Fletcher, Heald & Hildreth

Memorandum to Clients

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"This is only a test..."

First Ever National EAS Test In The Works

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If all goes as planned, sometime later this year it's at least theoretically possible that we may hear the President himself reach out to all of us through the Emergency Alert System (EAS) for the very first time. Which is odd, because for nearly two decades the EAS has been available (as was its predecessor, the Emergency Broadcast System, for still more decades) to enable the President to do just that. Even so, the nationwide capability of the EAS has never been formally tested (with or without the participation of the Commander-in-Chief). But now, as part of its overall review of the EAS, the Commission has adopted a Third Report and Order (*3rd R&O*) which will, among other changes, lead to the first-ever ***national*** test of the EAS.

Weekly and monthly EAS tests and EAS activations at the state and local level have for years been SOP for EAS participants, "EAS participants" being a broad universe including broadcasters, cable operators, direct broadcast satellite operators and others. But there has never been a national test (much less an actual nationwide activation, thank goodness) of the EAS. About a year ago, acknowledging the need for "top-to-bottom" national testing of EAS to ensure that the system would in fact work should the necessity arise, the Commission issued a notice of proposed rulemaking (*NPRM*) looking to establish practices for nationwide testing. The *3rd R&O* is the result.

Inside this issue . . .

The *3rd R&O* requires *all* EAS participants to participate in national EAS tests as scheduled by the FCC in consultation with the Federal Emergency Management Agency (FEMA) on an annual basis. It also requires all participants to submit test-related data to the FCC's Public Safety and Homeland Security Bureau (PSHSB) within 45 days following a national EAS test. The test data will be treated as presumptively confidential, although they may be shared on a confidential basis with certain other Federal agencies and state governmental emergency management agencies.

On the technical side, the new rules specify that the first national EAS test will use the Emergency Alert Notification (EAN) code, *i.e.*, the live event code for nationwide Presidential alerts. Going forward, the annual national test will replace the monthly and weekly EAS tests in the month and week in which it is held. The PSHSB will be responsible (in consultation with FEMA and others interested in EAS) for developing administrative procedures for national EAS tests – including location codes and pre-test outreach – but in any event it will provide at least two months' public notice prior to any national test.

This proceeding has its genesis in a report prepared by PSHSB in September, 2009, shortly after Chairman Genachowski took over the agency's reins. The report recommended that the three Federal partners responsible for EAS – the FCC, FEMA, and the National Weather Service (NWS) – review the EAS testing regime to see where improvements could be made. The three agencies, along with the Executive Office of the President (EOP), ultimately formed a working group to plan for initial testing of the EAS at the national level. That collaboration led to the first ever live code EAN test of the EAS's Presidential alert and warning capabilities in Alaska on January 6, 2010.

The 2010 Alaska test, which was conducted by the FCC, FEMA, the State of Alaska emergency preparedness officials, and the Alaska Broadcasters Association (ABA), revealed a number of technical weaknesses at various levels throughout the national alert system. This is not surprising, since the system had never been tested before – indeed, the purpose of the Alaska exercise was to identify, and correct, potential problems *before* any real need to activate the system might arise. A second live code EAN test was held in Alaska on January 26, 2011, and the weaknesses were largely remedied.

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It's (still) ALIVE!!!!!

Old Complaints Never Die . . .

And they apparently don't fade away, either

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The FCC's rule on the broadcast of telephone conversations is straightforward and, when you get right down to it, pretty simple. But a recent fine for a violation adds a new and troubling dimension to the enforcement of that or any other rule, a dimension that broadcasters should be aware of.

First things first. The telephone rule (Section 73.1206, if you want to get technical) comes into play when a broadcaster wants to air a telephone conversation, live or recorded. When that happens, the licensee is required, ***BEFORE*** the call is ***EITHER*** broadcast ***OR*** recorded, to inform the person on the other end of the call of the licensee's intention to broadcast the conversation. The mike can't be opened and the recorder can't be started unless and until that notice has been given – and if, upon receiving the notice, the caller chooses not to participate further, that's that. (There are some narrow exceptions, but they're not relevant here.)

The practical, and wholly intended, upshot of the rule is that it discourages – actually, it flat-out illegalizes – a wide range of classic radio bits that many find amusing. Fake phone calls – designed to elicit shocked or befuddled reactions which in turn generate laughter from all but the unfortunately shocked/befuddled soul on the call – are taboo. So, for example, if an announcer were to call someone and claim to be an intruder hiding under the call-ee's bed (without, of course, letting on that the whole thing was a joke), and if that call were to be broadcast live as it was happening, that would be a violation of the rule. Ditto if the announcer identified himself as a loan shark looking to collect on a debt.

The standard penalty for violation of Section 73.1206 is $4,000.

Now, about that recent fine.

A complainant alleged that the host of a radio show in San Juan, Puerto Rico had – without providing the required notice – made prank calls on-air, claiming to be, in one instance, an intruder hiding under the call-ee's bed, and in another, a loan shark looking to collect on a debt. If the allegations were accurate, it was an open-and-shut violation of the telephone rule.

But here's the problem. The complaint was filed with the Commission in April, 2006, but it appears from the Notice of Apparent Liability that the Commission didn't bother to ask the licensee for *its* side of the story until October, 2010, four and a half years later.

Quick, how much detail can ***you*** remember about what ***you*** were doing four and a half years ago?

Not surprisingly, the licensee responded that it couldn't confirm or deny that the incidents happened as alleged. Hey, stations aren't required to keep tapes of all their programming, 24/7, forever, and a lot can happen over the course of some 40,000 hours of broadcast programming. The licensee did confirm that, back in 2006, it aired a show featuring an announcer with the name identified in the complaint, and that announcer's show did include a segment in which "listeners called in and requested telephone calls be made to family members or friends".

In other words, the licensee at most confirmed a couple of the extraneous details of the complainant's allegations, but stopped well short of admitting anything close to a violation.

But that was enough for the Enforcement Bureau, which concluded that the licensee had confirmed enough of the complainant's allegations to make the complaint "credible" absent any "countervailing evidence". That'll be $25,000, please – make the check payable to the FCC, and thanks for your business.

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Focus on FCC Fines

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Badges? Badges? Why, yes, I have a badge right here . . . – The FCC readily admits that the public inspection file for Station KCET(TV), the former PBS affiliate in Los Angeles, was complete and not missing any required information. However, that didn't keep the FCC from fining the station a cool $10,000 . . . for failing to permit access to the file.

