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Memorandum to Clients

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The Swami: Looking At Violent Video Games Now, Seeing Indecency In The Future

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When the Supreme Court agreed to hear a challenge to a California law regulating the sale or rental of violent video games to minors, many First Amendment types like myself asked why. A key issue was whether the Court would carve out a new exception to the First Amendment. And the Court accepted the case just one week after it decided *United States v. Stevens*, in which it emphatically declined to create such a new exception for videos that show cruelty to animals. Why take another First Amendment case so soon? Perhaps the Court was signaling an intent to limit the *Stevens* decision to its particular facts (*i.e.*, animal cruelty videos) by opening the door to regulation of violent video games marketed to human children. And if so, might the Court be opening the door to FCC regulation of violent programming?

After the decision in *Brown v. Entertainment Merchants Association*, it appears the Court knew exactly what it was doing. *Brown* struck down the video game law, relying on *Stevens* in refusing to create another new kind of unprotected speech, even as to minors. Broadcasters should be happy. The decision clearly implies that the FCC does *NOT* have the authority to regulate violent programming. The decision also leads me to conclude that, perhaps more importantly, the Court will side against the FCC in *FCC v. Fox Television Stations*, the indecency case it accepted on the same day *Brown* was decided.

The timing may be a coincidence; it was, after all, the last day of the Court's term. But I prefer to see an interconnected series of events that takes us from *Stevens* to *Fox* in just two moves, with *Brown* linking them together. Six Degrees of First Amendment law.

The focus of *Brown* was a 2005 California law prohibiting the sale or rental of "violent video games" to minors and requiring such games to be labeled "18." (The law defined "violent video games" as those in which "the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that (a) "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors"; (b) is "patently offensive to prevailing standards in the community as to what is suitable for minors"; and (c) "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.")

The federal courts in California had ruled that the law violates the First Amendment. California asked the Supreme Court to reverse that ruling. To California's disappointment, the Supreme Court affirmed the lower court's ruling by a deceptively strong 7-2 vote. Here's a quick summary of the various opinions:

Majority Opinion by Justice Scalia (with Justices Kennedy, Ginsburg, Sotomayor, and Kagan joining):

Justice Scalia once again took up the cause for unpopular speech, acknowledging its rightful place in our society, no matter how tasteless that speech may be. In his words, "disgust is not a valid basis for restricting expression."

Scalia devoted a good three pages to the idea that *Stevens* (the case on animal cruelty videos) not only prevents the creation of a new "unprotected class" of speech, but is just the latest in a series of cases in which the Court rejects attempts to "shoehorn speech about violence into obscenity." Not being a subcategory of unprotected obscene speech, violent speech receives full First Amendment protection. Justice Scalia noted that violence has existed in media for children (*Grimm's Fairy Tales*) to high school reading lists (*The Odyssey*, *The Inferno*, and *Lord of the Flies*), to mainstream novels and films. In rejecting California's argument that video games present a special concern because they are "interactive," Scalia gave a nod to one of my own favorite childhood book series, the "Choose your Own Adventure" books. The California law could have stood only if it met the Court's

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Inside this issue . . .

Roadmap for the broadband juggernaut?

S.911: Senators Set Sights On Spectrum

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The Senate Commerce Committee has approved S.911, a bill – co-sponsored by the Committee's Republican and Democratic leaders – which provides perhaps the most detailed legislative effort advanced thus far to move incentive spectrum auctions closer to reality. (Check out www.CommLawBlog.com for our posts on previous incentive auction bills.) The bill now goes to the full Senate for its consideration, which is far from guaranteed at this point. Additionally, action on some corresponding bill (which has not yet surfaced) in the House will be necessary before S.911 becomes law. So we still have a ways to go before incentive auctions become reality, although some reports suggest that a move might be afoot to graft S.911 (or some similar bill) onto much broader budget-related legislation expected to come down the chute later this summer.

But given its bipartisan origins and the fact that it's already made it to the full Senate, S.911 is probably the horse to watch in the race among incentive auction bills.

The bill's primary focus is the creation of a public safety wireless network which would be controlled by a new governmentally-created corporation (the "Public Safety Broadband Corporation" (PSBC)). TV spectrum re-purposing enters into the picture as a potential source of funding, mainly through the sale of "reclaimed" spectrum to wireless companies. (The bill spreads out over more than 100 pages; the spectrum re-purposing/incentive auction portion takes up only about 20 pages or so.) For purposes of this post, let's focus on the TV spectrum re-purposing/incentive auction aspects of the bill.

