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Memorandum to Clients

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AM/FM move-ins on the way out?

Extreme Makeover - Radio Edition

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If you're looking to move an AM or FM radio station from a small community to a different, bigger, community, your job probably just got a boatload harder. The Commission has released a wide-ranging decision – technically, a "Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking" (ouch – let's just call it the *Second R&O* for short) – in its two-year old "rural radio" proceeding. Unlike the Commission's first order in that proceeding, the *Second R&O* tightens up radio channel allotment standards considerably.

Since radio broadcasting began, entrepreneurs have been inexorably drawn to the bright lights (and larger audiences) of big cities. Eschewing the bucolic delights of rural America, entrepreneurial folks have strived to locate stations in or near metropolitan areas. In response, the FCC has strived to keep the metro-bound tide in check. In recent years, though, the regulatory levees have been relatively easy to overcome, leading to a steady influx of channels to metro areas. With the release of the *Second R&O*, however, the flood barriers have been raised higher . . . much higher. And, as a bonus, the Commission has made it harder for FM translators to pop in or out of the reserved portion of the FM band.

First, some background.

For almost 30 years, radio allotments have been subject to a set of four priorities. In the Commission's view, the highest priority (dubbed Priority 1) calls for channels to provide first fulltime audio reception service. If a radio proposal would deliver service to areas and populations that don't already receive any radio service at all, that proposal moves to the front of the line. Next up (Priority 2) are proposals which would provide a second fulltime audio service to areas/populations that receive only one other such service.

As a practical matter, though, there are very, very few areas/populations in the U.S. that do not already receive at least two aural services. So Priorities 1 and 2 are largely vestigial; they seldom if ever come into play anymore.

That leaves Priorities 3 and 4. Priority 3 awards preference to any proposal which would result in a community receiving its first local station. The idea is that, to the extent possible, every community should have its own radio station which would, the FCC imagines, focus its programming on the needs and interests of its community of license. Priority 4 is a catch-all, rewarding "other public interest matters". (Normally, Priority 4 tends to involve comparisons of populations proposed to be served by competing proponents; the nod generally goes to the proposal promising to serve the greatest population.)

Note that Priority 3 requires only that the proposed station be the first in the community. It says nothing about where that community might be, or how many other radio services it may already receive. Accordingly, for many years the typical way to get the okay to put a station in an urban area has been to specify a community of license in or near the urban area, with no local station.

Presumably suspecting that the "first local station" test might lead to less-than-sincere proposals, the Commission eventually imposed additional mandatory showings if a proposed allotment brushed up against an urbanized area. In particular, the so-called "*Tuck* showing" (named after the 1988 decision in which the showing made its regulatory debut) requires allotment proponents to provide an extensive laundry list of information designed to establish that the proposed community of license really does have an independent need for its own local station.

But over the years, move-in proponents and their lawyers have become adept at making the required *Tuck* showings – possibly, in the view of some at the FCC, too adept.

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Inside this issue . . .

If you've got a website, you've (probably) got a problem

Does Your Website Need A Privacy Policy?

(Spoiler alert: You bet!)

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[*Editor's note: This is the first in a series of articles exploring the rapidly developing area of privacy law – an aspect of online (and even off-line) communications which affects everyone, often in unexpected ways*]

You've probably noticed that most websites have a link to a privacy notice or policy, a statement that describes how the website collects and uses personally identifiable information about its visitors. You may wonder whether your company's website needs a privacy policy. And if you already have one, is it adequate? In a series of articles in the *Memo to Clients* we will explore those questions and more. In this issue, we explore the question of whether your company's website needs a privacy policy.

Before you can know whether your website needs a privacy policy regarding the collection of personally identifiable information (PII), you need to know what PII is, and how it is collected.

PII is any information that relates to an *identified* or *identifiable* individual. PII is defined differently for different legal purposes, but generally includes: name, address, phone number, gender, date of birth, citizenship, Social Security number, driver's license number, race/ethnicity, as well as criminal record, health or financial information. PII also includes information that alone does not directly identify an individual, but when combined with other PII, could be used to identify an individual. This includes information obtained from the computer of a visitor to your website, including IP addresses, e-mail addresses, browser information, web search history and other information associated with the visitor's computer.

Websites can collect data from visitors either actively or passively. *Active* methods of data collection include requiring website users to affirmatively fill out forms, profiles, or account settings. But even if your website does not obtain user PII in that manner, almost every website engages in *passive* data collection, where information is gathered automatically as the user logs in, enters, and moves from page to page on your website. Typically, such passive collection obtains user IP addresses, e-mail addresses, browser information, and web search history information that can be combined to create PII. In addition, your website may insert "cookies" on the visitor's computer, or read cookies inserted by another website. Cookies are programs that store information on the visitor's computer associated with web use by that computer, and are used to facilitate logging into websites, purchasing products or services, and tracking the visitor's web search history. The information your website collects from cookies usually includes PII.

Now, back to the question, "should your company's website have a privacy policy"? The answer is: every commercial web site should have a clear and accurate privacy policy. The reasons are practical, contractual and legal:

1. *Your customers, and other users of your website, expect you to protect their private data.* It's no secret that users of the web are increasingly concerned about the security and privacy of the data that is collected about them on the web. While high profile law suits and criticism have to this point been primarily directed at search engines like Google or social network operators like Facebook, consumer expectations have been raised for all website operators. So competition and customer retention provide strong incentive for you not only to protect user personal information, but also to let them *know* that you are protecting it.

2. *Third parties may require your website to have a privacy policy.* Certain web advertising agreements require the website operator to have a posted privacy policy. In addition, if you engage in commerce on your website and want to boost consumer confidence in use of your site, it is helpful to obtain and post third-party certifications. Major third-party certifications, such as those provided by BBB Online, and TRUSTe, require the website to have

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Focus on FCC Fines

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Warrant? Warrant? We don't have to show you no stinking warrant – Readers of last month's column may recall the fine issued to an Los Angeles TV station because its security guard kept an undercover FCC inspector from inspecting the station's public file. Broadcast stations are required to be make that file available to members of the public during regular business hours.

A case this month reminds us all that the FCC believes that its agents may conduct a warrantless entry into a station at anytime, day or night, as long as the station is operating.

The FCC's warrantless entry argument arises from Section 303(n) of the Communications Act. Under that law, Congress has given the FCC the authority to inspect all radio installations whether those installations are required to be licensed or not. Flexing that particular regulatory authority, the FCC has adopted rules specifying that its agents may inspect a station at any time the station is in operation. If a G-man shows up at your doorstep demanding to be let in and your station is transmitting, the FCC asserts that you've got to let him in even if he doesn't happen to have a search warrant.

The "anytime" inspection rule is published at Section 73.1225 of the FCC's rules for broadcasters. (Similar rules permit such inspections for other types of radios, including CB radios.)

How does this work in practice?

Twice last year, FCC agents received complaints about radio interference in Merced, California. The agents used tracking equipment to identify a home from which CB signals were apparently being broadcast. The agents knocked on the door, flashed their badges and asked the man answering the door if he had CB equipment inside. Upon confirming that there was equipment inside, the agents demanded to be allowed to enter the house to inspect the equipment. The guy who answered the door – perhaps a viewer of *Perry Mason* or *Law and Order* – refused entry to the Feds because, he said, they didn't have a valid search warrant. (He acknowledged that the CB gear was his, but said that he was not the owner of the house.) The agents responded by telling the man that he had to let them inspect the equipment, but he was unconvinced. Eventually, the agents gave up, left an official Notice on the front porch and went on their way.

Five months after the first incident, the FCC again received an interference complaint and returned to the man's house. This time the Feds brought two local police officers with them. When they reached the home, the man was in the front yard; he again refused to let the agents into the house. Rather than battering down the front door, the FCC agents and police left without conducting an inspection. The FCC agents wrote up another Notice and, when the man refused to accept it, they attached it to the front fence of the house.

Next step: a Notice of Liability, sent by mail, advising the CB owner that he is getting hit with a $7,000 fine for failing to permit inspection. In other words, even though the inspectors were unable to determine that the CB radio was the source of the interference that had brought them to the house in the first place, they could still whack the CB operator for his lack of cooperation. Plus, if they ever do gain access to the CB gear, the agents may still be able to tack on extra fines if they find something amiss.

The moral of this story: a broadcaster's public file must be available to the public during business hours, but the FCC's "anytime" rule gives the *federales* access to station equipment anytime that equipment is being operated.

Translate this: too much power + too many antennas = $13K fine – The licensee of an FM translator station in Florida faces a $13,000 fine for operational problems which were discovered when FCC agents conducted an inspection there. The FCC's Field Office had been keeping an eye on this particular station since as early as 2009, when they had observed apparent overpower operation. They inspected the facilities in February, 2010, and found that the transmitter's meter showed power at about 280% of the station's authorized power. The licensee professed ignorance, claiming that the problem might have been caused by a faulty amplifier. He promptly cranked the transmitter down to its licensed power, and the inspectors went away. (Note to anyone else who finds themselves in this situation: Any equipment problems like that would ordinarily be reflected in the station's operating logs, which you can expect the agents to ask for. In the Florida case that's just what happened – and, presumably to no one's great surprise, the logs contained no indication of any equipment malfunctions.)

Seven months later they were back again, in response to a complaint. Lo and behold, the transmitter was back up to 229% its maximum licensed power. Go figure. A month later they returned and took some pictures of the station's transmission set-up. The photos established that the station was operating with a two-antenna array, even though its license specified only a single antenna.

So the Feds had the licensee nailed on overpower operation and use of unauthorized transmission facilities. The standard fine for the former is $4,000, and for the latter, $5,000. But the fact that the licensee had operated overpower on multiple occasions even *after* being warned (during the first inspection) warranted an upward adjustment, to the tune of an extra $4K. Total fine: $13,000.

Must-carry swan song?

Contemplating Life Without Compulsory Licenses

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While much attention in the MVPD/broadcaster world has recently been focused on the FCC's inquiry into possible changes to the retransmission consent process, a separate proceeding is cranking up over at the Copyright Office that could eventually lead to far more fundamental changes to the must-carry/retrans system. The Copyright Office is exploring the possible elimination of the compulsory copyright licenses that form the core of the system that determines how, and by whom, over-the-air broadcast programming can be retransmitted. So while the FCC may be contemplating various changes, significant or otherwise, within the existing box, the Copyright Office is not just thinking outside that box; rather, it's contemplating a situation in which that box no longer exists at all.

Are we surprised? Not at all. Anyone familiar with the minutiae of STELA (*i.e.*, the Satellite Television Extension and Localism Act of 2010) has seen this coming, because a provision (Section 302, if you're looking) in STELA ordered the Copyright Office to report on possible "mechanisms" or "methods" that might be used to "phase-out" compulsory licensing requirements. Are we scared? Not really, since this is just a very preliminary step in a process that might go nowhere.

The must-carry system arose from, and is designed primarily to address, copyright concerns.