Last August an FCC agent showed up at the KCET studio in LA and asked to review the public file. The agent didn't ID himself to the guard at the door – he just came in as if he were any Tom, Dick or Harry member of the general public. He didn't make it past security. Instead, he was turned away and told that he needed to make an appointment to review the file. He asked to speak with the station's GM, but was told that he'd need an appointment for that, too.

Undeterred, he showed up again the next day and again requested access to the station's main studio to view its public file. Again he was turned away. Again he asked to see the GM, again to no avail. So he waited a couple of hours and showed back up at the station. The guard asked him (again) whether he had an appointment, and this time, in response, he flashed his official FCC inspector badge and presented his G-man credentials. The third time – or maybe the shiny badge – was the charm. After a "thorough examination" of the badge (you just can't be too sure these days) and "several phone calls" to station personnel, the guard waved the inspector on into the station, where the agent reviewed the public file and found that it was complete.

While Mr. FCC was there, he grilled the station's Executive Assistant about why he had repeatedly been denied access. Her response? She wasn't familiar with the "exact organizational rules regarding public access to the station's public inspection file", and the station's General Counsel (who presumably was familiar with them) didn't happen to be around. On his way out the door, the inspector asked the same question of the Security Supervisor (who was also a KCET employee). His answer? The station's "security protocol" ordinarily calls for visitors to be stopped at the gate and not admitted without an appointment.

The FCC's rules are clear: a station's public file must be made available for public inspection at any time during regular business hours. Acceptable security protocols are permissible, but only as long as any member of the public seeking to review the public file during regular business hours is permitted to do so without substantial delay. Station policy should be clear on this point, and everyone on the station's staff who might encounter this situation should be intimately familiar with that policy. Remember – failing to do this can run you a five-figure fine.

Local public inspection file must be, er, local – A North Carolina AM faces a $12,000 fine for not keeping its public file locally available and up-to-date. In sharp contrast to the KCET situation described above, when an FCC agent visited the NC AM last year, he was given the station's public file *tout de suite*. The only problem: the file contained no documents more recent than 2006. Where might the rest of the file be? According to the GM, the "current public file documents" were kept at the licensee's headquarters . . . which happened to be in another city a little more than 250 miles away.

The FCC wasn't tickled pink to hear this. In fact, it was so *not* tickled pink that it tacked a 20% upward adjustment onto the standard $10,000 fine – for a total of $12,000 – because it was apparent (given the lack of any post-2006 materials in the file) that the file had been woefully incomplete for more than three years. The lesson here: maintain a complete and current public file *at the station's studio*, like the rules require. Keeping a file at corporate headquarters doesn't do the trick, especially if those headquarters are 250 miles away.

EAS and the disgruntled employee factor – A Pennsylvania FM station got hit with a $10,000 fine for not having EAS equipment. Actually, the licensee did have EAS gear – just not for this particular station. The station was co-located with two other commonly-owned stations, both of which had operational EAS systems. When the inspector showed up (tipped off by a complainant – but more on that later), the most the target station's engineer could do was to demonstrate that the station could generate an EAS alert, but only by receiving the signal from an alternate studio in a different city and then feeding it through the sister stations' EAS gear. The inspector acknowledged that that system, however jury-rigged, would work – but the station's engineer admitted that the station had never in fact conducted any tests using the procedure.

The standard fine for an EAS violation is $8,000, but the Commission figured that the violation here was flagrant enough to warrant an additional $2,000 – the station had gone without EAS gear for four years, for crying out loud.

Interestingly, the Notice of Apparent Liability (NAL) in this case provided a hint about how the inspectors happened to be inspecting that station in the first place. Remember the complaint that brought the feds in? According to the NAL, the complaint alleged that the station didn't have any EAS gear. That's not the kind of specific information that would be generally known by the public

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Except maybe affected spectrum users

White Space Database Administrator Sweepstakes! Everybody's A Winner!

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You know those T-ball games for very young children where everyone is declared a winner and everyone takes home a trophy?

Keep that in mind for a few minutes.

The FCC, as our readers know by now, has authorized wireless TV Band Devices (TVBDs) that will operate in the "white spaces" on the TV frequency map – *i.e.*, on TV channels that have no local TV station. Proponents, who like to call these devices "Wi-Fi on steroids", claim they will boost the availability of wireless services with extended range, fewer dead spots, and improved speeds, promote rural broadband, aid education and medicine, and further spectrum efficiency. And create jobs. And also clear up that annoying rash.

As a condition of operation, the millions of expected TVBDs will have to avoid causing interference to active TV stations, the many wireless microphones that share the TV band, and certain TV reception sites. To do this, most will consult a complex and changing database that indicates where TVBDs can safely operate. The existence of a database in turn presupposes one or more "database administrators." Last November, the FCC invited interested parties to submit applications for that role.

To say, "You're all winners!" is fine for T-ball. But . . .

Nine companies responded. Some, like Google and Comsearch, have enormous expertise in constructing and maintaining large databases. The qualifications of some others are less obvious.

The FCC made its choice by not making a choice: It approved all nine applicants as database administrators, with the expectation they will compete among themselves for business.

This inclusive non-decision may reflect the FCC's often-expressed distaste for "picking winners and losers." Or it might follow from the FCC's having neglected to state, at the outset, the criteria it would use for selection, an omission that leaves it vulnerable to challenge from the losers. This problem does not arise, of course, if there are no losers.

One applicant and a wireless microphone coalition challenged the impartiality of some other applicants. The FCC responded with a stern injunction against the administrators engaging in anti-competitive practices, and a promise of careful oversight.

For our part, though, we have two concerns.

The FCC could have decided to manage the database itself. It certainly knows how; it keeps close track of millions of licenses. The FCC opted instead to farm out the work. With one or two administrators, that might have been a labor-saving move. But riding herd on nine of them, some inexperienced, each working with a database built to a different design, might turn out to be more work for the FCC than just doing the job on its own.

The other problem relates to data quality. Each administrator will keep its own database, but all nine must reflect the same underlying reality. Some of the data are slow-moving and should be easy to maintain – TV station contours, for example, and locations of protected TV receive sites, such as cable TV headends and TV translators. Potentially more troublesome, though, will be wireless microphone users' frequent and changing registrations as they sign up for short-term interference protection at sporting events, political events, concerts, etc. These data will be volatile.

Suppose NBC, say, as part of its planning to cover an event, logs on to its preferred database administrator and registers a few dozen wireless microphones by date, time, place, and TV channel number. That information must be made available to every TVBD in the vicinity of the event, through every database administrator. Accordingly, the administrator receiving the registration must quickly and accurately disseminate it to the other eight, in a form that allows easy incorporation into their own, differently-designed databases. This kind of coordination is hard enough among two or three parties. We wonder whether nine can bring it off reliably.