Among other things, the bill as originally advanced by Senators Rockefeller and Hutchison provides that:

- No full-power TV licensee would be forced – "directly or indirectly" – to give up spectrum in order to make spectrum available for an incentive auction. But if any licensees were to opt to cough up some or all of their spectrum for such an auction, the Commission would be authorized to cut each such licensee in for a piece of the auction proceeds attributable (in the FCC's judgment) to the spectrum rights that that licensee gives up.
- Licensees choosing to hold onto their spectrum could still run into re-purposing-related hassles. S.911 would authorize the FCC to "reclaim" TV spectrum for re-purposing, opening the door for some involuntary jiggering that could force some TV licensees to move to different channels.
- In imposing such an involuntary move, though, the Commission would only have to make "reasonable efforts" to assure that the re-purposed licensee gets "an identical amount of contiguous spectrum": (a) in the same band (*i.e.*, UHF or VHF) that the licensee is forced to give up; (b) in the same geographic market; and (c) with the same areas/populations coverage and interference protection. But those efforts would be required only to the extent that meeting those conditions is "technically feasible" and "in the public interest". With the same "feasibility" and "public interest" conditions the Commission would also be permitted to make reasonable efforts to allow low band VHF stations (*i.e.*, on Channels 2-6) to move to UHF channels.
- Licensees subjected to involuntary re-packing could also be in line for a portion of the auction proceeds to cover at least some of the costs incurred as a result of any involuntary relocation.
- The FCC would ***not*** be permitted to force stations to share a channel, although licensees who voluntarily elect to channel share would be guaranteed the same MVPD carriage rights they currently enjoy.
- All proceeds of the incentive auctions would be deposited in a newly-created Public Safety Trust Fund (PSTF). Payments to TV licensees voluntarily giving up their spectrum would come from the PSTF. While the bill does not specify exactly how the

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Focus on FCC Fines

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FCC agents won't be ignored – Two cases this month serve as reminders that although FCC rules should never be ignored, they should really, really ***never*** be ignored when an FCC agent reminds you to follow them. Occasionally stations will be inspected by a representative of the Enforcement Bureau who is feeling particularly helpful and who gently reminds the station of a few rules that the station may have overlooked. When that happens, stations should take full advantage of the FCC agent's insight, advice and charity. Failure to do so may result in fines similar to those imposed on Pennsylvania and South Carolina stations this month.

An FCC agent visited a Pennsylvania FM station in April, 2010, and leafed through the public file. Finding no issues/programs lists in the file, he asked the owner about their whereabouts. The owner explained that it looked as if somebody had gone through the file and that some items had been removed. The owner allowed as to how he suspected some of the station's weekend announcers of having gone through the files. He then assured the FCC that he would replace the missing files.

Fast forward ten months to the follow-up FCC station inspection. Upon opening the public file, the inspector discovered that the issues/programs lists were still missing. This time, the owner said that the lists had been moved to storage, but then the roof of the storage building collapsing due to snow. The owner then offered that if they could save any files from storage they would be forwarded to the FCC. Nothing was forwarded to the FCC.

The base fine for missing a significant number of an issues/programs list from a public file is $10,000. However, the FCC decided to tack on a 50% additional penalty for the owner's apparent decision to ignore the first warning. The station has been issued a $15,000 fine.

In South Carolina, an inspector received a complaint that a radio station was not properly lighting its towers. The agent contacted the tower owner and told him to fix the lights, and reminded him that he should immediately notify the FAA of the outage for the protection of aircraft.

Because the FAA tracks the date of notices regarding tower outages, it didn't take much effort for the inspector to determine that the owner didn't notify the FAA until nearly two weeks after having been warned. More disturbingly, the FCC agent inspected the tower four months after the warning and found that the tower still wasn't properly lit. The FCC rang the owner up for $20,000. However, because the owner was able to demonstrate that he was suffering financial difficulties the FCC reduced the fine to $7,000.

Florida translator licensee voluntarily contributes $6,500 – The owner of two Florida FM translators will be forking over $6,500 to the Feds and implementing a compliance plan in order to avoid further investigation into the programming that the translators were carrying and whether or not the stations were turned over to new owners more than seven years ago. The FCC began investigating the owner when it became aware of advertisements that were airing on the translators. The investigation revealed larger problems when the FCC tried to identify who was really running the stations.

FCC rules prohibit FM translator operators from originating their own programming except for emergencies and for very limited fundraising. (How limited? The fundraising exception limits a station to 30 seconds per hour for such material.) FCC rules also limit the purposes for which fundraising can be conducted. The station admitted that it may have been generating its own advertisements to help pay for its operational expenses. In addition, the station admitted that it had turned control of the translators over to another operator several years earlier.

Faced with its own admissions and the FCC's rules, the station chose to enter into a consent decree (the Enforcement Bureau's equivalent of a plea bargain or settlement arrangement). The station has agreed to make a "voluntary contribution" of $6,500 to the U.S. Treasury and to adopt numerous internal compliance procedures. The jury is still out with respect to the operator who took control of the translators without prior Commission approval and ran them for the past seven years.