Nevertheless, when a majority of both Houses of Congress makes noises about "phasing-out" the compulsory licenses, attention should be paid.

It is perhaps easy to lose sight of the fact that the must-carry system arose from, and is designed primarily to address, copyright concerns. When an MVPD operator retransmits programming which it obtains from, say, an over-the-air broadcaster, the MVPD operator engages in a "use" of that material for which the programming's copyright holder is entitled to royalties. Absent compulsory licenses, the MVPD operator wishing to retransmit broadcast signals would have to negotiate separately with each broadcaster (and, possibly, others holding the rights to the broadcaster's programming). That would be an extraordinarily cumbersome process.

The compulsory license approach takes care of that. That approach requires that MVPDs pay royalties into a governmentally-administered fund which is then doled out (by a governmental tribunal) to program suppliers entitled to payment from the fund. There are quids and quos on both sides. MVPDs get access to programming without the burden in individualized negotiations, but they *have* to carry (hence "must-carry") local stations; broadcasters are entitled to carriage, but they have to accept the governmentally-determined royalties. (This over-simplifies the system somewhat, but you get the idea.)

For anyone wishing to read the statutory provisions establishing the various compulsory licenses, check out Section 111 (the Cable Compulsory License, covering cable TV carriage of local and distant broadcast signals), Section 119 (the Satellite Home View Act, allowing satellite operators to carry distant broadcast signals) and Section 122 (the Satellite Home Viewer Improvements Act, permitting satellite carriage of local TV signals).

STELA addressed aspects of each of the three. And, as noted above, it included a requirement that the Copyright Office produce, within 18 months of enactment, a "Report on Market Based Alternatives to Statutory Licensing". The law was enacted on May 27, 2010. That means the report is due around the end of 2011. The Copyright Office (after procrastinating slightly, it seems) is now starting that process.

The Copyright Office isn't necessarily advocating for extinguishing the compulsory licenses (and, lest there be any question about this, neither are we). It's just trying to get a better idea of the current legal and business landscape, "exploring marketplace alternatives that would permit cable operators and satellite carriers to retransmit the entire broadcast signal just as they would have been allowed to do under the statutory [*i.e.*, compulsory] licenses."

The alternatives suggested by the Copyright Office include:

Sublicensing – Instead of a compulsory license allowing an MVPD operator to carry a broadcast signal in its entirety, this approach would move the rights clearance process further down the chain. Broadcasters would have to clear all rights in the programs they carry for ultimate performance by third party distributors. This clearly has an eye toward incorporating online streaming, as it provides more flexibility than the somewhat rigid and confining licenses currently in place. The FCC suggested this as a viable alternative as far back as 1989, as did the Copyright Office in 1997. Both pointed to the fact that sublicensing has been utilized in connection with carriage of nonbroadcast programming on more than 500 MVPD channels. But sublicensing is a market-driven process that is (to use the Copyright Office's language) "impeded" by the availability of compulsory licenses. The validity of the analogy between nonbroadcast and broadcast programming which the Copyright Office draws is not clear: the NAB, for example, has noted that at least some broadcasters lack the core financial

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Revising Retrans: The Process Starts

FCC proposes modest – but possibly significant – changes to rules regulating MVPD/broadcaster retransmission consent negotiations

The long-awaited Notice of Proposed Rulemaking (NPRM) addressing the thorny issue of retransmission consent has been released. When it comes to the ebb and flow of the on-going debate about the retrans system, some had hoped that the Commission might jump into the deep end while others had hoped that it would stay comfortably high and dry in the lifeguard's chair – but it looks like the FCC isn't inclined toward either of those options. Instead, it proposes, in effect, to dip its toe, maybe even roll up its pants to wade in a bit. In other words, even if some change in the retransmission consent negotiation process is possible, the likely scope of the change on the immediate horizon appears limited.

Then again, the Commission has invited comments, so who knows where this may end up?

Retransmission consent is one component of the perennial tug-of-war between television broadcasters and multichannel video program distributors (MVPDs, *i.e.*, cable, satellite systems, and the like) relative to carriage of broadcast programming on MVPD systems. Broadcasters periodically elect either "must carry" or "retransmission consent" status. Must carry status more or less guarantees carriage within the stations' local markets, but without compensation to the broadcaster for such carriage.

The NPRM recognizes that the FCC's authority to involve itself in retrans negotiations is limited.

By contrast, retransmission consent allows broadcasters to negotiate for compensation for carriage, the risk being that carriage must cease if the parties can't come to terms. Occasionally a broadcaster and a cable operator fail to reach an agreement; in that case, the cable operator must cease carriage of the station at issue, which in turn deprives cable subscribers of cable-fed access to the programming (including, in some instances, high profile items like the World Series, football play-offs, special award shows and the like). This typically results in a burst of consumer outrage, a bout of finger pointing between the cable operator and broadcaster, and a round of concerned statements from elected officials and the FCC.

Such disputes have been rare. But last year, after some particularly noisy set-tos, a group of cable operators asked the FCC to devise new rules governing retransmission consent negotiations. The petitioners wanted the Commission to block broadcasters from withdrawing retransmission consent during negotiations and to order binding arbitration in the event negotiations did not produce a result. Broadcasters countered that such requirements would undermine the free market nature of retransmission consent negotiations.

Responding to the petition, the NPRM recognizes that the FCC's authority to involve itself in retrans negotiations is limited. Since 1999, the Communications Act has required broadcasters to negotiate with MVPDs in good faith – but it gave the Commission only a limited role in determining what "good faith" might involve in this context. Acknowledging that limitation, the FCC in the NPRM rejects as beyond its statutory authority the ideas of imposing either (a) "interim" retransmission consent (providing the MVPD with a right to carry programming despite the broadcaster's refusal) or (b) mandatory arbitration.

Rather, the FCC focuses on tweaking existing rules that affect how parties to retransmission consent negotiations conduct themselves. Specifically, the FCC's proposals address possible changes in rules relating to: (1) "strengthening" the "good faith" standard governing negotiations; (2) notice to subscribers; (3) deletion of channels during "sweeps" periods; and (4) syndicated exclusivity and network non-duplication rules.

Good Faith Negotiations. The FCC's current rules require parties to engage in "good faith" negotiations for retransmission consent. Not surprisingly, then, the FCC's proposals focus on whether the "good faith" rules might be strengthened by adding to the list of actions that are considered *per se* violations of the rules. For instance, should a station giving its network the right to approve retrans agreements be considered a *per se* violation of the station's duty to negotiate in good faith? How about a station appointing another licensee (pursuant, say, to a JSA or LMA) to negotiate the retrans terms? Should one party's refusal to agree to non-binding mediation in the event of a negotiation impasse be deemed a *per se* violation? The NPRM seeks comment on a range of conduct which might be deemed *per se* violations of the good faith requirement.

Notice to Subscribers. Noting that adequate warnings of impending retransmission consent disputes might help consumers prepare for disruptions, the NPRM looks at the Commission's rules governing notices to subscribers. The rules currently require that cable operators give their subscribers 30 days prior notice before deleting channels or changing channel lineups. But the uncertainty produced by retransmission consent negotiations makes it difficult for cable operators to know 30 days in advance whether or not a particular broadcast channel is going to be deleted. Accordingly, the NPRM questions whether the rules should be amended to require notice of

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More proposed carrots, no proposed sticks (so far)

Three Incentive Auction Bills Introduced In Congress

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It's no secret that: (a) the FCC would like to re-purpose already-occupied broadcast TV spectrum for broadband use; (b) many (if not most) of the folks who currently occupy that spectrum are not particularly keen on the idea; and (c) the FCC figures that any broadcaster resistance to spectrum re-purposing might be softened by the siren song of a big payday, with the cash coming out of the proceeds of an auction of the re-purposed spectrum.

The FCC's problem (also not a secret) is that the Commission doesn't have the statutory authority to promise any auction proceeds to licensees who relinquish their spectrum.

It's obviously time (with apologies to Stephen Sondheim) to . . . send in the legislators!

Already, three bills have been introduced this year that would allow the Commission to spread the spectrum wealth around; reports of still more bills in the works continue to surface. (This is in addition to several bills introduced last year.)

The fact that none of the bills threatens imposition of a spectrum tax is a hopeful sign.

First into the mix this year was S.415 (a/k/a the Spectrum Optimization Act). A short and sweet four-page bill from Sen. Mark Warner (D-VA), it would give the FCC the authority to conduct auctions of spectrum that is "voluntarily relinquished by a licensee", with "a portion" of the proceeds being shared with relinquishing licensees.

Exactly what portion, you ask? The bill would simply leave it to the Commission to "establish a maximum revenue sharing threshold applicable to all licensees within any auction, unless the establishment of such threshold would increase the amount of spectrum cleared or would increase the net revenue from the auction of such spectrum". Say what? The bill would also order the Commission to "minimize the cost to the taxpayer of the transition of the spectrum to be auctioned". That provision could complicate the workability of a suggestion being advanced by Media Bureau Chief William Lake (in a series of webinars to state broadcast associations) that the government might also pay for the costs of repacking the spectrum.

So the Warner bill would give the FCC a carrot (*i.e.*, auction proceeds sharing) with which to induce broadcaster cooperation, even if the size and deliciousness of that carrot are still up in the air. By contrast, it has no provision for a stick with which broadcasters might be threatened into cooperating. Some of last year's bills would have created a spectrum tax that could have done just that – but the Warner bill says nothing about such a tax.

On the House side, we have H.R.911 (dubbed the Spectrum Inventory and Auction Act of 2011) introduced by Rep. John Barrow (D-GA). This, too, would give the FCC the authority to conduct incentive auctions. But before such auctions could be conducted, the FCC and the NTIA would first have to complete an exhaustive broadband spectrum inventory report which would have to be made public and updated semi-annually. The report would be no walk in the park: it would have to detail federal and non-federal uses of the spectrum and describe (among other things) the types of receivers in use, the geographic distribution of the various uses, and the frequency of use.

Only after this initial report is completed could the FCC move forward with incentive auctions. As with S.415, H.R.911 would leave the to-be-shared amount of auction proceeds up to the FCC's discretion. The only guidance on that score is that the sharing should be "in an amount or percentage that the Commission considers appropriate and that is more than de minimis".

Importantly, the bill would expressly prohibit the Commission from reclaiming spectrum "directly or indirectly on an involuntary basis". The bill is silent as to what would qualify as an "indirect" involuntary measure. Nevertheless, the fact that that language is included may comfort some skeptics who expect that the FCC might otherwise opt for non-voluntary strong-arm measures to persuade licensees to give up their spectrum. (Note: no reference to any spectrum tax here, either.)

Back on the Senate side, we have S.455, the Reforming Airwaves by Developing Incentives and Opportunistic Sharing Act – or "RADIOS Act" – co-sponsored by Sens. John Kerry (D-MA) and Olympia Snowe (R-ME). This bad boy weighs in at a much heftier 51 pages. It follows up on a similar bill these two senators co-sponsored last year. According to Kerry's website, this year's edition is "comprehensive spectrum reform legislation to modernize our nation's radio spectrum planning, management, and coordination activities."