And those nine will be competitors after the same business. It may become tempting for some to try making the others look bad by feeding them bad (or late) information. Even greater will be the temptation to cut costs by using ill-trained and badly supervised staff. Just as the hygiene of a shared kitchen quickly sinks to the level of the sloppiest person using it, so will the quality of the shared data reflect the least careful administrator. (Users may appreciate the lower cost . . . at least until they realize that you do, in fact, get what they pay for.)

To say, "You're all winners!" is fine for T-ball. But maintaining a large and critical database takes real skill and a large measure of dedication. We may all come to wish the FCC had exercised greater adult authority in making its choices.

The view from the Hill

The 112th Congress: New Line-Up, New Players - New Priorities?

By Catherine McCullough
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Guest Columnist

(Editor's Note: The Memo to Clients welcomes back guest commentator Catherine McCullough. This month she provides her perspective on the impact recent committee appointments are likely to have on communications issues in the 112th Congress. Catherine is a principal in Meadowbrook Strategic Government Relations, LLC and a specialist in Congressional relations.)

January is over, and the House and Senate Committees that oversee telecom issues have officially organized – issuing full lists of members, deciding on the rules by which the committees will work, and dividing up the budgets between Democrats and Republicans (thus setting the tone for how well the parties will work together in the 112th Congress).

So what will the legislative priorities of these committees be? The two themes of love and money – constituent votes and budget issues – that I identified in a piece in the November, 2010 *Memo to Clients* still dominate. However, now that we know who all of the players are, including the subcommittee chairs, we can take these policymakers' legislative pasts into account, and perhaps identify which specific bills we should expect to see introduced in the coming months.

The two themes of love and money – constituent votes and budget issues – still dominate.

The biggest changes from last Congress are on the House side, where the agenda will be determined by Commerce Committee Chairman Fred Upton (R-MI-6th) and the Chair and Vice-Chair of the Subcommittee on Communications, Technology and the Internet Greg Walden (R-OR-2nd) and Lee Terry (R-NE-2nd). The new Chair of Commerce's Subcommittee on Oversight and Investigations, Cliff Stearns (R-FL-6th), will have a strong impact on the Committee's telecom policy, too, since he served as the Communications Subcommittee's Ranking Member last Congress.

Chairman Upton enjoys a reputation as a solid, pro-business Congressman who is reasonable to deal with. He has chosen to hire former Ranking Member Joe Barton's (R-TX-6th) well-respected telecom aide, Neil Fried, as his Chief Counsel for telecom matters, which gives his staff bench the depth and institutional memory critical for real legislative negotiations.

Upton jumped into the telecom policy fray early when he co-issued a strongly worded release – along with Reps. Walden and Terry – denouncing the FCC's rules on net neutrality. His communications on that front tend to focus, directly or otherwise, on the agency's process (or lack thereof), especially the lack of transparency in its decision-making.

Look for this concern about FCC process to color much of the Committee's telecom work this year. Complaints about the agency's lack of responsiveness are common, and Committee Republicans consider a lack of orderly process an impediment to investment and a barrier to job growth. In addition to the consumer and budget-related issues discussed in my November, 2010 *Memo to Clients* article , specific FCC reform legislation could be introduced this year. If so, it could resemble H.R. 2183, a bill introduced by Reps. Barton and Stearns in the last Congress. That bill called for a modified "shot clock" – deadlines by which the FCC would have to issue decisions – and statutorily-required processes for the issuance of FCC decisions.

On the Senate side, where Chairman Rockefeller (D-WV) still reigns, work has begun on spectrum allocation. As predicted, this issue is a top priority because Congress can use auction proceeds to pay down the debt or pay for other funding priorities. Rockefeller's bill, which was introduced with no support from fellow Republicans, would set aside the D-block for public safety use (thus removing it from the pool of auctionable spectrum) and would give the FCC incentive auction authority.

It is the opening shot in the debate over spectrum allocation policy, which is sure to move more quickly than usual through Congress given the strong incentives for all involved to come to a common understanding. Look for Communications Subcommittee Chair Walden to have a strong hand in the negotiations here on the House side. His background as an owner and operator of radio stations makes him a natural ally for the National Association of Broadcasters (NAB) and its efforts to get its members to give up as little spectrum as possible for as much as possible.

The cast of characters is now set: let the play begin!

FOIA consideration

Is A Corporation Entitled To "Personal Privacy"?

The Swami's back . . . with more vaticinations and haruspications

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[*Editor's Note: We welcome back our resident odds-making courtside observer, Kevin Goldberg, a/k/a the Swami, who tells it like it is and how his crystal ball thinks it will be. This time out the Swami reports on a FOIA face-off in the Supreme Court between the FCC and AT&T in January. With Sunshine Week – the national celebration of open government – just around the corner, Kevin thought this would be a good time to reveal his prediction. Spoiler alert: the Swami's liking the FCC in this one.*]

Are corporations people? Are they entitled to "personal privacy"? Those were some of the questions thrashed out in oral argument before the Supreme Court last month, in a case in which the FCC happened to be one of the parties. I was there on behalf of our client, the American Society of News Editors (ASNE), which had joined with several other media organizations in an amicus brief in the case, but given the issues in the case, you really had to wonder why any of us – including the parties and the Court itself – were there at all.

The case is *FCC v. AT&T, Inc.* It started back in 2004, when the FCC opened an investigation into whether AT&T had violated the FCC's E-Rate program. It collected various documents from AT&T, some of which apparently went beyond unflattering into downright embarrassing. The matter was eventually settled, with AT&T paying a fine.

CompTel, an association of communications service providers and their supplier partners (including some AT&T competitors), wasn't satisfied. It filed a Freedom of Information Act (FOIA) request for copies of all pleadings and correspondence in the investigation file. AT&T parried with a gambit sometimes known as a "reverse FOIA": it asked the FCC to reject CompTel's request because (according to AT&T) at least some of the documents at issue were exempt from disclosure under FOIA Section 7(c). That section exempts from routine FOIA treatment information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy".

The Commission denied AT&T's request. AT&T took the case to the U.S. Court of Appeals for the Third Circuit which, to the surprise of many, ruled for AT&T. (You can read more about the case on the website of the Reporters Committee for Freedom of the Press, in whose amicus brief ASNE joined.) The gist of the Third Circuit's decision: a corporation may claim a personal privacy interest for purposes of FOIA Section 7(c).