Telephone call violations lead to $20,000 voluntary contribution – A Newark, N.J., FM licensee has agreed to fork over $20,000 to wrap up an investigation into whether its announcers violated the rule about the broadcast of telephone conversations. That rule, of course, prohibits the recording and broadcast of a phone conversation unless the caller has been notified of, and consented to, the recording and broadcast. The Enforcement Bureau got wind of at least a couple of apparent violations of that rule and launched an investigation. We can only assume that the G-men hit paydirt, as the station agreed to enter into a consent decree pursuant to which it would "voluntarily contribute" $20K to the guv'mint *and* implement a three-year compliance plan designed to avoid recurrences.

Come and get 'em

FCC Unleashes First Round of Media Ownership Studies

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As seems chronically to be the case, the FCC is currently conducting a review of its media ownership rules. (You can thank Congress for that – Congress requires the FCC to conduct a review every four years.) The Commission kicked off its latest review last May, asking a number of fundamental questions about what its media ownership rules should accomplish, and how, if at all, they should be revised.

Thirsting for hard data on which to base its decisions, the Commission solicited nine economic studies to evaluate the current state of the media industry. That's in addition to two studies the Commission is going to prepare in-house. The studies were to develop some metric of performance on the FCC's three public interest goals (*i.e.*, competition, localism, and diversity) and then examine how that metric is affected across markets with different ownership structures.

One year into the process, the Commission has now released for public review five of those research studies. It has also identified by author and title the remaining six studies, which are to be released in their entirety at a later, unspecified date. Based on the study titles, most of the conducted studies appear to closely track those for which the Commission requested quotations. Once interesting change, however, appears to be that Study No. 1 (which has not yet been released), will now attempt to measure "Local Media Ownership and Media Quality." While potentially quite interesting, this focus on quality seems to be a bit of a departure from the "Media usage as a function of local market structure" study for which the Commission sought quotations last year. The Commission has also revealed the title of one of its internal studies, a study of Broadcast Ownership Rules and Innovation.

The validity of the studies' techniques and/or their conclusions are, of course, wide open for debate.

Along with the five research studies themselves, the Commission has also released at least one peer review of each study and, in most cases, a revised draft of the study prepared in response to that peer review. While the brief summaries below attempt to touch on the major conclusions of each study, for those with greater economics backgrounds, it may be interesting to examine the initial and revised drafts of the studies to determine how they have addressed the peer reviews.

The following provides a quick glimpse at each of the available studies and their primary conclusions.

Study No. 3 – "How the Ownership of Media Markets affects Civic Engagement and Political Knowledge, 2006-2008" – attempted through two "projects" to evaluate how media ownership structures in local markets affect civic and political engagement and knowledge of residents of those markets. The study's "Project A" attempted to determine whether certain aspects of local media ownership were related to measures of civic engagement around the 2008 presidential election. "Project B" looked at data regarding the ability of respondents to identify photographs of their local Congressional candidates in the 2006 election; from there it attempted to analyze whether there were relationships between this data and local market ownership structures. Conclusion: The existing data did not show that market ownership structures had any effect on civic and political engagement or knowledge.

The Peer Review Evaluation of Study No. 3, while generally finding that the authors did an admirable job, notes that the underlying datasets were not designed to address the authors' particular research questions. The Peer Review questions the authors' ultimate conclusion that the lack of a correlation provides evidence for the lack of an effect, hypothesizing rather that it is perhaps more likely that the datasets were simply not sensitive to the effects the authors were attempting to measure.

Study No. 5 – "Station Ownership and the Provision and Consumption of Radio News" – aimed to measure the availability of news on the radio, and whether station ownership affects the availability of radio news. The study first concluded that "news" stations (*i.e.*, commercial and public stations that identify their formats as news, talk, or business news) are "almost ubiquitously available" in US markets, with commercial news stations being the most common, followed by commercial talk and public news. The study also concluded (you should probably be sitting down for this one) that commercial and public news stations are not perfect substitutes for each other.

The study did not identify any relationship between concentration of ownership of local news stations and the availability of different varieties of news, but it did find that in markets where commercial news stations are owned by group owners, there are fewer total news stations. There was no evidence that the ownership of a local news station by a newspaper publisher leads to greater news availability. The study and the Peer Review Evaluation both note, however, that because there was no major policy change affecting ownership during the time period (2005-2009) covered by the study, it's difficult to draw any conclusions as to the causation of the patterns found in the data.