Much like Barrow's bill, the RADIOS Act would permit the sharing of auction proceeds while requiring the FCC to complete a spectrum inventory and other similar exercises. However, here completion of the inventory does not appear to be a condition precedent to the incentive auction. The amount of auction proceeds available for sharing would be

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"Soylent Green is . . ."

To Serve Broadcasters*

***With acknowledgement to Rod Serling and Damon Knight**

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In what appears to be an ongoing effort by the Media Bureau to soften the ground on the spectrum re-purposing front in advance of an eventual all-out assault, Bureau Chief William Lake recently spoke to the National Alliance of State Broadcasters Associations, preaching the gospel of incentive auctions. His message: We come in peace, with broadcasters' interests at heart. Submit to our plans and everything will work out for the best. Honest.

Maybe theirs ***is*** the path to the ultimate win-win-win situation. As we have previously urged, broadcasters should keep an open mind and give careful consideration to any final plan the Commission eventually comes up with.

But broadcasters might also be forgiven if, at least for now, they opt for skepticism over unquestioning acceptance.

"It is natural to fear the unknown."

No kidding.

In his speech (a link to which may be found on our blog at www.CommLawBlog.com), Lake lays out five basic points. Let's take a look at them.

Point 1: The need for more spectrum for wireless broadband is real.

We can all agree that the general public is relying increasingly on mobile devices, and that, to the extent that those devices require spectrum to do their job, the demand for wireless-friendly spectrum is growing correspondingly. No problem there.

But the existence of increased demand for spectrum does not necessarily support the FCC's apparent conclusion that it is essential that TV broadcasters cough up *their* particular chunks of spectrum so that others might use it. Why, for instance, can't the Commission simply modify the rules governing spectrum use to permit broadcasters to offer wireless services? If the need for spectrum is so dire, shouldn't the Commission be doing everything it can to encourage innovations that could increase efficient spectrum use? (Apparently not, since the Bureau recently rejected a proposal for experimental authority to test an over-the-air broadband delivery service on TV channels.)

Point 2: All the good spectrum is already occupied, so somebody's going to have to be relocated – and that somebody should be TV.

While it's one thing to speak generally of total spectrum congestion, it's another to provide a detailed inventory of precisely (a) who's got what spectrum, (b) how long they've had it, and (c) what they're currently doing with it. A number of senators submitted a bill two years ago that would have required the FCC and NTIA to assemble such an inventory. That bill went nowhere.

The Commission is apparently sensitive to criticism about the utilization of spectrum by non-broadcasters, as Lake (somewhat defensively, it seemed) alluded in his speech to the fact that Verizon and AT&T are in the process of building out the spectrum they bought three years ago. (According to Lake, Verizon expects to be serving nearly 300 million folks by the end of 2013; AT&T plans to be serving 75 million by mid-2011 and "to expand rapidly after that".) OK, that's two spectrum holders. How about the rest, including the government itself? Does the Commission really have a solid, detailed grasp of actual spectrum usage? Shouldn't it – at least before starting to herd an established industry off into more confined pastures?

Point 3: The FCC has the broadcast industry's interests at heart.

Lake says this point "deserves emphasis", but then dedicates a grand total of two sentences to it. In the first sentence, he perfunctorily tips his hat to the "great service" TV provides to the public. The second (and last) sentence reads simply:

We firmly believe that an incentive auction can provide a financial shot in the arm for those broadcasters who choose to participate *and* can leave the remainder of the industry in an even stronger position to carry on the important benefits of over-the-air television.

The Commission may in fact believe that – but you have to admit that the wholesale lack of detail there is a bit disquieting. It has the ring of an over-eager sales pitch, holding out the promise of pure upside and non-existent downside.

Point 4: "It is natural to fear the unknown."

No kidding. Unfortunately, what is unknown to broadcasters is, at this point, also unknown to the Commission. That's because the FCC's preferred course – incentive auctions – isn't currently available to the Commission, and won't be unless and until Congress gives it the authority to offer such incentives.

But that doesn't stop Lake from offering glimpses of an idyllic system in which broadcasters would basically name

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Renewals 2011

Saber-Rattling On The Nondiscrimination-In-Advertising Front

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The FCC has unleashed a new "Enforcement Advisory" announcing its intention (in the Chairman's words) to "vigorously enforce its rules against discrimination in advertising sales contracts". The Advisory also "alerts" broadcasters about their "new" obligations concerning nondiscriminatory advertising contracts. Unfortunately, the Advisory (and its accompanying news release) leave something to be desired. Which is par for the course with respect to the nondiscrimination-in-advertising policy (NIAP).

Three years ago, the FCC released what has come to be known as the Diversity Order, a sprawling piece of work by which it sought to increase, um, "diversity" in the broadcast industry. The order included new and amended rules, a sprinkling of new and revised policies, some expressions of good intentions, and a bunch of proposals.

It is difficult, if not impossible, to know for certain what the FCC expects here.

In two paragraphs buried in the middle of the Diversity Order (those would be Paragraphs 49 and 50, if you're looking), the Commission announced that it would henceforth "require broadcasters renewing their licenses to certify that their advertising sales contracts contain nondiscrimination clauses that prohibit all forms of discrimination, as outlined below." The phrase "as outlined below" suggested that further details about what this meant for affected broadcasters might be found elsewhere in the Diversity Order.

But no such details were to be found.

To the contrary, citing the First Amendment, the Commission explicitly declined to tell broadcasters precisely what language their advertising contracts should or should not contain. Instead, the Commission simply reiterated that it would "require broadcasters renewing their licenses to certify that their advertising contracts do not discriminate on the basis of race or gender and that such contracts contain nondiscrimination clauses."

Overall, the Diversity Order's terse treatment of the NIAP was less than thorough – a fact underscored two years later when the Commission issued an "erratum" revising the phrase "race or gender" to read "race or ethnicity". Oops. No explanation was offered. Nor did the erratum address the fact that, by deleting "gender", the Commission was at least implicitly condoning discrimination based on gender.

Importantly, the NIAP was ***not*** incorporated in any rule proscribing discrimination in advertising. (By contrast, the Commission ***did*** adopt a specific rule – Section 73.2090 – prohibiting discrimination in the sale of broadcast stations.) All the NIAP did was to impose a new certification requirement in the broadcast renewal application. Since the NIAP was announced in 2008, and the next cycle of broadcast renewals wasn't due to start until 2011, little was heard of the NIAP in the meantime.

Time moved on, the years passed, and lookee here – it's 2011! Already! Which means that thousands of broadcasters will soon be required to sign off on the certification in their renewal applications.

But since the Commission hasn't bothered to shed any meaningful light on the underlying conduct that broadcasters are expected to be certifying about, many broadcasters have been hoping that maybe, just maybe, the Commission would provide some guidance: Do I need to re-write all of my advertising sales orders to include some magic language (and if so, what might that language be)? What if the advertiser uses a standard form contract for everyone – am I expected to forego a sale if they refuse to incorporate this language? How can a broadcaster confidently certify anything about the intent of the advertiser? If the Commission's trying to stop discrimination against Urban and Spanish format, what happens if an advertiser chooses ONLY Spanish stations or ONLY Urban stations – isn't that race/ethnicity-based discrimination too? If an advertiser sells cowboy hats, is it wrong that he advertises on my country music station but chooses not to buy time on my R&B station? (We could go on, but you get the point.) So when the Advisory appeared, there was at least some hope that the Commission was finally ready to let the industry in on the secret.

No such luck.

Instead of guidance, the Advisory offers not-so-veiled threats about enforcement of the policy without any particular indication of what will constitute a violation. Indeed, in the public notice the Chairman, apparently unaware that the policy is just that – merely a policy – refers incorrectly to the policy as "rules" or a "rule". If it were a rule, it would show up somewhere in 47 C.F.R. It doesn't. If it were a rule, the Commission would be able to impose a fine for its violation. It can't.

[Of course, there's always a chance that we're missing something here. Nobody's perfect. So if anyone can point us to a section of the FCC's rules that contains any provision that codifies the NIAP, we would appreciate it if you would let us know by any means that you feel comfortable with – email, phone, comment below, whatever. We'll happily post a correction, with full credit to you, on www.CommLawBlog.com.]

Now let's be clear. Inappropriate discrimination – on the basis of race, ethnicity, gender, religious belief or other

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Renewals 2011

Revving Up For Renewal Season

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The Media Bureau has released a Public Notice announcing revisions to the Form 303-S license renewal application and providing a few more details regarding the upcoming renewal process. The notice largely tracks the information we have previously reported, but it does include a couple of interesting surprises worthy of mention and a couple of non-surprises worthy of attention.

First, the revised renewal form requires commercial applicants to certify that: (a) their advertising contracts do not discriminate based on race or ethnicity; and (b) those contracts in fact contain nondiscrimination clauses. (*See* related story on Page 8.) We knew that was coming; what we didn't know for sure was the precise time frame that the certification would cover. Now we do: while the language of the certification is still in the present tense ("Licensee certifies that its advertising sales agreements ***do not*** discriminate...and that all such agreements...***contain*** nondiscrimination clauses" [emphasis added]), the Notice indicates that the certification will refer retrospectively back to March 14, 2011 (*i.e.*, the date of the Notice).

Don't look for reminder cards from the FCC. Each licensee is on its own to remind itself when its renewal is due.

Since the FCC first generally alerted broadcasters in 2008 that some certification would be required, licensees have had plenty of opportunity to get their nondiscriminatory houses in order. Those who haven't done so can still correct the problem by notifying all advertisers on the books as of March 14 that all advertising sales agreements effective on or after that date are deemed to include the necessary nondiscriminatory provisions. (We have previously posted some sample language that might do the trick at www.CommLawBlog.com.)

The second surprise – actually, it turns out to have been more like a head fake, we think – involves certifications of compliance with the RF exposure guidelines.

When the Bureau's anticipated changes in the renewal form first emerged last Fall, one of the highlights was the fact that radio licensees would be relieved of the burden of submitting any exhibits to their RF certifications. But the Notice now could be read to say otherwise:

> For stations that have had a material change in their RF environment since they last received a grant of a license application or license renewal application, either an exhibit or a worksheet demonstrating compliance with the RF exposure limits is required.

That seems to say that, at least in some limited cases, it may be necessary to submit something – like an exhibit or worksheet. But that would be flatly inconsistent with what the Commission said last Fall when it spoke, repeatedly and unequivocally, of the "elimination of the exhibit requirement for radio broadcasters". What's up with that?