So, there we were: up was down, black was white, corporations were people, and press organizations (like ASNE) which routinely find themselves opposed to the government in FOIA matters were suddenly siding with it. It was like some bizarre joke.

Thankfully, the Justices of the Supreme Court don't have much of a sense of humor.

As I gaze into my post-argument crystal ball, it seems clear that the Court will rule for the FCC with a 7-1 vote (8-0 being a less likely possibility and 6-2 an even less likely shot). Why eight votes, when there are nine Justices? Justice Kagan recused herself from the case.

In fact, I've rarely witnessed so one-sided an argument. This thing was over before it started. The government's counsel received only a few questions, mainly from Justice Alito; he sat down with a full six minutes of his allotted time remaining. When he used his reserved time for rebuttal, he was asked no questions at all. That almost never happens.

> *I've rarely witnessed so one-sided an argument. This thing was over before it started.*

The Court's treatment of AT&T's counsel seemed to confirm the Court's preference for the FCC's arguments. The questions started early (within 30 seconds), hit hard, then tapered off quickly, as if the Justices got their shots in, satisfied themselves that the FCC should win, and quickly got bored.

So the Court appeared to like the government's position – which may strike some as odd in view of the fact that it was just last year that the same Court issued a seemingly contrary decision. That would be Citizens United v. Federal Elections Commission, one of the most controversial decisions in recent years, in which the Court concluded that corporations *are* people for purposes of political advocacy and the First Amendment.

Here's how I figure it:

First, I see a very solid six votes for the FCC.

Start with Justice Scalia, who loves two things above all else: plain language and original intent. The transcript of the oral argument in the AT&T case is riddled with illustrations of his mindset (like when he says that the phrase "personal privacy of a corporation" is a "very strange phrase to me"). That's not a good sign for AT&T.

Since Chief Justice Roberts and Justice Thomas generally share this preference for plain statutory language, I think it's safe to put them on the FCC's side along with Scalia.

Justice Breyer was clearly skeptical as well, at one point asking AT&T's attorney whether he could think of any examples where the government has asserted a personal privacy right under this exemption. The inevitable "No" response sealed

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Form 303-S: Improved And Approved

The recently revised broadcast license renewal form (FCC Form 303-S) has received the formal blessing of the Office of Management and Budget (OMB) – which means that it's now just about ready for use by radio licensees whose renewals are due by June 1. (That would be licensees in Maryland, the District of Columbia, Virginia and West Virginia.) OMB signed off on the updated form on February 2 (a scant week after the close of the comment period), and word of that approval has since been published in the Federal Register. Following a 30-day post-publication waiting period, the revised form will officially be "effective".

The OMB review process did reveal a couple of items worthy of mention. First, the FCC's "supporting statement" confirms what we reported last September relative to the basis for the new certification about non-operation. The Commission specifically observes that a "licensee will face a very heavy burden in demonstrating that it has served the public interest where it has remained silent for most or all of the prior license term." Since serving the public interest is a — and arguably *the* — crucial component of the renewal process, prolonged failure to operate could be a serious impediment to renewal.

Second, a couple of parties filed comments suggesting that the new certification concerning non-discrimination in advertising contracts should include a "not applicable" option for noncommercial licensees, since they can't sell "advertising" and thus don't have any "advertising" contracts to certify about. The FCC initially rejected that suggestion; the plan was to design the revised form so that, when an NCE licensee indicates (in the first section of the form) that it's noncommercial, the form would not display the advertising certification at all.

But it appears that the fancy-dancy approach originally envisioned by the FCC caused some "technical difficulties" and would have required more tinkering with CDBS than the Commission was willing to undertake . . . particularly in view of the fact that the Commission is looking to phase CDBS out as part of a wholesale overhaul of its electronic systems over the next couple of years. No need to trick out the old Datsun if you're going to be trading it in on a Volt pretty soon. So despite what the FCC told OMB in the initial go-around, the new form will include the classic "N/A" option relative to NCE applicants.

The revised form will be "effective" as of ***March 14, 2011***. Media Bureau officials have indicated that they're planning to issue a public notice on or about that effective date to provide additional guidance for renewal applicants. Check www.CommLawBlog.com for updates.

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his vote, and probably Justice Sotomayor's as well. That would be two more votes for the government.

Justice Ginsburg seemed especially unconvinced by any of AT&T's arguments about the supposed original "understanding" of this exemption. One more pro-FCC vote there, giving us six solid in that category.

Justice Kennedy was a little tougher to read, mainly because he didn't ask many questions. However, those he did ask were very similar: all were intended to clarify the distinction between a corporation acting in its own interest, on the one hand, and acting in the interest of, say, its employees, on the other. He seemed to be trying to confirm that: (a) employees can protect themselves when necessary; and (b) the corporation can raise other objections (such as whether the agency followed its own procedures). If he's convinced that both of those are "yes", he should be voting with the FCC (although, of these seven, he's the most likely to go the other way).

I'm predicting that only Justice Alito will vote for AT&T. He seemed the most sympathetic to AT&T's arguments, engaged in the most antagonistic questioning of the government's attorney and, generally, is the most willing of the conservative judges to throw aside the "originalism" principle in favor of a particular result, especially where corporations are involved. Toss in the fact that he was previously a judge on the Third Circuit and, therefore, might be inclined to side with his former colleagues, and he's the most solid vote for AT&T.

So you heard it here first: the Swami's calling this one a romp for the FCC and the government. Shoot, I'm so confident about the prospects of an FCC victory here that I'll toss in a bonus prediction: look for Justice Scalia to write the majority opinion.

[A closing observation on jumping into bed with the enemy: In FOIA litigation, folks on the side of the press normally find themselves at odds with the government. No surprise there: the press usually wants FOIA access to materials that the government doesn't want to cough up. But in *FCC v. AT&T*, the FCC was happy to make the contested materials publicly available, so it made sense for press interests to support the Commission. However, the government's counsel demonstrated why, even in such situations, the government isn't the most reliable of allies. The government's lawyer was asked by Justice Scalia whether FOIA exemptions should be construed narrowly. The simple answer could and should have been "Yes, of course" – since that would have been consistent both with the FCC's position in this case and with earlier Supreme Court decisions regarding application of FOIA exemptions. But instead, the government's counsel hedged, responding that FOIA exemptions "are to be given meaningful reach". While that approach won't help the government in this particular case, it's likely to come in handy for the government in about 99% of the FOIA cases coming down the pike – including the Supreme Court's soon-to-be-issued decision in another FOIA case, *Milner v. Department of the Navy*.]