Joel Waldfogel, the author of Study No. 5, also authored

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Forgotten but not gone . . . yet

"I See Dead Proceedings"

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In February, 2010, the Commission issued a low-profile Notice of Proposed Rulemaking addressing a number of procedural issues of seemingly minor interest to most of us. In a section titled "Management of Dockets", the Commission observed that it has more than 3,000 open dockets on its books, many of which "have seen little or no activity in years." No surprise there. Conjuring dark images of Docket Death Panels, the Commission ominously opined that "some open dockets may be candidates for termination." The Commission then proposed to authorize its Consumer and Governmental Affairs Bureau (CGB) to "review all open dockets", identify "candidate[s] for termination", consult with the relevant Bureaus and then, WHACK, pull the plug on dockets in which, for example, "no further action is required or contemplated."

Fast forward to February, 2011. In a similarly low-key order, the Commission did indeed empower CGB to euthanize what the FCC now characterized euphemistically as "dormant proceedings". In doing so it gave CGB virtually no guidance to help it identify such proceedings. Candidates for termination with prejudice "might include dockets in which no further action is required or contemplated and dockets in which no pleadings or other documents have been filed for several years" – but would *not* ordinarily include "proceedings in which petitions addressing the merits are pending", unless the parties consent.

When can we get CGB to come to our office to work its magic with ***our*** *backlog?*

Armed with that nebulous mandate, CGB has released for comment its initial list of "dormant proceedings" which, absent objection, will be summarily flushed down the tubes in a couple of months. That list is set out in a 97-page table containing more than 1,000 separate line entries. When you dig into them (see below for how you can do this – the process is not as simple as you might think), you find that a fair number of those individual line entries in turn contain as many as 30 or 40 separate and distinct items. From a casual back-of-the-hand calculation, we'd say that CGB is proposing to dump somewhere close to 1,500 separate and distinct proceedings.

So the FCC could be relieving itself of up to half of its open dockets with little more than a single perfunctory notice.

One question: When can we get CGB to come to our office to work its magic with *our* backlog?

The cut-off formula that CGB has adopted for identifying proceedings suitable for the scrap heap is simple: any "open proceedings in which no action has been taken or pleading filed since December 31, 2004" are fair game. Note that CGB appears to have expanded the scope of its authority. The Commission's February, 2011 order referred to dockets in which "no further action is required or contemplated"; by contrast, CGB has included proceedings in which "no action has been taken". In other words, CGB seems to have concluded that if the FCC hasn't acted on a matter for a few years – for any reason, or maybe even for no reason at all – the matter can be deep-sixed.

So unlike most of the rest of us, if the Commission chooses to ignore something long enough, that something will apparently just go away.

The Commission did provide something of a safety net to protect against the untimely dispatch of still vibrant, or at least viable, proceedings. It required that interested parties be afforded an opportunity to comment before any particular proceeding is terminated. Accordingly, the issuance of a public notice and a reasonable opportunity for public input were imposed as conditions precedent to CGB termination.

CGB's recent notice and accompanying list constitute that notice and opportunity. If you think that you might have a proceeding on that list that you want to snatch from the jaws of dismissal, you've got until ***July 20, 2011*** to plead your case to the Commission. Otherwise, it's curtains.

If you do think that one or more of the 1,500 or so items on CGB's chopping block might be worth saving, you'd better start looking now. That's because CGB's list doesn't identify the parties involved in any of the line items. Rather, the list indicates the relevant Bureau and provides only the proceeding number, the date the proceeding was created, the date of the most recent filing, and the subject matter. (Irony Alert: At least eight of the items include the word "expedite" or "expedited" in the subject description.)

The CGB-provided PDF version of the list also purports to include links to each line item. Don't be fooled – the links don't appear to work. Not to worry, though. Check on our blog (www.CommLawBlog.com) where we've included a link to a CGB-produced Excel spreadsheet which

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In CDBS and ULS, mind your p's and q's

Helpful Tips About FCC Database Updating

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When you close on the acquisition of a broadcast station, you have to file a consummation notice to let the FCC that the deal is done and you're the proud new owner of the station. Everybody knows that. But heads up – while that that consummation notice may update CDBS, it does not update all ULS entries. And that could spell trouble for the unwary.

In 2003, the Consolidated Data Base System (CDBS) and the Universal Licensing System (ULS) were linked. CDBS, of course, is the primary database for broadcast facilities. ULS, on the other hand, is the repository for (among other things) *auxiliary* broadcast facilities. Linking the two means that, when a full service station's information is updated in CDBS, that update information is automatically carried over to the related auxiliary facilities in ULS. This is a very handy time-saving process that keeps the licensee information updated in both CDBS and ULS in one easy step. Thus, a consummation notices filed in CDBS will cause an update to the licensee information in ULS.

Attention must be paid to precisely what information is being updated.

But attention must be paid to precisely what ULS information is being updated in that process – and what information remains unchanged or is simply deleted.