After reading this over several times and chatting informally with the Commission's staff, we think that the key to understanding the Notice is as follows: while the Notice does say that an exhibit or worksheet demonstrating compliance is, in some instances, "required", it does ***not*** say that that exhibit/worksheet is "required *to be submitted with the application*". That is, where there has been a material change in the RF environment of your transmitter site since grant of your last renewal or license application, you *will* have to work through the worksheets to confirm that the site is still in compliance. (And if the worksheets don't confirm that, you'll need to enlist the help of a consulting engineer to study the situation.) But once you get to the point that you can confirm compliance, you would simply so certify and that would be that. No separate supporting documentation would need to be submitted with the renewal application (although it would be a good idea to hold onto your worksheets or engineering study, in case somewhere down the line the FCC asks you to explain your certification).

We're reasonably confident that this is what the Bureau has in mind – but we'll keep our eyes out, and if we get any contrary information, we'll post it here. In any event, though, if you are a radio licensee and there have been material changes at your site since your last renewal/license grant, you probably want to begin looking at the worksheets and, if necessary, lining up engineering services soon.

The Notice also included a couple of useful reminders.

For one, this renewal cycle the Media Bureau will ***not*** be mailing postcards to licensees reminding them of their upcoming renewal applications. In other words, each licensee is on its own to remind itself when its renewal is due. (Where the Bureau has an e-mail address, it will attempt to remind the licensee by e-mail – but if no such reminder arrives, that will ***not*** excuse a failure to file on time.) As a reminder, the first license renewal applications are due for radio stations in D.C., Maryland, Virginia and West Virginia on June 1.

Second, the Notice advises that the earliest date on which

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left to the Commission ("an amount or percentage determined in the discretion of the Commission"), and broadcaster participation would be strictly voluntary. And as with the two bills described above, the RADIOS Act says nothing about spectrum taxes. Interestingly, in the section about incentive auctions, the RADIOS Act requires that the Commission assure that there will be "adequate opportunity nationwide for unlicensed access to any spectrum that is the subject of such an auction." This is intended to protect the continued availability of spectrum for white spaces devices.

(The RADIOS Act sprawls well beyond these narrow limits, but the description above should answer the immediate questions of folks concerned about the possibility of incentive auctions.)

The RADIOS Act, Warner's Spectrum Optimization Act, and Barrow's "Spectrum Inventory and Auction Act of 2011" are the first, but almost certainly *not* the last, pieces of legislation that have come out of the chute this year. Word is that several other legislators will likely get in the act over the next few months. We understand that at least one bill will specifically direct that a portion of incentive auction proceeds will be set aside to assist broadcasters relocate to different channels as part of a repacking process.

None of these three bills provides any clear indication – or even basis for speculation – about the amount of auction proceeds that participating broadcasters might expect to get their hands on. Indeed, other than the impenetrably obfuscatory language in the Warner bill, the bills would give the FCC nearly unfettered discretion to make that call. That's not necessarily good news, but it might be unrealistic to expect Congress to micromanage such things. On the other hand, the fact that none of the bills threatens imposition of a spectrum tax is a hopeful sign, since such a tax could easily be wielded as a threatening economic cudgel to encourage "voluntary" participation in the spectrum repurposing process.

Of course, Congress's seeming interest, just right now, in spectrum auction legislation must be counterbalanced against the undeniable fact that, by the end of this year, posturing for the 2012 elections will have begun. As a result, by then prospects for movement on most legislation of any sort will likely be slim. So if we're going to see the enactment of any new legislation dealing with the overhaul of spectrum regulation, including incentive auctions, it will likely be sooner rather than later. We'll keep you updated on these bills, and any new ones that get added to the Incentive Auction Sweepstakes.

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their own price (by setting, up front, a "reserve price" for their spectrum). Once the spectrum to be sold is identified, the Commission would auction it off, with the proceeds "being shared" by the Treasury and contributing broadcasters. Lake emphasizes that any participating broadcaster would "set its own price".

That sounds great, but would it really be as simple as that? Who knows – since neither the precise auction mechanisms nor any possible limitations on the splitting of auction proceeds have even been proposed, much less adopted?

Point 5: Keep an open mind.

This one we can all agree on. It never does anybody any good to make prejudgments about unknowns, and at this point the incentive auction is just that, an unknown.

But because it is an unknown, it's also important not to be lulled into a false sense of tranquility and acceptance. The Commission may, as Lake indicates, be totally committed to doing right by broadcasters. But even if that's the case, the Commission may find those best wishes frustrated by whatever Congress does.

And then there's the possibility that, while the Commission may talk a good game, its seemingly monomaniacal obsession to maximize the spread of wireless broadband is really the only thing that matters here – and if broadcasters get in the way of that goal, well, that'll just be too bad. (Indeed, according to a speech given by former Chairman Reed Hundt on the eve of the adoption of the National Broadband Plan last year, the weaning of the American public away from broadcasting and onto the Internet as the dominant "common medium" has apparently been a project on Chairman Genachowski's to-do list since he served as Hundt's Chief Counsel back in the mid-1990s.)

At this point, none of us can know for sure what's going to happen – indeed, even the Commission can't know, given its lack of statutory authority. So while we should definitely maintain an open mind and a willingness to examine alternatives, we should also be mindful that the halcyon image Lake has described may not be anywhere close to the eventual reality.

Wireless operators to channel 51: Vamoose!

Range War 2011: Broadcasters vs. Wireless Providers

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In the Old West, even the vast wide open spaces were not vast enough and wide enough for everybody. Farmers and cattle ranchers fought over scarce resources, like water and grazing rights. These conflicts were known as range wars.

The tradition lives on, but the turf in dispute today is spectrum, particularly TV channel 51. The wireless companies want to ease out the TV broadcasters, who may want to stay put. Better hunker down; the legal papers are going to fly.

The dispute is a by-product of the digital TV transition. Digital technology allowed the geographic repacking of TV stations into fewer channels than before. That freed up 108 MHz of spectrum in the 700 MHz band, part of which the FCC auctioned off to wireless broadband providers for almost $20 billion. Even here in Washington, that counts as real money. The government got the cash; the broadcasters got to quadruple their video capacity; and the wireless companies got more bandwidth, over which customers could download more videos of cats riding on vacuum cleaners.

Two factors make compliance difficult for wireless operators near channel 51.

Now the happy honeymoon is over. Reality has settled in. The domestic-bickering phase has begun.

The immediate issue is TV channel 51, which (after the transition) is the highest TV channel at the highest frequency. Just above it in the spectrum, where channel 52 used to be, is the lower portion of the wireless 700 MHz band, known to the cognoscenti as A Block. But channel 51 and A Block are on different frequencies, right? So there should be no conflict.

That sounds logical, but it's wrong.

The problem lies in receiver design. Channel 51 covers 692-698 MHz. Ideally a TV set tuned to channel 51 would receive everything in that range, and nothing above or below. Sadly, though, that is not possible. You can build a receiver that comes pretty close, but it would add more cost to the TV than a consumer wants to pay. A real-world TV receives some signal above and below the channel it is tuned to. In particular, a TV tuned to channel 51 will pick up some signal from above channel 51, in wireless A Block. The TV does not show the cat on the vacuum cleaner, but the wireless signal can degrade or even block the TV reception. The reverse is likewise true: reception on an A Block mobile wireless mobile device can be impaired by a nearby TV station on channel 51.

Of course, that last irks the wireless companies. Even worse, from their standpoint, is their legal obligation to protect channel 51 TV reception. The strength of the wireless signal must not exceed that of the TV signal by more than a certain amount within the station's service contour, which for this purpose is anything within 55 miles of the station.

Two factors make compliance difficult. First, some Block A devices are mobile handsets that can inadvertently stray into the 55-mile zone and put out more power than is allowed. This is hard to prevent. Second, although the viewing public thinks of TV stations as being relatively permanent, in fact they come and go and change their channels (all subject to FCC consent). So even if an A block wireless company can work around all the stations currently operating on channel 51, another one can pop up at any time.

The wireless company trade associations have filed a petition with the FCC to complain about these problems and request relief. The petition opens with several pages on the importance of wireless broadband (no mention of the cats). Then come three requests:

- change the rules to foreclose all future TV licensing on channel 51;
- in the meantime, freeze all future and pending TV applications to operate in channel 51;
- and streamline procedures for facilitating "voluntary efforts" to relocate existing channel 51 licensees to other channels.

To be sure, the problems facing A Block licensees should not be a surprise. The companies that bid on that spectrum knew they would have to protect channel 51 TV stations, including later arrivals, and they knew the risk of incoming interference from TV operations. They bought the spectrum anyway, "as is". Yet now they want the FCC to control the number of channel 51s they must deal with. They also hint that people might seek channel 51 licenses "to exploit opportunities for personal gain" at the expense of an A Block licensee – in other words, to deliberately make trouble for a wireless company, with an offer to go away if paid enough money. On the other hand, the "voluntary efforts" mentioned in item 3 above appear to involve payoffs to existing channel 51 licensees from willing wireless A Block licensees.

The wireless companies could have solved their problem, in principle, by leaving the lower part of A Block vacant as a guard band. That would cost a lot of money. Instead, despite not having paid for it, they want the 6 MHz of channel 51 to be vacant.

The FCC has not yet put out the request for comment. We'll let you know if and when that happens.

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incentive to engage in sublicensing.

Among the more interesting questions the Copyright Office asks are:

> Would sublicensing be an effective alternative to both the local and distant signal statutory licenses? (On the point, the Copyright Office specifically solicits comments about the current state of sublicensing of television programming in the United States)
>
> Are broadcast stations truly different from cable networks, as the NAB suggests?
>
> What percentage of the public views broadcast stations through their cable and satellite subscriptions rather than directly over the air?
>
> Are there sublicensing examples from other countries that may be used as models in this regard?

Private Licensing – This allows a cable system or satellite carrier to negotiate with the copyright owner of a specific program for the right to perform the work. Of course, this market-driven process would appear to benefit the program producers to the detriment of the actual stations (and, we think, would pose a danger to local network affiliates, as we'd figure that cable systems and satellite carriers would try to negotiate with the most popular shows, especially network shows, to provide them as part of an "on demand" package). This alternative is also held back somewhat by the fact that the copyright owners of each individual program may be hard to identify.

Among the questions asked here are:

> Would privately negotiated copyright licenses afford a plausible and effective marketplace alternative to the three existing statutory licenses?
>
> How many private copyright licenses currently exist and how do they function?
>
> Are there any successful private licensing models currently in operation outside the United States that the Office may study?

Collective Licensing – This involves copyright owners getting one or more third party organizations to represent them en masse. It is already employed on the radio side, with ASCAP, BMI and SESAC setting the rates and terms for performance of musical works. There is no equivalent on the television side.

Among the questions here are:

> With respect to the development of a collective licensing body for audiovisual works, are there lessons to be learned from the experience with strictly audio works?
>
> Are there collective licensing models around the world that may be relevant to this study?

It's clear that the continued availability of compulsory licenses is at least on the table for the moment – and, as a result, so is must-carry.