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(To avoid, or at least minimize, any widespread War-of-the-Worlds style panic, both of the Alaska tests were preceded by extensive public outreach campaigns facilitated by the ABA.)

The new rules for *national* tests impose significant reporting requirements *not* present in the current state and local EAS testing regime. In particular, for each message source monitored at the time of a national test, EAS participants will be required to record *and submit to the FCC* the following information:

- whether they received the alert message during the designated test;
- whether they retransmitted the alert;
- if they were not able to receive and/or transmit the alert, their "best effort" diagnostic analysis regarding the cause(s) for such failure;
- a description of their station identification and level of designation (PEP, LP-1, etc.);
- the date and time of:
  - receipt of the EAN message by all stations;
  - PEP station acknowledgement of receipt of the EAN message to FOC;
  - initiation of actual broadcast of the Presidential message;
  - receipt of the Emergency Action Termination (EAT) message by all stations; and
- who they were monitoring at the time of the test, and the make and model number of the EAS equipment that they utilized.

All EAS participants will be required to file the above-described test data with the FCC within 45 days of the test. For now the filing must be submitted on paper, although the Commission expects to implement an optional electronic reporting system soon.

This new reporting requirement raises the very real potential problem of self-incrimination. The reports could easily disclose if an EAS participant's equipment is not functioning properly, or if the participant has failed to comply with the operational EAS requirements – and such disclosures could lead to forfeitures. Many commenters urged the FCC, in effect, to look the other way with respect to any rule violations that might be revealed in reports filed in connection with the national test. In response, the Commission declined to make any specific commitments. Instead, it said that, for the first national test, it "intend[s] to exercise [its] discretion . . . to promote compliance and encourage EAS participants to benefit from the educational process, identify problems, and implement corrective measures."

The 3rd R&O provides a wake-up call to all EAS participants.

That's not much comfort, especially in view of the fact that the Commission acknowledges (in a footnote) that the reports will be considered to be "voluntary disclosures" for enforcement purposes, garnering less harsh treatment. The good news here? The Commission may elect not to come down as hard as it might on violations that show up in the required disclosures. The bad news? The fact that the Commission may come down at all on such violations. Plus, the Commission expressly cautions that such lenient treatment might not be applied to violations that are repeated, egregious or not promptly remedied. Our experience indicates that the FCC is more interested in fostering compliance and "getting it right" – but the Commission is clearly not promising that it won't wield its enforcement authority.

The *3rd R&O* provides a wake-up call to all EAS participants. NOW is the time for each participant to assess its readiness for the first national EAS test. Remember that any shortcomings in your EAS operation are likely to surface in the mandatory reports following the first national test, and the Commission has given no assurance that such shortcomings will not be penalized. It's probably better to get ahead of the curve now than to sit back and take your chances down the line.

Note: The national EAS test will proceed independently of the implementation of the Common Alerting Protocol (CAP) rules and the deadline for installation of CAP-compliant equipment.

(Continued from page 3)

at large. Hmmmm. And how about the fact that, in reviewing the station's operating logs, the inspectors just happened to find a notation (from two and a half years ago) indicating that the station's engineer did not then comply with the EAS rules. Maybe it was just a happy little coincidence that the inspector happened to run across that entry. Or maybe not.

The NAL stops short of identifying the complainant, but it doesn't seem too much of a stretch to suspect that the complainant may have been a disgruntled former employee. We're just saying.

New rules tweaked after four months on the books

Re-re-shuffling The (Cable)CARDs

By Jeffrey Gee
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Remember last October, when the Commission hustled through a rulemaking aimed at encouraging the use of consumer-owned "CableCARD" devices for accessing MVPD services? (We reported on that in the October, 2010 *Memo to Clients*.) The FCC has decided that the rules it adopted less than four months ago could already use some tweaking. The tweaks, contained in a terse "Order on Reconsideration" issued *sua sponte* (translation: on the FCC's own motion), appear designed to correct some looseness in the regulatory language.

For example, the original Order's requirement that cable operators provide access to bandwidth-efficient "switched digital video" (SDV) programming could be read to apply *not* just to cable operators and devices subject to the CableCARD rules, but to ALL cable operators and ALL set-top boxes. Since the FCC didn't intend the rule to be *that* sweeping, the text has been tightened up.

A similar fate befell the rule preventing MVPD operators from subsidizing the cost of operator-provided set-top boxes through the imposition of service fees on subscribers who own their own boxes. As originally written, the rule appeared to protect *any* subscriber who happened to own a set-top box of *any* kind, even if that box was not going to be used to access the MVPD's programming. The rule has now been clarified to specify that the anti-subsidization provision applies only if the subscriber-owned box is used in lieu of operator-provided gear.

In a slightly different vein, after further reflection the FCC found that the rules announced last October refer at times to technical testing standards that aren't the latest and the greatest. The rules also were inconsistent when it came to the facilities qualified to certify the devices. The inconsistency has now been eliminated, and the language massaged to assure the use of the most recent standards in developing new products.

Finally, the new order tweaked the prior exemption of "one-way" set-top boxes provided by cable operators from the general prohibition on integrated security and Internet Protocol (IP) interface elements. The whole point of the CableCARD system is to separate out the set-top box's security functions from its navigation functions, so that third party devices can provide navigation and other functions without compromising the security of the cable system. To give subscribers a lower cost option, however, the FCC exempted less advanced "one-way" set-top boxes (*i.e.*, devices without advanced "two-way" features like digital video recording or Internet accessibility) from the separation requirement. The FCC reasoned that this limited exemption would not affect the competitive market, which will presumably focus on advanced "two way" functions.

The FCC's new order clarifies that cable-provided set-top boxes with integrated security *can* include an IP interface, but *only if* that interface is *not* used to access cable operator-provided on-demand or digital video recorder services. The restriction does *not* preclude a subscriber from using a cable-provided IP connection to connect to a retail recording device.

While none of these revisions is particularly groundbreaking, the removal of any regulatory uncertainty is always welcome. Ideally, the Commission's increased precision will encourage more widespread adoption of advanced devices. We continue to live in hope (but still rent our set-top boxes).

FM Allotments Adopted – 11/20/10-2/22/11

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
HI	Kualapuu	Island of Molokai	296C2	09-189	TBA
CA	Willow Creek	48 miles NE of Eureka, CA	258A	10-189	TBA

Notice Concerning Listings of FM Allotments

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

Coming soon to a computer screen near you!