Changing the licensee in CDBS by filing a Consummation Notice in CDBS causes ULS to be updated, overnight, to reflect the new licensee information. However, the process does ***not*** change only the licensee name and address in ULS. In addition, the ULS update strips the FRN associated with the former licensee's name but does ***not*** insert the new licensee's FRN; rather, the update leaves the licensee's FRN information blank in ULS. ***This means each new licensee must manually associate any newly-acquired broadcast auxiliary stations with the new licensee's FRN.***

Furthermore, the contact information for the broadcast auxiliary stations is ***not*** changed during the automatic update. So, the new licensee must also file an Administrative Update in ULS to manually change the contact information.

Therefore, the one-step consummation process must become a three-step process to complete the update in ULS for any acquisition involving broadcast auxiliary stations in ULS:

Step 1 – File the consummation notice in CDBS, then wait two days (one for the CDBS update to kick in, the second for the ULS update to do the same);

Step 2 – Associate the broadcast auxiliary station(s) with the licensee's FRN;

Step 3 – Submit an Administrative Update to change the contact information for the auxiliary station(s).

Also, the automatic update in ULS does ***not*** update the Antenna Structure Registration (ASR) system, even though the both systems are operated by the Wireless Telecommunications Bureau. But the FCC requires that, when a registered tower is acquired by a new owner, that new owner must update ASR records to reflect that change. (Failure to do so can result in fines of several thousands of dollars.) So if you are also buying one or more towers, be sure to add to the following to your checklist of post-closing consummation chores:

Step 4 – File an Ownership Change application in ASR.

If you start down this checklist and run into problems, don't hesitate to reach out to us for help.

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does contain live links to the various proceedings. But that means you have to click on each one to glimpse the underlying paperwork which reflects the party (or parties) involved. As noted above, some of the line items in the spreadsheet lead you to long (some including more than 30 items) secondary lists of parties with no accompanying indication of the nature of the proceeding. To figure out what each of those entries entails, you have to click on each party to review the pleading in question.

On your mark, get set, start looking. How long can it take to click your way through about 1,500 items, anyway?

Whether CGB's approach really satisfies the notice and comment opportunity the FCC required is far from clear. But the Commission's goal is evidently to toss as many proceedings as possible, and CGB's approach is eminently suited for that.

It's possible, of course, that all of the proceedings on CGB's Goner List have been abandoned by their proponents and can, therefore, be put out of their misery. But without considerable effort, it would be impossible to confirm that.

Bottom line: if you filed a petition for rulemaking at any time between, say, 1991 and 2004, and you think you might like to keep it alive, you'd do well to spend some time with CGB's list.

Rule? What rule?

For Years FCC Ignores Own Rule, Pockets Filing Fees

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The Commission has recently "clarified" its rules on application fees due from successful bidders in FCC auctions for broadcast permits. Didn't notice that change? That's possibly because the Commission went to some lengths to downplay the significance of what it was doing – characterizing the revision as nothing more than an effort to "rectify a possible inconsistency", a "clarification" that "does not substantially affect the rights or obligations of non-agency parties". Nothing to see here, folks. Just move along.

But thanks to our good friend Jack Mullaney – long-time RF engineer and, apparently, part-time transparency champion – we can report that there is indeed something to see here, and it does not cast the FCC in a particularly favorable light, transparency-wise (or fairness-wise, for that matter). (Jack learned of the problem and brought his concerns to *Radio World*, whose editors then asked us to investigate further. Good thing they did.)

The question is whether the FCC has, since 2004, been collecting application fees to which it was not entitled. The answer appears to be: "Yes".

Has the FCC been collecting application fees to which it was not entitled? Apparently yes.

The situation arose back when the Commission first started auctioning spectrum in the 1990s. In 1994, Subsection (c) of Section 1.2107 (titled "Submission of down payment and filing of long-form applications") included the following all-encompassing, unequivocal statement:

Notwithstanding any other provision in [the Commission's rules] to the contrary, high bidders need not submit an additional application filing fee with their long-form applications.

Four years later, Congress had granted the Commission authority to auction off broadcast spectrum, and the Commission modified its rules accordingly. At that time (that would be 1998), the FCC indicated in its Report and Order that it intended for successful broadcast bidders to pay application fees at the time they tendered their long-form applications. To achieve that result, of course, the Commission would have had to amend the sentence quoted above from Section 1.2107(c), since that sentence says *precisely the opposite of the intentions expressed in the FCC's passing remark in 1998*.

But this detail apparently fell through the cracks and the rule never got changed.

As a result, Section 1.2107(c) continued in no uncertain terms to dictate – from 1994 until June 28, 2011 – that successful bidders would ***not*** have to file application fees with their long-forms.

Despite that, the Commission's procedural notices concerning most broadcast auctions from 2004 through 2010 consistently indicated that such application fees ***would*** have to be submitted. And, as far as we can tell, the Commission has consistently cashed those fee checks as they have rolled in the door over the years, even though Section 1.2107(c) specifically said that those fees were not required to be paid.