In addition, the Copyright Office welcomes other ideas which might be successful. It also asks how it might transition from the compulsory licenses to another method. For example, would it be preferable to transition using: (a) a station-by-station basis; (b) a staggered approach which would phase compulsory licenses out in stages; or (c) a sunset approach (sunsetting to occur some years in the future) which would provide ample time for all parties to prepare for the transition)?

Again, this is a very preliminary, Congressionally-mandated proceeding. And, since the elimination of compulsory licenses would eventually require Congressional action, it's clear that the Copyright Office does ***not*** have the last word here. But it's also clear that the continued availability of compulsory licenses is at least on the table for the moment – and, as a result, so is must-carry. Broadcasters who depend on must-carry (because, for example, they believe they lack sufficient bargaining power to make retransmission consent workable) in particular should be aware of this. We expect that there will be further opportunities to comment on more specific proposals should the elimination of compulsory licenses move forward. But if you think you have information, insights or opinions to offer, you need to file comments with the Copyright Office by ***April 17, 2011*** or reply comments by ***May 17, 2011***.

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potential deletions in advance of retransmission consent negotiations and whether the notice requirements should extend to broadcasters, as well.

"Sweeps" Prohibition. Cable operators – but *not* other MVPDs (*i.e.*, satellite providers) – are prohibited from deleting or repositioning channels during "sweeps" periods (*i.e.*, when rating companies conduct audience measurements and, consequently, the networks roll out all the good episodes of your favorite shows). That could affect retrans negotiations, since the disparity accords non-cable MVPDs some greater freedom than their cable compatriots. The Commission questions whether it would be appropriate to put *all* MVPDs on an equal footing by extending the "sweeps" prohibition to non-cable MVPDs. The NPRM also raises the possibility of imposing a corresponding prohibition on broadcasters. On that point the Commission tentatively concludes that it doesn't have the authority to do so; nevertheless, the FCC invites comment on whether or not it does have the authority.

Syndex/Network Non-dupe. Finally, and perhaps most significantly, the NPRM seeks comment on the possible elimination of the current rules governing syndicated pro-

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April 5 is the day – mark your calendars

White Spaces Reminder: Deadline For Registering Distant OTA Receive Sites Fast Approaching

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If you're a TV licensee providing over-the-air feeds to one or more distant translator/LPTV/Class A stations, cable head-ends or satellite local receive sites, heads up. You need to act soon if you want reception of your signal at those sites to be protected from unlicensed devices operating in the TV band. ***April 5, 2011*** is the deadline for ***TV stations with receive sites more than 80 kilometers beyond their protected contour*** to seek a waiver of the Commission's geographic limitation to be able to register such receive locations. Note: this is a one-time-only opportunity.

This is a one-time-only opportunity.

Back in 2008, when the Commission adopted rules to govern the operation of unlicensed devices in the so-called "TV white spaces", it sought to protect existing TV operations by establishing a database in which certain locations requiring protection could be registered. While receive locations that happen to be *within* a TV station's protected service area were already routinely protected, that wasn't the case for receive sites serving distant TV translator/LPTV/Class A TV stations, satellite or cable (MVPD) services, all of which deliver the signal to viewers outside the originating station's protected contour. The Commission decided to protect, within reasonable bounds, the ability of such stations and services to receive programming over-the-air for retransmission. "Within reasonable bounds" in this context meant within 80 kilometers of the originating TV station's protected contour. Translator/LPTV/Class A stations and MVPD services with receive sites so located were thus allowed to register their sites in the TV bands device database.

On reconsideration, though, the FCC determined that some MVPD services and translator/LPTV/Class A stations relying on over-the-air reception to obtain and redistribute TV signals are located more than 80 kilometers from the originating TV station's protected service contour. In order to avoid disruption in those circumstances, the Commission opted to expand the notion of "within reasonable bounds" *temporarily*: it provided a 90-day opportunity (commencing with the effective date of the rules) for MVPD's, TV translator, LPTV and Class A TV stations to request a rule waiver to allow them to register their receive locations in the TV bands devices database. This opportunity is available only for locations at which the TV programming is received over-the-air more than 80 kilometers from the originating station's protected contour.

The initial 90-day waiver request filing period will expire on ***April 5, 2011***. (Facilities that meet the geographic standards but don't get licensed until later will have 90 days, starting with commencement of operation, to file for a waiver.)

Waiver requests should demonstrate how the operation of an unlicensed device near the relevant receive site would act to disrupt current patterns of television viewing. After a waiver request is received, the FCC will put it out for public comment and then will make a determination as to whether it will be granted.

The Commission has not yet provided any special instructions for the filing of such a waiver request. Check back here for updates on that score. But absent any such instructions, it would appear that filing through the Secretary's office with a reference to ET Docket Nos. 02-380 and 04-186 should do the trick. Electronic filing in the dockets might also be a possibility – but, again, the FCC hasn't given any guidance yet. We'll post a follow-up on our blog (www.CommLawBlog.com) about this as developments warrant.

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gramming exclusivity and network non-duplication. These rules generally protect the contractual rights of broadcasters in their programming by requiring cable and satellite operators to black out programming on other channels that duplicate programming for which a broadcaster holds exclusive rights. Since the exclusive programming rights they hold provide much of the broadcasters' leverage in retransmission consent negotiations, changes to the FCC rules relating to those rights could affect the dynamics of retransmission consent negotiations. The underlying contractual rights to exclusivity would, of course, remain unchanged. But the elimination of the FCC's rules would eliminate the FCC as a forum in which the parties' rights could be adjudicated – meaning that parties would likely have to go to court in the first instance to enforce their rights. Whether that would really be a preferable alternative to either side in a retransmission dispute is far from clear.

Comments in this proceeding are currently due to be filed on ***May 27, 2011***; the deadline for reply comments is ***June 27***. As this proceeding is certain to attract a lot of attention from all sides, interested parties should strongly consider making their views known.

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The New Presumption. Concerned that the continuing trend of stations toward metro areas may be leaving the radio needs of rural areas underserved, the FCC has now come up with a new approach designed to slow (if not stop altogether) that trend. The *Second R&O* creates a "rebuttable presumption" applicable to proposals to allot AM or FM channels either: (a) to a community in an urbanized area or (b) in such a way that the facilities proposed would (or, with a minor modification application, could) cover 50% or more of the urbanized area with a city-grade signal (for AM's, that would be the *daytime* city-grade). If either of those conditions is met, then the proposal will be presumed to be proposing service to the entire urbanized area rather than the named community of license. That is, no Priority 3 preference would be awarded, even if the proposed community of license technically did not have any other local stations. For ease of reference, we'll call this concept "the Presumption".

Additionally, the FCC has tweaked Priority 4 to put much greater emphasis on coverage of relatively underserved areas rather than raw differences in the number of people covered.

The *Second R&O* explains how these changes are to be applied to various common radio allotment situations. Those include: (a) proposed community of license changes (for both FM and AM stations); (b) applications for new AM stations and major modifications to existing AM stations; and (c) new FM allotment proposals.

Community of License Changes. To change an AM or FM station's community of license, the applicant must show that the proposed facilities in the proposed community will serve the FCC's allotment priorities better than do the station's present facilities in its present community.

The FCC will apply the Presumption to all such proposals – even those that were pending before the *Second R&O* was released. That will limit severely the ability of proponents to avail themselves of Priority 3.

Recall that the Presumption applies not only when a proposal would put a city-grade signal over at least 50% of the urban area, but also if the proposed facilities ***could*** do so after a minor mod. Because of that, the applicant will also need, in effect, to demonstrate a negative – *i.e.*, that it will not be able to use its proposed facilities as a launching pad for a change that would produce 50% or greater urban area coverage.

It's always hard to prove a negative, of course. In this context, the *Second R&O* addresses that problem by requiring proponents to certify that "there are no existing towers in the area to which, at the time of filing, the applicant's antenna could be relocated through a minor modification application to serve 50% or more of an urbanized area and still cover its proposed community of license." In making that certification, the applicant will be required to consider every existing tower with an Antenna Structure Registration and every unregistered tower currently used by licensed radio station. The applicant also must consider possible use of a directional antenna, contour protection and other techniques widely employed to fashion a rule-compliant modification application.

The Commission will also impose an absolute bar to any facility modification that would create a "white" area (*i.e.*, an area with no over-the-air service available) or a "gray" area (an area with only one over-the-air service available).

And under the newly-tweaked Priority 4, the Commission will "strongly disfavor": (a) any change that would result in the net loss of third, fourth, or fifth reception service to more than 15% of the population in the station's current protected contour; and (b) any proposed removal of a second local transmission service from a community with a population of 7,500 or greater.

Historically, once a proponent could show that at least five services were available, it could stop counting. No longer.

There's more. Applicants will have to set forth the size of the populations that would gain and lose service, together with the numbers of services those populations will receive if the application is granted. Historically, in this context the Commission's concern has topped out if at least five other services were shown to be available to a given area; that is, once a proponent could show that at least five services were available, it could stop counting. No longer. Here's how the FCC describes the showing it would expect in a proposal to provide a 21st new reception service to 500,000 people while removing the sixth reception service from 50,000:

> A detailed summary should suffice, for example, to point out that 50,000 people would receive 20 or more services, 10,000 would receive between 15 and 20 services, 7,000 would receive between 10 and 15 services, etc. The showing should, however, state what service the modified facility would represent to the majority of the population gaining new service, e.g., the 16th service to 58 percent of the population, and the corresponding service that the majority of the population losing service would lose, e.g., 60 percent of the current coverage population would lose the ninth reception service. New service or service losses to underserved listeners should be detailed.

The Presumption is, by its very terms, a *rebuttable* presumption. Like all rebuttable presumptions, it can be, um, rebutted. But to do so, a proponent must make a "compelling" show. You can start with a *Tuck* showing, but that may not be enough. The FCC has said it will scrutinize *Tuck* showings more rigorously "than has sometimes been the case in the past". For example, an applicant "should submit actual evidence of the number of local residents who work in the community, not merely extrapolations from commute times or observations that there are businesses where local residents could work if they so chose."

Proposals for New/Major Mod AM Facilities. Like

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proposals to change community of license, applications filed during an auction window for a new AM station or major changes of an existing station will be subject to the Presumption. In such cases, applicants have historically been able to prevail without going to auction if they can demonstrate up front that their proposal is preferable on Section 307(b) grounds. Factoring in the Presumption will likely make such auction-free results more difficult to achieve.

As with community of license changes, the Commission will consider not only whether the proposal itself would serve the urban area, but also whether the applicant might be able to realize such service through a minor mod of the proposed facilities. In assessing the hypothetical potential for such service, the Commission will consider only whether the applicant could file a minor mod specifying the same site and a frequency available at the time the filing window closed without changing the proposed antenna configuration.

With respect to Priority 4, large service population differentials between competing applicants alone will not be sufficient to secure a dispositive Section 307 (b) preference. But an AM applicant that will provide third, fourth and/or fifth reception service to at least 25% of the population within its proposed primary service area *and* has specified a community of license with no more than two local stations *may* receive a dispositive Section 307(b) preference.

