) have sued ivi for copyright infringement.

O Canada – that's the way you do it! – Back in July, 2009, we reported on an effort to have the M-word (hint: rhymes with "Gidget") effectively banned from the airwaves in the U.S. No news on that front, but in a related development, the Canadian Broadcast Standards Council recently banned the broadcast (in Canada) of Money for Nothing because it includes the word "faggot". The Council reportedly based its decision on the notion that "societal values [since the song's 1985 release] have shifted and the broadcast of the song in 2010 must reflect those values." To be sure, the lyrics do contain "faggot", but only as used by a character in the song, a character whose perspective is plainly being lampooned. In that regard, its use is similar to Twain's use of "nigger" in Huckleberry Finn. No matter the context, according to the Council – the word's offensive, and it's got to go. Reportedly the Canadian Radio-Television and Telecommunications Commission is asking the Council to review the ban.

(Continued from page 4)

broadband and insisting instead on Last Century approaches which have historically proven ineffective.

No matter. We are headed into a new cycle of broadcast license renewals, which will require EEO showings from all non-exempt licensees. (*See below* for exemptions.) After an eight-year respite, some stations may have gotten a tad rusty on the EEO front. It's important ***NOT*** to let that happen. When you file your renewal application, you will have to submit your ***two*** most recent EEO public file reports. So even if you work extra hard to make your latest report complete, you could still get caught with your pants down if the report from the year before fell short.

While not mentioned in last week's cases, all non-exempt licensees must also undertake two or four (depending on staff and market size) EEO "initiatives" every two years, drawn from a list of activities set out in the EEO rule (47 C.F.R. Section 73.2080). If you haven't read that section lately, it would be a very good idea to read it now.

(***A note on exemptions***. Employment units with not more than four full-time (*i.e.*, at least 30 hours/week) employees are exempt from the EEO recruiting/reporting rules. Employees with a 20% or greater ownership interest in the licensee are ***not*** counted in determining staff size. There are ***no*** blanket exemptions for low power TV or noncommercial stations. Radio stations with at least five but no more than ten full-time employees do *not* have to file a mid-term EEO report (Form 397) between license renewals, ***but*** they ***are*** still subject to other EEO recruitment and reporting obligations (including the annual public file report). Stations with religious programming formats need not go through a full-scale recruitment process where a specific faith is a relevant qualification for a particular job, but they are still expected to reach out widely to reach qualified potential applicants for those jobs and must recruit fully for positions where faith is not a relevant qualification.)