FCC Webinars Touting Spectrum Re-Purposing

By Harry F. Cole
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As far as the Commission's concerned, it's apparently all systems go and full speed ahead with the effort to encourage TV broadcasters to relinquish their spectrum so that it can be used to further the National Broadband Plan. The latest evidence of this is the following announcement sent by Commission reps to state broadcast associations:

> ***FCC Webinar for Television Broadcasters***
>
> Please join FCC Media Bureau Chief Bill Lake and Rebecca Hanson, Senior Advisor, Broadcast Spectrum, in a live webinar that describes the financial opportunities offered by voluntary incentive auctions, as proposed in the FCC's National Broadband Plan. Incentive auctions for TV spectrum seek to offer broadcasters new business model options involving their voluntary contribution of some or all of their licensed spectrum, including options that allow broadcasters to participate and continue to broadcast. This webinar will give an overview of those opportunities and will provide an opportunity for the FCC representatives to respond to questions, including questions about the need to repack the remaining television channels following the auction. Specific topics will include:
>
> -- How would an incentive auction work?
>
> -- Broadcaster Opportunities, channel-sharing, and
>
> -- VHF Repacking Implications
>
> Station owners, managers, key personnel, and station attorneys are invited to participate - so please forward this notice to others who have interest. Stay tuned for details about registration for this event.
>
> Thank you.

A total of 15 separate presentations have apparently been scheduled from March 10 – April 6. We don't know if this is the final number. Nor have we yet gotten the scoop on how to access any of the webinars (URL's, dial-in phone numbers, access codes, etc.), but when we do, we'll be sure to pass along what we learn, so check back on www.CommLawBlog for updates.

However one might feel about the re-purposing of TV spectrum, it would make sense to attend the webinar if only to get, straight from the horse's mouth, any and all details of the plan that might be disclosed. For more than a year the Commission has demonstrated an overwhelming determination to use TV spectrum for broadband. The timing of these webinars may be somewhat premature – for instance, the spectrum at issue has still not been allocated for broadband use (although that's in the works), and the FCC doesn't have the authority to provide broadcasters "incentives" in the form of portions of auction proceeds – but the fact is that the Commission seems absolutely bound and determined to make the repurposing happen. That being the case, it's a good idea for all folks likely to be affected by the change – broadcasters being the most obvious example – to learn as much about the plan as possible as early as possible.

It will be intriguing to hear the FCC's take on "how would an incentive auction work?"

Of particular interest should be the "new business model options" the Commission has in mind for broadcasters. Helpful suggestions about new alternatives and opportunities are always welcome, even when the source is as unlikely as the federal government. It is unclear, however, whether the Commission's list of "options" will be as broad as possible: in one recent decision, the Media Bureau displayed a curiously constricted approach to a possible alternative use of broadcast spectrum. The Bureau denied a request by an LPTV licensee to test an innovative technology that might have led to a "new business model option". It was not an option, apparently, that the Commission wants to encourage. (Full disclosure: FHH member Peter Tannenwald represents the proponent in that case.)

It will also be intriguing to hear the Commission's take on "how would an incentive auction work?" As noted, the agency still doesn't have the authority to share its

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FHH - On the Job, On the Go

On February 18, **Mitchell Lazarus** spoke to the Association of Federal Communications Consulting Engineers on "Regulation of Fixed Microwave Service". And on March 29, **Mitchell** will be addressing the American Council of Independent Laboratories on "The Role of Test Labs in Roll-Out of New Technologies".

On February 22, **Kevin Goldberg** participated in a panel discussion presented by the D.C. Chapter of the Online News Association concerning the lawsuit filed by Washington Redskins owner Daniel Snyder against the Washington City Paper. Going from the local to the international, **Kevin** will next speak (on March 7) to the Free Expression Network on the impact of the WikiLeaks investigation on the media. And then, on March 14, he'll be a member of a panel discussion on "FOIA Privacy Issues – a discussion of the privacy issues that divide agencies and FOIA requesters", in connection with the Fourth Annual National Freedom of Information Day Celebration at the Washington College of Law of American University.

From February 28-March 1, **Peter Tannenwald** and **Harry Martin** will be attending the National Religious Broadcasters Convention and Exposition in Nashville. (As previously reported, both are scheduled to appear on panels from 9:00-10:30 a.m. on February 28.)

Ever the jet-setter, **Peter** will then head to the Hearing Industries Association Annual Meeting in Delray Beach, Florida, from March 1-4. He'll be speaking there, too.

Meanwhile, back at the ranch, **Frank Jazzo**, **Frank Montero**, **Scott Johnson**, **Matt McCormick** and **Lee Petro** will be attending the NAB's State Leadership Conference in Washington from February 28-March 2.

On March 7, **Davina Sashkin** will be moderating a brown bag "event" in Washington, D.C., co-sponsored by the Engineering and Technical Practice and Young Lawyers Committees of the Federal Communications Bar Association. Subject: Working with consulting engineers and outside engineers.

On March 9, **Dan Kirkpatrick** will present a webinar on "Surviving the Renewal Process" to the West Virginia Broadcasters Association.

Frank J and **Michelle McClure** will be attending the Society of Satellite Professionals International's Gala in Washington on March 15, in conjunction with the "Satellite 2011" Conference, which they will also be attending from March 15-17.

And wrapping up the month, **Scott** will be conducting Renewal Workshop seminars for the South Carolina Broadcasters Association (on March 23, in Columbia) and the Alabama Broadcasters Association (on March 26, in Birmingham). Accompanying him will be **Dan** (for the South Carolina leg of the trip) and **Davina** (for the Alabama leg).

As so often happens, FHH got plenty of ink this past month. **Howard Weiss** was quoted in *Comm Daily*, as was **Frank J** (an impressive four times, thank you very much). But ink is one thing, and airtime is another. And if you happened to be tuning in to WJFK(FM) on February 2 – or February 3, for that matter – you would have heard **Kevin Goldberg** holding forth eloquently (as always) about Dan Snyder's lawsuit against the City Paper, an issue that gripped the attention of Greater Washington for at least a couple of days. Testing, one, two – hey, is this mike working? You bet it is, Kevin – that's why you're our *Media Darling of the Month!*

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auction proceeds with private parties (like broadcasters seeking compensation for turning their spectrum in for auction). Nor has it been determined precisely – or even roughly – how any individual broadcaster's share of those proceeds might be computed. As a result, we shouldn't be surprised if this portion of the webinar tends to be longer on hopeful promotion than on useful practical detail.

Still, the fact that the Commission is sending its missionaries out to preach the gospel of spectrum re-purposing and, in the process, possibly convert non-believers is an important development for all concerned. It presents opportunities for all sides. Such opportunities should not be ignored.