The FCC is determined to stem the flow of radio service toward urban, and away from rural, areas.

An AM applicant also may, but is not required to, submit something called a Service Value Index (SVI) showing. This complicated (indeed, geeky) formula takes into consideration the population served and the number of reception services received by segments of that population. In order for an AM applicant to prevail with an SVI showing, it must demonstrate a 30% differential between its proposal and the next-highest-rated proposal.

The Presumption and the other policies and procedures adopted in the *Second R&O* will not be applied to the applications still pending from the AM Auction 84 window, which closed in 2004. But they will be applied the next time an AM window is opened.

The Commission also formally codified a previously informal standard used to determine when the nighttime proposals included in applications for new AM stations or major changes of existing stations are mutually exclusive. Detailed explanation of this is best left to engineers. According to the FCC, two applications will be deemed mutually exclusive if either application's nighttime proposal would enter into the 25% exclusion RSS nighttime limit of the other. That will be the case even if each applicant could still provide the requisite nighttime coverage of its community of license.

FM Allotment Proposals. The Presumption and the policy under Priority 4 of putting heavier emphasis on reaching underserved populations (as opposed to simply reaching a greater total population) will be applied immediately to all pending petitions to amend the FM Table of Allotments, all other open FM allotment proceedings and all non-final FM allotment orders – *except* any non-final FM allotment proceeding in which the FCC has already modified a radio station license or granted a construction permit.

FM Translator "Band-Hopping" Applications. The FCC has decided it does not like it when the owner of an unbuilt or relatively new FM translator seeks to "hop" in or out the NCE reserved portion of the FM band (88.1 MHz to 91.9 MHz). The Commission is concerned that that practice might reflect an effort by some applicants to game the system. For example, an applicant might apply during a filing window for translators in the non-reserved portion of the band. With a non-reserved permit in hand, it could then modify the permit to hop over to the reserved portion and thereby take advantage of certain less strict regulations applicable to the reserved portion.

The FCC is not enthusiastic about such initiative. According to the *Second R&O*, the practice wastes staff resources and otherwise is, well, not a good thing. So an application to change an FM translator's frequency from the non-reserved portion of the band to the reserved portion or vice versa may now be filed only by an FM translator station that has been (a) licensed (or for which a license application has been pending) *and* (b) operating for at least two years. (Note, however, that the rule language adopted by the Commission makes no mention of any two-year holding period. If the FCC really does want to impose such a limit, we may be seeing an erratum in the near future spelling that out officially.)

Tribal Priority. The *Second R&O* also adopted certain changes, and proposes other changes, regarding the Tribal Priority which was the focus of last year's preliminary action in this proceeding. Since the Tribal Priority is available only to a very limited universe of applicants (*i.e.*, an applicant that is itself an Indian Tribe or of which the majority owner is an Indian Tribe), we will leave to another time the discussion of this topic, although we stand ready to field any questions that come our way.

The *Second R&O* is a sweeping action which reflects the Commission's determination to stem the flow of radio service toward urban, and away from rural, areas. Whether – and if so, for how long – these changes will serve that purpose remains to be seen.

According to the *Second R&O*, all the changes made in the order will become effective as soon as it's published in the Federal Register – except for one aspect of the Tribal Priority rule, which will require prior OMB approval. However, as we have reported on our blog (www.CommLawBlog.com), at least some of the other changes – including, *e.g.*, some of the new certification requirements – will also need OMB approval before they can be implemented. The process of obtaining that approval has begun, but it will take at the very least 90 days before the certification requirements can kick in. Check back with our blog for updates on these and other developments on this front.

White House White Paper

Obama Administration On Copyright: PRA, Yes! Illegal Streaming, No!

By Kevin M. Goldberg
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Last June, the White House officer charged with protecting "the ideas and creativity of the American public" – that would be the U.S Intellectual Property Enforcement Coordinator – issued a Strategic Plan on the enforcement of Intellectual Property. Prepared in coordination with a wide range of federal agencies, the Strategic Plan examined existing laws to identify (among other things) "deficiencies that could hinder enforcement" of intellectual property (IP) rights. Following up on that initial effort, the White House has now issued the Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations (White Paper), in which it offers suggestions for legislation to beef up IP enforcement.

Much of the 20-page report – which addresses such esoterica as corporate espionage, drug counterfeiting and criminal sentencing standards – is probably of limited direct interest to our readers. But two items in the White Paper do warrant attention here.

First, the White Paper urges Congress to "clarify that infringement by streaming . . . is a felony in appropriate circumstances." (We can hear it now – "Book 'em, Dan-O. Streaming in the first degree".) The brief discussion accompanying this recommendation isn't entirely clear, but the appearance of the word "streaming" got our attention.

We can hear it now: "Book 'em, Dan-O. Streaming in the first degree".

At first glance, one could take "streaming" here to mean "webcasting" in the broadest sense. In that case it would be a good idea to heed our frequent admonitions about jumping through all of SoundExchange's various hoops. But our gut instinct is that this isn't the "streaming" that the Administration is worried about. Rather, the White Paper refers to "the illegal streaming of content" – so we're guessing that its real target is something along the lines of the illegal file sharing we've discussed in the past, or maybe the live streaming of broadcast content – often sporting events – by some users of services like UStream.com or Justin.Tv. That more limited interpretation makes more sense in terms of the actual economic damage involved. But given the plain language meaning of "streaming", we can't rule out the possibility that the Administration may indeed want to criminalize *any* unauthorized streaming of music. Such a get-tough approach would arguably be consistent with the Administration's recommendation (described below) concerning performance rights.

The second item of interest appears in the very last section of the White Paper, which recommends that "Congress create a right of public performance for sound recordings transmitted by over-the-air broadcast stations." That's right – the White House is now on record as officially endorsing the Performance Rights Act (PRA). According to the White Paper, the fact that the U.S. has no performance right for recordings "disadvantages" U.S. copyright owners overseas, since "[t]hey are not permitted to collect overseas royalties because they are not granted rights in the U.S." The White Paper contains no extensive discussion (much less specific support) for this assertion. Indeed, the entire section on this point is a total of five sentences long.

We don't know how much effect this endorsement will have. The PRA has yet to be reintroduced in either the Senate or the House in the 112th Congress, and the last time it was introduced (in the 111th) it clearly didn't have the votes to pass. But, as endorsements go, this is a pretty big one. If nothing else, it might lead to the introduction of a bill, thus starting the legislative process yet again. Or it could resurrect the currently dormant discussions between the NAB and the RIAA regarding an accord on this issue. (The success of any legislation will likely depend on those two parties reaching an agreement that both can live with.) But the White House could play a role here, especially if it follows up on the White Paper by using its "bully pulpit" to bring the parties to the negotiating table. Let's just say the gauntlet has been thrown down and we think the PRA can fairly be described as "in play" at this point.

Of course, despite the fact that these recommendations come from the White House, they are nothing more than recommendations. It is up to Congress to act on them or not, as it sees fit. And it remains to be seen whether Congress will do so. We'll just say that, if it does, we hope that Congress will consider all points of view and move cautiously, with clarity and precision, to ensure that legitimate rights, including First Amendment rights, are not infringed.

FHH - On the Job, On the Go

On March 15, **Matt McCormick** attended the dedication of StationWHGT(AM), Maugansville, Maryland, at which he delivered the Dedication Prayer.

On March 29, **Mitchell Lazarus** will address the Mid-Winter Meeting of the American Council of Independent Laboratories, an organization of laboratories that (among other things) conduct FCC compliance testing. On April 6, he'll speak to the Telecommunications Certification Body Council, a group which includes TCBs (*i.e.*, Telecommunications Certification Bodies authorized by the FCC to issue Certifications of compliance with FCC rules) and others interested in the certification process. **Mitchell**'s topic both times will be the roles of the respective member organizations in expediting FCC approval of new technologies.

If it's March, it's time to start packing up for Vegas. And as usual, a cohort of FHH folks will be attending the NAB's annual festivities there. Be on the lookout for **Kevin Goldberg**, **Frank Jazzo**, **Michelle McClure, Lee Petro**, **Jim Riley, Davina Sashkin**, **Peter Tannenwald**, **Kathleen Victory** and **Howard Weiss**, all of whom will be making the rounds. **Kevin** will be speaking on a panel about "Copyright Myths and FAQs" on April 12 (at 10:30 a.m.). As a warm-up to the big do, on Sunday, April 10, **Lee** will be moderating a panel during the "Representing Your Local Broadcaster" Seminar sponsored jointly by the American Bar Association and the Federal Communications Bar Association.

Frank J (along with **Peter Doyle**, Chief of the FCC's Audio Division) will be participants in the NAB's License Renewal Webcast at 3:30 pm on Tuesday, April 26. And then **Frank** will head north to attend the Rockefeller College Advisory Board Meeting in Albany, New York, on Friday, April 29.

Bright Lights, Big City. Back in February, **Christine Goepp** appeared as a talking head (literally) on "Independent Sources", a weekly television program produced by CUNY. She waxed eloquent, and erudite, on the esoterica and arcana of Net Neutrality. (The show is still available on line, last time we looked — let us know if you'd like the link.) The program was carried on cable through all five boroughs of the Big Apple . . . Gotham . . . New York, New York. Hey, Christine – now that you've made it there, you can make it anywhere – but we knew that all along. That's why you're our *Media Darling of the Month*!

(Continued from page 2)

a clear and effective website privacy policy.

3. *Legal Requirements*. The legal requirements to have a clear and accurate privacy policy for your website are growing. While there currently are no substantive federal rules that apply to all website operators, broad federal legislation is pending in this area. In the meantime, there are significant federal requirements already in place.

For example, the federal Children's Online Privacy Protection Act (COPPA) restricts the online collection of data and marketing of services to children younger than 13. If you operate a commercial website directed to that age group, or if you know that your website is in fact collecting personal information from kids that age, then the COPPA-based rules of the Federal Trade Commission (FTC) require you to post a clear and comprehensive privacy policy on your website describing your company's information practices for children's personal information.

More generally, the FTC also uses enforcement actions to prevent *all* website operators from failing to fulfill the terms of their website privacy policies, which the FTC has ruled constitutes an "unfair" and/or "deceptive" trade practice. In addition to various federal requirements, many states have laws that directly or indirectly require website operators to have accurate and complete privacy policies. For example, California requires operators of commercial websites or online services that collect personal information on California residents to conspicuously post a privacy policy on the site and to comply with that policy. The law has specific categories of information that must be in the privacy policy.

So, the bottom line is that your company's website should have an accurate and complete privacy policy. In future articles in the Privacy Law Corner, we will explore what should be included in a good privacy policy. Stay tuned.