In October, 2009, counsel (another long-time friend, Lauren Colby) for one successful bidder who had paid the application fee wrote to the FCC's Managing Director; he sent a copy of his letter to the Media Bureau as well. In his letter he pointed out the unequivocal language of Section 1.2107(c) and politely asked for a refund.

In mid-March, 2011 – that would be more than 16 months later – Colby received a check, payable to his client, in the full amount he had requested. We understand that no explanatory letter or order accompanied the check, although the check itself did include the memorandum notation "NOT REQUIRED TO PAY FEES".

And on March 3, 2011 – a week or two before that refund check was cut – the Commission issued its order announcing an updated application fee schedule, an order which included a Notice of Proposed Rulemaking (*NPRM*) component looking to completely reverse the crucial sentence in Section 1.2107(c). Under the proposal, application fees *would* be required to be paid with the submission of long-form applications. The Commission said that its proposed change was intended merely to "clarify" the rules and "to resolve any inconsistency" between the rule and the FCC's 1998 statement.

Hold on there. "*Clarify*"? "*Any* inconsistency"? That's kind of like saying that changing one's plea from "not guilty" to "guilty" is a "clarification" intended to resolve some "possible" inconsistency.

The fact is that, since 1994, Section 1.2107(c) has barred any requirement that application fees be paid with long-form applications, and the Commission now has chosen to reverse that. The fact also is that, while the FCC indicated in 1998 that it planned to perform that reversal, it never acted on those plans (until now, at least).

Ordinarily, if the FCC wants to regulate, it does so by adopting rules – and once it has adopted a rule, that rule governs absent formal amendment or waiver. Sure, the

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Patent (claims) pending

Company Asserting Broad Patent Claims in Automated Programming Systems

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Mission Abstract Data. Ever heard of them? Does business as "DigiMedia". Maybe that rings a bell.

You've probably never heard of them under either name. They don't own a single radio station. Yet they might just become the most influential company in radio broadcasting this year.

That's because Mission Abstract Data (MAD) is trying to enforce its rights in two patents granted in 1997. According to MAD, those patents are crucial to the automation of radio programming. So if you happen to be one of the many stations relying to any degree on program automation, you might be hearing from these folks sooner rather than later.

The patents in question are Numbers 5,629,867 and 5,809,246. They are very similar, with nearly identical descriptions of a system for "retrieval of music from a digital database". They cover:

> A digital radio broadcast station which includes a single on-line digital database having stored therein a plurality of at least several hundred (preferably at least 1800) different selections of music to be played and broadcast by the radio station. A processor system is provided for programming the operation of the digital radio broadcast station with a sequence of music selections, which are subsequently retrieved in order from the common digital database and played over the digital radio broadcast station. The single on-line digital database comprises a disk array storage, preferably a dual port RAID disk array. The digital radio broadcast station also includes a plurality of work station consoles for use by personnel responsible for operating the radio station such as disc jockeys and engineers. A bridge network such as a modem is also provided for connecting the radio station to a further digital database for music selections not stored in the common digital database. The processor system is provided with a connection to a telephone network, such that radio station callers can communicate with the radio station by a touch tone telephone, and is also provided with a connection to an interactive cable television network, such that cable television viewers can communicate with the radio station over the interactive cable television network.

The only real difference between the two is that one of the patents covers a "common on-line digital database" while the other covers a "single on-line digital database".

On March 1, 2011 (more than a decade after the patents were first applied for), MAD filed a patent infringement lawsuit against several large radio companies, including CBS Radio, Cox Radio, Cumulus, Entercom and Greater Media (basically most of the superlarge, national radio company other than Clear Channel) for their use of automated programming software across approximately 900 stations.

MAD's claim is really pretty simple: it asserts ownership of the two patents and claims a connection between those patents and most of the radio programming automation software in use today. The basis for the claimed connection consists of several trade publication stories describing the radio industry's reliance on hard drive storage and database access. MAD seeks a permanent injunction, damages, costs and attorneys fees, as well as a post-judgment accounting of damages. Notably, MAD did ***not*** sue any software providers (which would seem a more direct, but also less lucrative, route to protecting whatever patent rights it might hold).

*Notably, MAD did **not** sue any software providers*

The radio companies' answers thus far have been equally straightforward, adopting that age-old legal approach, "deny everything". The radio companies have also counterclaimed by seeking a determination that no patent infringement has occurred and that MAD's patents are invalid.

In short, the whole thing boils down to two questions:

Does MAD have a valid patent at all (which entails a number of subsidiary questions, such as whether equivalent technologies existed at the time the patent was initially sought – if such alternatives did exists, MAD's technology might not be "unique", which could invalidate the patent); and

Does the use of automated systems like Audiovault actually constitute a patent infringement?

This is, of course, an über-simplification of the legal issues in hand. (More detailed descriptions can be found in the archives of such publications as Radio World and Radio Business Report.)