Misrepresentation lite

Five-Figure Fine For Deceit-Free Fallibility

By Mitchell Lazarus
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FCC enforcement procedures continue to baffle us.

Take the case of Cricket Communications. They are a cell phone company, as you probably know – their ads are hard to miss. To move their phone traffic from place to place, they operate dozens of microwave stations. The FCC rules require licenses for these. If you want one, you have to apply for it, but you need not wait for the license to be granted. Rather, you can begin operating as soon as the application is filed, assuming certain conditions are met. Once the FCC does grant the license, the licensee has 18 months to get its station built and on the air (if it isn't already), and has 15 days beyond that to certify to the FCC that it has done so. Without that certification, the license cancels automatically.

Cricket had trouble with two of its microwave licenses.

As to one, it filed the construction certification on time, stating it had built the station within the 18 months allowed. But it later found the certification was in error, and had to amend. The new certification showed it had built and begun using the station much earlier, before it had even filed the license application. That amounts to unauthorized operation, which is a violation of FCC rules.

Multi-million dollar numbers are obviously out of line with what actually happened.

As to the other license, Cricket got the contents of the construction certificate right the first time. But it filed the certificate late, after the 18-months-plus-15-days had elapsed. And this certificate likewise showed that operation had commenced before the application was on file.

The Enforcement Bureau has proposed a fine of $20,000, which is exactly the expected penalty for two instances of unauthorized operation.

That should be the end of the story.

But the Bureau did not stop there. Rather than just cite Cricket for unauthorized operation, it charged Cricket with filing inaccurate information in three instances: the initially incorrect construction certificate, and the two earlier applications that failed to disclose the stations were already operating. The FCC accepted that the slip-ups were inadvertent. But it went on to explain that an inadvertent error is just as actionable as an intentional falsehood. [For more on the difference between intentional misrepresentation and inadvertent inaccuracy, see the endnote, below.]

The accusation of misrepresentation, however inadvertent it might have been, enabled the Bureau to throw around big numbers. The recommended "base" fine for misrepresenting a fact to the FCC is the maximum dollar amount the FCC could assess against Cricket for *any* offense, including the most heinous. The Bureau asserted it could fine Cricket $150,000 for each violation, or each day of a continuing violation. Get out the calculator. The first construction notice went uncorrected for 31 days, which exposes Cricket to a total of $4.65 million. Factoring in the alleged omissions from the two applications, on a per-day basis, brings the numbers up past $160 million. In practice the FCC rarely imposes per-day fines, but the rules permit it.

Multi-million dollar numbers are obviously out of line with what actually happened. The Bureau must think so. It decided, based on all the facts and circumstances – but with no other explanation – that the appropriate base fine here is $25,000. Then, noting that Cricket had voluntarily disclosed the mistake and moved to fix it, the FCC reduced the fine to $20,000. As we noted, that is the recommended amount for two counts of unauthorized operation.

Back where we started. Since the FCC's accusation of inaccurate statements had no effect on the outcome, why should anyone care?

The FCC cited Cricket both for (a) unauthorized operation and (b) filing inaccurate information about its operation. If a miscreant knew it had done something wrong and, when asked, chose not to disclose it, the failure to disclose might constitute a second and separate transgression. Here, though, Cricket apparently did not know about the problem when it filed the incorrect papers; once it found out, it promptly owned up and fixed the problem. To charge the company for both its initial unauthorized operation ***and*** for its initial reporting mistake, before it learned of the mistake, is unreasonable.

The other problem here is numerical. A separate charge of failure to disclose can escalate a reasonable penalty into the realm of the outrageous. While the FCC did not impose a fine against Cricket in the millions, it did lay out a legal rationale for doing so. And it remains free to invoke that same rationale against someone else.

The FCC places a host of obligations on its licensees. Responsible licensees – and most of them are – struggle mightily to comply. They hire regulatory personnel, retain lawyers and consulting engineers, and conduct regular audits. Even so, errors do slip through. Sanctions are appropriate, in those cases – certainly for a substantive offense, like unauthorized operation, and also for deliberate falsifications, such as lying about qualifications for a license.

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Take a tip from the engineering gurus

Time To Doublecheck Your BAS Data In ULS?

By Harry F. Cole
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Last August we posted a report on www.CommLawBlog.com about a Commission proposal to make more spectrum available for wireless backhaul linking mobile signals back to the core network. As of yet we haven't heard anything more on this from the Commission, but it's a reasonable assumption – particularly given the FCC's fixation on all things wireless – that all or most of its proposals will be adopted eventually, probably sooner rather than later.

One central element of the proposal would open up the 6875-7125 MHz and 12.7-13.2 GHz bands for backhaul on Fixed Service (FS) stations. But heads up – those bands are currently used for Broadcast Auxiliary Services (BAS), including studio-transmitter links. If new FS stations are allowed into those bands, they would presumably be required first to prepare and submit coordination studies to demonstrate appropriate protection to incumbent licensees, including BAS stations. No problem so far.

How the problem can be avoided is incredibly clear and incredibly simple.

But as our friend Dane Ericksen, a well-known and highly-respected consulting engineer, has pointed out in a recent piece posted on the *TVTechnology* website, the FS coordination efforts will be based on information currently available in the FCC's Universal Licensing System (ULS) database. And, according to Dane, that information is in many instances less than complete and accurate. He cites figures that are pretty amazing.

According to Dane:

(a) Of all 7 GHz TV BAS fixed-link records: 15 percent of all 7 GHz TV BAS fixed-link records had missing receive-end coordinates; 37 percent had missing receive-end antenna height; and 51 percent had missing receive-end antenna make and model information; and

(b) Of all 13 GHz TV BAS fixed-link records: 13 percent had missing receive end coordinates; 35 percent had missing receive-end antenna height; and 50 percent had missing receive-end antenna make and model information.

So if an FS applicant were to undertake coordination based on existing partial ULS data, it's at least possible that it would succeed in obtaining authorization that could cause interference to an incumbent BAS facility.

How such a problem would get resolved is not clear at this point. But how such a problem can be avoided is incredibly clear and incredibly simple: BAS licensees can and should take a few minutes, now, to confirm that the ULS database accurately reflects the facilities they are currently utilizing. (Dane's article provides a useful checklist of Things To Do along those lines.) If errors or omissions in the data pop up, in most instances they should be correctable through routine processes (*e.g.*, an application to amend the entry).

By making sure that your licensed facilities are accurately reflected in the database, you will be doing yourself, other potential spectrum users, and the Commission a very useful service.