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renewals may be filed is May 2. Form 303-S may be available on CDBS prior to May 2, but it can't be submitted until then – no matter how many eager beaver licensees may prefer to get it over with before then. While there is currently a version of Form 303-S listed on CDBS, don't be fooled: that's probably ***NOT*** the new version. Check under the official OMB number at the top right side of the first page – if it doesn't say "March 2011", it's not the new version. If it's not the new version, don't spend any time looking at it (or the instructions, which are also outdated). If you want to see a PDF version of the new form and instructions, you can find that on the FCC's forms page. But that version is just for reading – you can't complete and submit it on line. You'll have to wait for May 2 for that.

As always, check back on www.CommLawBlog.com for updates.

The long march toward a consolidated license system continues . . .

CORES Update

By Denise A. Branson, Paralegal
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In the December, 2010 *Memo to Clients*, we reported that the FCC had issued a Notice of Proposed Rulemaking (NPRM) looking to revamp its CORES registration system. In March, the Commission convened a public forum to promote further discussion of the changes under consideration.

Attendance at the forum was somewhat sparse – maybe a couple of dozen people in person, others attending on line – but that appears to be consistent with the level of public involvement the Commission has already encountered in this proceeding. (A total of five comments and two reply comments – a total of 56 pages in the aggregate – were filed in response to the NPRM.) Anyone who missed the forum can still catch the official video at http://reboot.fcc.gov/video-archives.

The NPRM looks to enhance security and facilitate investigation of possible FRN misuse.

As we noted back in December, the lion's share of the FCC's CORES proposals involve FCC Registration Numbers (FRNs) – mainly, how to reduce duplication and simplify the FRN system generally.

According to the Commission, there are 1.9 million FRNs in CORES. In an ideal world, FRNs would be issued one-to-a-customer, with each FRN based on the holder's unique identification number (*e.g.*, a taxpayer identification number (TIN), or social security number). It hasn't worked out quite that way, though. The Commission reports that 50,129 outstanding FRNs involve duplicate use of a TIN. And of the FRNs using duplicate TINs, 274 have five or more FRNs associated with a single TIN. The greatest number of FRNs associated with a single TIN is an impressive 107. It appears that a number of the duplicate FRNs were created for a single use and then abandoned; others were created by the FCC itself. The Commission refers to this subset of FRNs as "dormant" or "orphaned" FRNs.

In contrast to the cases where multiple FRNs are associated with a single TIN, more than 40% of FRNs aren't associated with any TIN at all! Non-TIN FRNs are issued subject to a number of exemptions. For example, foreign entities/individuals do not have TINs but may still need an FRN. Additionally, the FRN system currently permits the issuance of an FRN without a TIN if the registrant indicates that he/she/it is in the process of applying for a TIN.

As envisioned by the Commission in the NPRM, all (or at least most) of this duplication could be eliminated by (a) assigning each entity only one FRN with subaccounts or (b) adding common prefixes to existing FRNs using the same TIN. During the Public Forum, the Commission moderators sought comment on: removal of dormant/orphaned FRNs from the database; deletion of FRNs generally; the benefits of listing multiple contacts on an FRN; and how to more stringently regulate the use of TIN exemptions. Unfortunately for the Commission, the forum did not appear to generate any significant preference for any of the available options under consideration.

Of greatest interest during the forum was the security of CORES. The NPRM looks to enhance security and facilitate investigation of possible FRN misuse. For example, the use of a single FRN with linked sub-accounts and/or custom user IDs could limit the points of access to an entity's authorizations. In the event of an unauthorized action (possibly taken by a disgruntled ex-employee), that could make it easier to identify the intruder. Comments also favored using e-mail addresses for an additional level of security.

The overhaul of CORES is a crucial hurdle that will have to be crossed before the Commission can implement its ultimate goal, a new Consolidated Licensing System which will allow it to integrate all of its licensing functions through a single interface. The FCC is clearly determined to reach that goal, but the process of doing so is likely to be long and daunting.

FM Allotments Adopted – 2/22/11-3/22/11

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
TX	Early	119 miles West of Waco, TX	294A	09-181	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.

This time with Congressional blessing

Video Description, On The Comeback Trail

By Christine E. Goepp
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They're baaaaack . . . almost. The video description rules, dealt a death blow by a federal appeals court nearly a decade ago, are one step closer to resurrection with the release of a Notice of Proposed Rulemaking (NPRM) looking to their reimposition.

As we reported in the October, 2010 *Memo to Clients*, the FCC's original video description rules were struck down by the U.S. Court of Appeals for the D.C. Circuit in 2002. According to the Court, the FCC did not have the requisite statutory authority to impose such rules. (Quick refresher course on video description: it's a process that gives blind and visually impaired people a way to "watch" video programming by adding a spoken narrative describing the visual elements of a scene during natural pauses in dialog. Example: "Workers throw Kane's belongings into a burning furnace. One item is a sled with the word 'Rosebud' stenciled on it.")

In light of the 2002 decision, only Congress has the power to rescue the rules by granting the Commission the authority it was (and has since been) lacking. Congress did so last October, in a sweeping omnibus disabilities law: the "21st Century Communications and Video Accessibility Act of 2010." (Back then we coined the abbreviation "21CenComVidAccAct", but the FCC has since opted for "CVAA". Even though the FCC's choice of abbreviation seems a bit *too* abbreviated – what century are we talking about again? – we'll bow to their will and use "CVAA".)

The CVAA leaves it to the FCC to decide what entities are to be subject to the video description rules.

In the CVAA, Congress directed the Commission to reinstate its rules more or less exactly as they were in 2000, with certain mandated changes. One might ask, why go through a rulemaking at all, if all the agency has to do is find a copy of the old rules, cut-and-paste them into a new order, and insert the necessary changes? It turns out, though, that the Commission does have *some* discretion this time around. In particular, the CVAA leaves it to the FCC to decide what entities – broadcast stations, multichannel video programming distributors (MVPDs), networks – are to be subject to the video description rules. Accordingly, the Commission would like public input on a limited number of points.

So, if you're a broadcaster or an MVPD, you may want to refresh your memory of the original rules and consider commenting if you might be affected by the proposed modifications.

The Basics

As in the first go-round with video description, the rules this time around will have two main components: the "50-Hour Rule" and the "Pass-Through Rule".

The "50-Hour Rule" will apply to broadcast stations that are: (a) affiliated with the top four national commercial networks (ABC, CBS, Fox, and NBC); and (b) located in the top 25 markets (per the 2011 Nielson rankings). Such stations ***must provide*** 50 hours per calendar quarter of video-described programming during prime time – although *any* children's programming can also be included in the 50 hours, regardless of when it happens to be aired. A program can be counted twice – but *only* twice – if it is re-run. A station can count a program even if the program has previously been telecast elsewhere, so long as the program is airing for the first or second time on that station. [Note: the CVAA requires the Commission to expand this requirement to the top 60 markets by October 2016].

MVPDs (cable, satellite, etc) with 50,000 or more subscribers must also provide 50 hours per calendar quarter of video-described prime time and/or children's programming on each channel on which they carry one of the top five national non-broadcast networks. (FYI: the FCC figures that the top five currently are USA, the Disney Channel, ESPN, TNT, and Nickelodeon's Nick at Nite. But heads up – Fox News, TBS, A&E, History, the Cartoon Network's Adult Swim, the Family Channel, and HGTV could also be contenders if any of the top five come up short on the non-exempt programming front.)

Under the "pass-through" rule, broadcasters affiliated with *any* network and *all* MVPDs will have to pass through any video description that they receive from a broadcast station or network or a cable network channel, including re-airings, so long as they have the technical capability to do so. And yes, providers subject to the 50-hour rule must also pass through video description programming.

Questions For Comment

These two basic requirements are not up for discussion. However, the FCC *would* like input on a number of questions regarding their implementation:

? What is "near-live" programming? The CVAA exempts "live" and "near-live" programming from the new rules. This exemption seems superfluous given that video providers already have latitude in selecting which 50 hours will have video description. Presumably, the exemption would mainly come into play if a top five cable channel had so much live programming that there weren't 50 hours left over for video description. The FCC logically proposes, in that case, to exclude the channel from the top five list. It also proposes that "near-live" programming would mean programming produced no more

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Wilkommen, Bienvenu, Welcome

Rob Schill Joins FHH As Of Counsel

Fletcher, Heald & Hildreth is pleased to announce that Robert J. Schill has joined us as Of Counsel. Rob is a graduate of the George Washington University School of Law; he received his BA from Binghamton University (SUNY).

Rob comes to us from a telecommunications-focused government affairs firm, where he was Vice President of Law and Public Policy. He's also done time on the Hill, serving as Correspondence Director for Senator Daniel Patrick Moynihan. He has helped clients before Congress and a number of federal agencies (including the FCC) on a wide range of subjects, including wireline, wireless, geospatial, homeland security and related technology issues. Rob also served as Executive Director of the Vehicle Traffic Information Coalition, an advocacy group formed by auto manufacturers and technology suppliers to advance the role of mobility technologies in transportation policy.

In his spare time, Rob volunteers at Martha's Table, a non-profit operation serving the needs of local at-risk families, and coaches little league baseball on Capitol Hill. An avid connoisseur of hoops, he professes to be awaiting the Knicks' turnaround.

FHH welcomes Rob to the fold. He can be reached at schill@fhhlaw.com or 703-812-0445.

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than 24 hours prior to its telecast.

- ? How often, if at all, should the list of top 25 markets be updated? As the FCC aptly notes, while market rankings routinely change over time, constant revision of the list would burden and aggravate everyone concerned. Therefore it seeks comment on whether, and how often, to reconsider the top 25 rankings.
- ? What equipment would be needed to comply with the pass-through requirement, and how much would it cost?
- ? How much would the 50-hour rule cost, per program or hour described? The FCC would like to hear from both the purchasers and producers of video description on this point.
- ? Under what circumstances would the rules become so "economically burdensome" to providers to warrant an exemption? The prior version of the rules allowed exemptions when the rules posed an "undue burden." The CVAA changed the exemption standard to "economically burdensome." The FCC is not fazed by this change and proposes to use the same factors it used in the previous version.
- ? Should the 50-hour and pass-through rules apply to commercial low power stations?
- ? Is there a continuing need for the previous "another program-related service" exception? The former version of the pass-through rule did not apply in situations where the second audio program (SAP) equipment and channel were being used to provide some other program-related service. But a digital universe permits numerous audio channels for any video stream – meaning that there may be no continuing need for an exception. The Commission seeks comments on that question.
- ? What digital stream should the rules apply to? For the 50-hour rule, the Commission would for sure count programming carried on the primary stream. But it also proposes to apply the rule to each separate stream which carries another top-four network's programming. The pass-through rule would apply to all network-provided programming on all digital streams.
- ? Should the Commission adopt quality standards for video description?
- ? How should programs be selected and advertised?
- ? Should the new ATSC standard be incorporated to ensure that video description can be received by all DTV receivers?
- ? Should children's programming mean programming directed at children 16 years old and under?

Should the Commission adopt quality standards for video description?