While its initial lawsuit against the Really Big Radio Companies moves forward, MAD is ramping up Phase 2 of its plan for world radio domination. Several medium-sized radio broadcasters, including some clients of this firm, have been contacted by MAD with an offer to allow the

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On the EAS front

FCC Asks Questions, Suggests Extension Of CAP Compliance May Be In Store, Sets Date For National Test

By Lee G. Petro
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The future of the Emergency Alert System (EAS) is here . . . almost. With the release of a Third Further Notice of Proposed Rulemaking (3rd FNPRM), the Commission has raised a welter of questions which, once resolved, should set the penultimate stage between the 20th Century's Emergency Broadcast System and the 21st Century's Next Generation EAS (NG-EAS). Perhaps the most important immediate question for broadcasters: should the current September 30, 2011 deadline for implementing the Common Alerting Protocol (*CAP*) for emergency messaging be extended? (Hint: In view of the number of open questions, the preferred answer is "Yes".) The deadlines for comments on that and the rest of the questions posed by the Commission have now been announced.

And on a separate but related note, the date for the long-awaited national EAS test – which we wrote about back in February – has now been set. Mark your calendars: ***November 9, 2011 at 2:00 p.m. EST***. (Everybody take note: that date occurs just ***after*** the switch back to standard time.)

The process of converting from old-school, broadcast-centric EAS to a more ambitious NG-EAS, which will feature simultaneous messaging across multiple platforms (including cellular, internet, satellite and cable television providers, as well as broadcast radio and TV), has been in the works for several years. (Check out our related post from April, 2010 on www.CommLawBlog.com for more details.) The goal is to implement the CAP across the board. CAP is "an open, interoperable, data interchange format for collecting and distributing all-hazard safety notifications and emergency warnings to multiple information networks, public safety alerting systems, and personal communications devices." It's part of the federal government's deployment of the Integrated Public Alert and Warning System (IPAWS).

Plain language: The Commission wants to move emergency messaging from the historic but limited analog approach to a digital system that can take advantage of all modes of electronic communication.

One problem in moving the process forward, however, has been the fact that the Federal Emergency Management Agency (FEMA) is also an integral player in the process. In fact, FEMA is the agency with primary responsibility for developing the CAP standards. So the FCC had to hold off on telling its regulatees what to do until FEMA had announced those standards. FEMA took care of that step in September, 2010, starting a 180-day count-down to implementation of the standard on the FCC side.

But that count-down got extended another 180 days – to September 30, 2011 – to accommodate equipment vendors and EAS participants, all of whom need time to gear up to produce the necessary equipment, obtain it, install it, test it, etc. The extension also gave the Commission extra time to revise its own EAS rules to address the transition from previous EAS standards to CAP.

The 3rd FNPRM reflects the Commission's latest effort to take care of its end of the project. And a big project it is. After all, while moving multiple industries to a CAP-based system is the ultimate goal, the Commission must still work to maintain the existing system in the meantime. And that's what the Commission is working on now. The plan is to retain the existing EAS while overlaying CAP messaging through RSS feeds and Internet Protocol technology.

The goal is to move emergency messaging from the historic but limited analog approach to a modern digital system.

To achieve that goal, the Commission has issued the 3rd FNPRM, a 74-page (not including appendices, which add another 50 or so pages) thicket of questions, questions and more questions. All EAS participants should take a look at it, but be forewarned: it's not easy reading and, in the end, it's not clear how much input any of us will really have in the final result.

The Commission is looking for comment on the necessary steps that it must take to overlay CAP messages with the current EAS system while trying to move away from the out-dated technology that underlies that system in favor of more modern alert technologies (*e.g.*, RSS feeds). Also on the docket: standards for CAP-compatible EAS equipment and the extent to which any need to certify that equipment could affect the Commission's timetable for requiring compliance.

The Commission is also looking for input regarding the possible use of intermediary devices by EAS Participants that would receive the CAP messaging and translate the message into the format currently used by legacy EAS equipment. These intermediary devices may offer a more cost-effective approach for EAS participants to come into compliance while the Commission and FEMA are considering a more comprehensive overhaul to EAS.

Perhaps the most important question posed by the Commission in the 3rd FNPRM is whether a further extension of the CAP implementation deadline is necessary. Given the depth and breadth of questions asked by the Commission in the 3rd FNPRM, we think it's pretty obvious that

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Study No. 7 – "Radio Station Ownership Structure and the Provision of Programming to Minority Audiences: Evidence from 2005-2009" – which addressed whether ownership structure (*i.e.*, whether an owner has multiple stations in a market) and/or minority ownership influences the availability and consumption of "minority-targeted" programming. The study found that minority listeners (black and Hispanic) demonstrate "starkly different" preferences in radio listening. Generally, most minority-owned stations target minority listeners, although most stations targeting minority listeners are not in fact minority-owned. Not surprisingly, the availability of stations targeting minority audiences tends to attract an overall higher number of minority listeners; also, more minority-targeted programming appears in markets with minority-owned stations.