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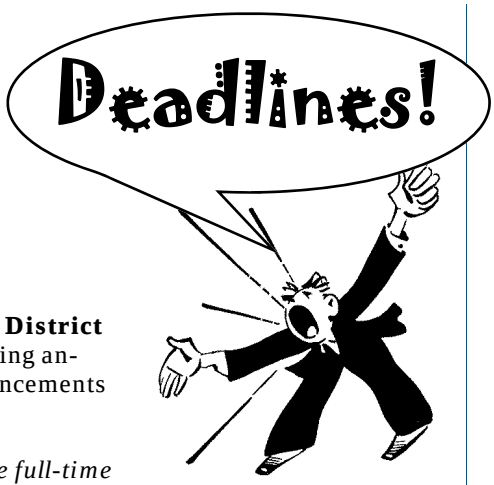
But unintentionally wrong information is different. It can cover a wide range: from harmless typos to, say, understating the height of a tower that in fact creates an air traffic hazard. Where the misstatement is merely incidental to another offense, as was the case here, it should not play any part in figuring sanctions. In other cases, the fine should bear some sense of proportion to the degree of harm that the error might cause. And the rules should so provide. There should be no talk of $150,000 per day for an unknowing paperwork foul-up that triggers its own sanction. Letting the FCC staff arbitrarily pick numbers out of the air, with no explanation at all, has no place in a well run agency.

[Endnote: The rule at issue here – Section 1.17 –as applied to Cricket, reads like this:

In any investigatory or adjudicatory matter within the Commission's jurisdiction . . . no person subject to this rule shall . . . (2) In any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.

The misconduct identified here does ***not*** involve "misrepresentation" – what many of us know as "lying" – because that requires some element of deceit. No showing of deceit is necessary to trigger Section 1.17. All it takes is the filing of "incorrect" information "without a reasonable basis for believing" that the information is, in fact, correct. This seems to say that *any* mistake in an application could subject the applicant to a very substantial penalty, even if the mistake is purely unintentional.]



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* stations *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 emp*loyees 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 television* 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.

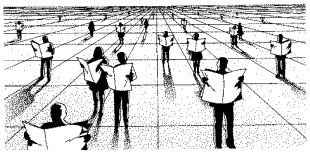
Issues/Programs Lists - For all *radio*, *television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues must be placed in the station's local public inspection file. The list should include a brief narrative describing the issues covered and 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

Inching toward NEPA compliance –The National Environmental Policy Act (NEPA) has long required the FCC to take certain steps in certain circumstances, all with an eye toward protecting the environment. The Commission, for its part, historically declined to take some of those steps – a recalcitrance which led to an order from the U.S. Court of Appeals for the D.C. Circuit that the FCC really did have to do what NEPA required.

That was three years ago. (Check out our report on the court's decision in the February, 2008 *Memo to Clients*.)



As we reported back when it happened, the FCC finally got around to complying – or, at least, starting to comply – with that order in November, 2010. Better late than never. At that point the FCC invited comments and announced three "scoping meetings" at which the public could provide input into the process, a process dubbed a "Programmatic Environmental Assessment", or "PEA". It also set up a new webpage – www.fcc.gov/pea – to provide easy access to relevant FCC documents, enable individuals to contact the Commission, and to publicize periodic "key milestones".

If you haven't checked out the site lately, be advised: another key milestone is fast approaching. On April 1 the Commission will convene a "public workshop" (FYI – that's different from a "scoping meeting") to "discuss the data sources, assumptions and methodologies" which it's using in developing the PEA. Comments from the public will also be accepted.

According to the PEA webpage, the April 1 meeting will be the last step in the process before release of the draft PEA, which is scheduled for release in "Spring, 2011 *" – the asterisk there refers the reader to a footnote indicating that this already vague scheduling is, at best, "tentative". Apparently, the Commission will then convene "public meetings" on the draft PEA during "Spring/Summer 2011 *" (same asterisked footnote), and in "Summer 2011 *" (ditto) the final PEA will be released. Whether the Commission will be able to stick to this schedule remains to be seen – but it does appear that, if you want to get your two cents' worth in on the PEA process *before* the FCC commits itself to an actual draft of the PEA, you should mark your calendar for April 1. (The festivities will be held at the FCC's headquarters.)

(Continued from page 2)

Wait a minute. $25K? What happened to the standard $4,000 fine for telephone rule violations?

The Bureau did start at the $4,000 level, but didn't take long to adjust that figure upward more than six-fold. It turns out that the program in question was broadcast not only on the station mentioned by the complainant, but two other stations as well. And it also turns out that this particular licensee had been fined for violations of the telephone rule on at least four separate occasions previously. None of those earlier occasions involved the San Juan station (or the two others which carried the show at issued here), but they provided a "history of prior offenses" sufficient to justify upward adjustment of the fine.

So just like that, allegations raised four and a half years ago but apparently ignored by the Bureau in the meantime suddenly blossomed into a healthy five-figure fine.

Sure, the licensee in question here may have had a checkered history and may have deserved what it got. (We're not in a position to resolve that – although at least two of the licensee's earlier telephone rule violations shed a less than favorable light on its programming. You can find links to them at www.CommLawBlog.com.) But the question of its recidivistic nature entered into things only *after* the Enforcement folks had determined that a new violation had occurred. And that determination was made on the basis of allegations which the licensee had been given no opportunity to challenge until four and a half years after the fact.

Which brings us to the lesson here. It appears that the Enforcement Bureau does not view itself to be under any obligation to give broadcasters the opportunity to respond to complaints within a reasonable time after the alleged misconduct. And when it does finally get around to asking for the broadcaster's side of the story – in this case, more than four years after the fact – it will happily take a wholly reasonable non-committal answer (*e.g.*, "we can't confirm or deny the allegation") as a failure to adequately rebut the complaint. That seems to put the targeted broadcaster at a huge disadvantage.

Unfortunately, until greater advances are made in time travel, there may be no effective way of counteracting this. That is especially so when the allegations involve something as ephemeral as a snippet of unrecorded programming. A reasonable statute of limitations might be nice, but the statute of limitations that routinely applies to broadcasters is, at bottom, no limitation at all, as this case demonstrates. (Of course, the longer the Bureau delays in getting the enforcement process started, the more it jeopardizes its own ability to be able eventually to collect any fine that might be assessed, as we pointed out in the August, 2010 *Memo to Clients*. So even if the Bureau isn't worried about due process considerations, it might consider whether its time is prudently spent initiating forfeiture proceedings that will just die on the vine.)

All of which merely underscores the importance of vigilance at the time of broadcast. The best defense against allegations of long-ago misconduct is to try to avoid any misconduct in the first place.