Finally, the FCC proposes to require compliance with the video description rules (subject, of course, to any OMB approval that may be required for any of the rules) starting January 1, 2012, 85 days after they are scheduled to be adopted and published.

The proposed video description requirements present virtually all of the serious practical difficulties, as well as potential First Amendment arguments, that the earlier version did. The last time around, though, the Court didn't have to address those considerations because the wholesale lack of statutory authority eliminated the need to do so. Now that the CVAA has plugged that hole, it will be interesting to see whether any appellant(s) raise other, still undecided, issues.

Comments in response to the NPRM are currently due to be filed by ***April 18, 2011***, with reply comments due by ***May 17, 2011***.

Además el cambio ca, además de que es lo mismo.

Indecency Complaint, With A Spanish Accent

By Frank Montero
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Five years ago I was quoted in an article in *Billboard* about whether Spanish-language broadcasters get a pass when it comes to enforcement of the FCC's indecency rules. Several English-language broadcasters – including Howard Stern (who quoted me on the air) – have frequently complained that the FCC does not enforce the rules equally. Suspected reasons for the disparity: fewer complaints get filed against Spanish language programs, and the Spanish-speaking staff at the FCC has traditionally been undermanned. Now a couple of groups are looking to change the first of those possible reasons.

The National Hispanic Media Coalition (NHMC) and the Gay & Lesbian Alliance Against Defamation (GLAAD) have filed a complaint (173 pages in all, including extensive attachments) with the FCC against a TV station in the Los Angeles area. The focus of their complaint: the Spanish-language television talk show "José Luis Sin Censura" (translation: "José Luis Uncensored").

The complaint echoes charges that were raised in 2006.

According to NHMC and GLAAD, over 20 episodes of the show that aired between June-December of last year contained images and language that were indecent and that would have been routinely edited out of English-language broadcasts. The complaint alleges the repeated use of sexually-oriented terms such as "pinche" and "culero", along with anti-gay epithets ("maricón", "joto", "puñal") and anti-Latino slurs (*e.g.*, "mojado"). Presumably recognizing the likelihood that the FCC may not be familiar with Spanish pejoratives, the complainants have included a "Note on Translation" in which they provide the approximate English equivalents. ("Pinche" is said to be "roughly equivalent" to "fucking"; "culero" means "assfucker"; "maricón", "joto" and "puñal" are derogatory terms for gay people, akin to "faggot"; "mojado" refers to "wetback".)

The complainants have also posted a collection of examples (including a number of NSFW items, such as semi-clad women) demonstrating their point on YouTube.

In recent years the NHMC – a non-profit, media advocacy organization aimed at improving the image of Latinos in the media – has been increasingly active in filing complaints against what it perceives to be offensive content on the airwaves. Two years ago it asked the Commission to investigate the use of "hate speech", and particularly such speech directed against Latinos, on the airwaves. For its part, GLAAD – an organization aimed at promoting understanding, increases acceptance, and advancing equality for the LGBT community – has been working against the "José Luis Sin Censura" show for years. It claims that its efforts have prompted a number of prominent sponsors to pull their advertising.

The latest complaint echoes the charges that were raised in the 2006 *Billboard* article. In fact, the complaint quotes from (and attaches a copy of) the 2006 *Billboard* article. It will be interesting to see whether the Commission's reaction does anything to alter the perception that, for whatever reason, its indecency enforcement activities have historically reflected some cultural bias.

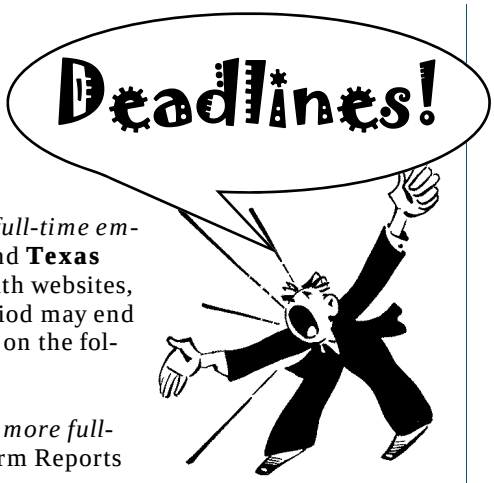
Language and cultural differences aside, though, the complainants may run into a different problem. The TV licensee here is being accused of broadcasting indecency. But the Commission's ability to regulate indecency has been questioned by a couple of court cases, as my blogging colleagues have chronicled on www.CommLawBlog.com. So even if the FCC would like to demonstrate conclusively that it is an equal opportunity indecency enforcer, it may find itself without the ability to do so. Stay tuned.

(Continued from page 8)

similar factors – is wrong and should not be tolerated. But while there are some areas in which the Commission can effectively police improper conduct, it's not clear that private contractual arrangements are among those areas. After all, even in the Diversity Order the Commission referred to "nondiscrimination laws", acknowledging that there are legal mechanisms *other than FCC regulation* with which the government can address such problems. And the misconduct which appears to be the FCC's primary concern is not misconduct by broadcasters, but rather by advertisers and/or their agents. Rattling the enforcement saber at broadcasters seems a curiously misdirected effort, especially when there are other federal agencies (the FTC comes to mind as one example) which should already be enforcing the "nondiscrimination laws" to which the FCC itself referred.

We have addressed the question of how one might deal with the NIAP in previous posts on www.CommLawBlog.com, long before the Advisory. The Advisory provides little reason to alter what we have said there. But the problem with the situation the Commission has created is that it is difficult, if not impossible, to know for certain what the Commission expects here. Indeed, even the Enforcement Bureau can't seem to figure it out. Its Advisory says that the Bureau "will work in close collaboration with the Media Bureau to give this new requirement meaning." How could the "new" requirement (that is, the policy that was adopted more than three years ago) still need to be given "meaning"?

Unfortunately until the Commission sheds more light, broadcasters will have to tread carefully to certify according to their reasonable beliefs and due diligence efforts – whatever that means.



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 also be broadcast 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 employees* and located in **Delaware** and **Pennsylvania** must file EEO Mid-Term Reports electronically on FCC Form 397.

Noncommercial Television 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 Radio 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 5, 2011

TV White Spaces Rule Waiver – *Television* stations *with receive sites more than 80 kilometers beyond their protected contour* must seek a waiver of the Commission's geographic limitation to be able to register such receive locations. For existing facilities, this is a one-time only opportunity.

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.

June 1, 2011

License Renewal Applications – *Radio* stations located in the **District of Columbia**, **Maryland**, **Virginia**, and **West Virginia** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

License Renewal Pre-Filing Announcements – *Radio* stations located in **North Carolina** and **South Carolina** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must also be broadcast on June 16, July 1, and July 16.

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Nevada**, **New Mexico**, **Ohio**, **Virginia**, **West Virginia**, and

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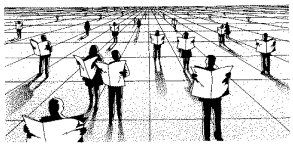
Stuff you may have read about before is back again . . .

Updates On The News

Swami, how we love you, how we love you – In last month's issue, our resident Supreme Court swami, Kevin Goldberg, looked into his crystal ball and predicted the court's vote in an FOIA case involving the FCC. A couple of days after he went public with the prediction, the Supreme Court acted – and our man was right on the money. Is he good or what? You can read his analysis of the Court's decision on our blog (www.CommLawBlog.com). Once you get to the front page of our blog, just search for "swami".

Application fees – going up! – For the first time in a couple of years, the FCC has announced that it is raising its applications fees, to the tune of about 3%-3.5%. Congress requires fee adjustments according to changes in the Consumer Price Index every two years, so there's nothing anybody can do about this. But note that the precise date the new fees will kick in is still up in the air. The Communications Act appears to set the date at 90 days after the FCC notifies Congress of the new rates, but the FCC's public notice announcing the rates says nothing about that. (Some confusion on the FCC's part when it comes to this is not unusual. The last time around the FCC announced the new rates in September, 2008, but they ended up not becoming effective until mid-April, 2009.) Check back to our blog for updates.



Collegiality, behind closed doors – A new bill has been introduced in Congress. The Federal Communications Commission Collaboration Act (FCCCA) would (if enacted) free the FCC from some of the constraints of that pesky old Sunshine Act – you know, the law that, for several decades now, has required governmental agencies to conduct their business out in public. One of the basic concepts behind the Sunshine Act is that the government's business ought to be done out in broad daylight, where the governed can see it all happen.

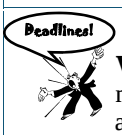
The existing law does not permit more than two Commissioners to get together at any given time to discuss agency business except in a public meeting (with proper notice). But according to Commissioner Copps, that limitation "stifl[es] collaborative discussions", "discourage[e]s collegiality" and "short-chang[es] consumers and the public interest". He doesn't explain exactly why Commissioners might be uncollegial if they're forced to discuss things in front of an audience . . . or, for that matter, why they *would* be collegial if the audience were removed.

The FCCCA is similarly unenlightening. It says that, because of the Sunshine Act requirements, Commissioners end up having to communicate by written messages, through staff-members, and in serial meetings each involving no more than two Commissioners. It also says that use of "such methods of communication has harmed collegiality and communication at the Commission." Its solution is to permit three or more Commissioners to get together to talk about business in private, no public allowed. Some minor requirements would apply (*e.g.*, an attorney from the General Counsel's office would have to be present), but the bottom line would be the privacy that Commissioner Copps would prefer. As far as a record of the meeting goes, well, the Commission would have to post a notice on its website within five days of the meeting, providing "a summary of the matters discussed at the meeting."

A summary is nice and all, but we've seen enough summaries of *ex parte* meetings to suspect that summaries may not convey the entire flavor of just what happened at any particular meeting. Details can be lost in the process of attempting to reconsider back-and-forth, give-and-take discussions – even collegial ones. Summaries might tell part of the story, but they likely wouldn't show how the governmental sausage is really made.

How about this as an alternative? Allow Commissioners to get together whenever they want, out of sight of the public – as long as the meeting is videorecorded, and the recording is posted on-line, in its entirety, within five days. Arranging for recording on short notice shouldn't be difficult for the FCC: it has a permanent, very sophisticated AV set-up in its conference room, available pretty much any time the Commission wants in. (It's likely that AV capabilities are available all over the 8th Floor, too.) So when Commissioners want to meet collegially – that is to say, out of the public eye – no problem. They just call an AV tech (and an attorney from the GC's office), get the gear running, and bingo, let the collegiality flow.

Such a high tech approach would be consistent with the Commission's penchant for whiz-bang, on-line digital solutions to problems. Plus, it would give the public the most accurate possible idea of exactly what went on at the meeting. But maybe we're missing something . . .



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Wyoming 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.

Noncommercial Television Ownership Reports – All *noncommercial television* stations located in **Ohio** and **Michigan** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports – All *noncommercial radio* stations located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Nevada**, **New Mexico**, **Virginia**, **West Virginia**, and **Wyoming** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.