The study also attempted to address the question of whether common ownership of multiple stations in a market increases the variety of programming formats available – the idea being that a single owner will not program multiple stations in a single format, while separate owners will program to the same popular formats to compete with each other). Conclusion: while there is some evidence to support this argument, the data for the period covered (2005-2009) were insufficient to draw any strong conclusions. The study's authors the Peer Review all acknowledge that the available underlying data somewhat undermine the strength of its conclusions, as minority ownership data were unavailable for 2009, and the available 2005 and 2007 data were very different. The study and Peer Review also both again acknowledge the difficulty in drawing conclusions about causation.

Coming to D.C.?

In addition to releasing the five completed studies, the Commission would be happy to let you peruse the datasets used by the researchers in completing the studies – as long as you sign onto a Protective Order . . . and also as long as you're prepared for a trip to Washington: the Protective Order specifies that the datasets may be reviewed only in person at FCC headquarters. (Appointments are encouraged, drop-in traffic not so much.) You'll also need to sign a Declaration stating that you'll use the data only for purposes of participating the media ownership rulemaking proceeding, and that they won't disclose the data to anyone who hasn't signed the same declaration. You won't be allowed to make any copies of the data, and you'll have to agree that any calculations or analysis you perform using that data will not reveal any "protected information." There is probably some very interesting information in the datasets, and for those with a significant interest in this proceeding, it may be worth conducting further analysis.

Sandwiched between the two Joel Waldfogel studies is Study No. 6, by Matthew Hindman – "Less of the Same: The Lack of Local News on the Internet". The title pretty much sums up the study's conclusion – most local news readership on the Internet occurs at sites produced by existing news sources, with "Web-native" news organizations receiving almost no traffic. Using data provided by comScore, a firm devoted to measuring Internet traffic, Mr. Hindman analyzed usage of local news websites. Using an audience threshold of one percent, the study concluded that most television markets have fewer than a dozen local news sites, and of those, most are affiliated with existing television stations or newspapers. The study also concluded that overall usage of local news websites is much less than has been assumed; this may account, at least in part, for the observation that online local news operations have difficulty becoming financially viable.

The Peer Review Evaluation of Study No. 6 questions the use of the one percent audience threshold, hypothesizing that, collectively, a large number of sites, particularly "hyper-local" sites each with very small readership could add up to a significant amount of aggregate usage, particularly in large markets where niche sites would have greater difficulty reaching a one percent threshold. In response, Mr. Hindman notes that in some markets the size of the comScore samples make a one percent threshold necessary; however, he also finds that the data generally do not in any event support the conclusion that a significant amount of aggregate readership is being directed to local news sites below the one percent threshold. The Peer Review also notes, at least in passing, one of the continuing disputes in the FCC's Media Ownership proceeding: while Study No. 6 is titled "The Lack of Local News", it in fact measures consumption, not availability. The degree to which popularity, rather than simply the availability, of news sources should direct the FCC's policy determinations remains in dispute.

The final released study was Study No. 9 – "A Theoretical Analysis of the Impact of Local Market Structure on the Range of Viewpoints Supplied". This ambitious study attempted to determine whether a market ownership structure leads to viewers receiving better quality information on political issues. The study approached this question by looking at the viewpoint of media outlets, defined as those outlets preference for various political outcomes. The study considered whether certain markets exhibit bias in which media firms suppress information contrary to their viewpoint, or "garble" the signal of other outlets. Through analysis of existing data, as well as laboratory experiments on students at the University of Southern California, the authors attempted to determine how certain types and amounts of competition

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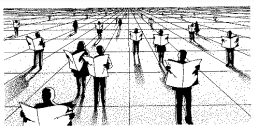
Stuff you may have read about before is back again . . .



Updates On The News

Updates? There's lots to tell, but space and time limitations are putting the squeeze on. Because of that, may we recommend that you take a minute and subscribe to our blog, www.CommLawBlog.com. We update useful information on an on-going basis, not just once a month. If you were a subscriber, you would already know about much of what we're reporting in this issue of the *Memo to Clients* – PLUS you'd know about the latest developments on:

- the move to make some types of unauthorized streaming a Federal criminal offense – a felony, no less;
- effective dates and comment deadlines in proceedings involving STELA and the CALM Act, among others;
- the Paperwork Reduction Act-generated inquiry into whether the public file is necessary;
- and other interesting stuff.

How to subscribe? There are a number of ways. You can go to the blog, scroll down a bit and look in the right hand column for the "Subscribe" option, and then either click on the RSS button (to sign up for automatic feeds) or provide your email address (which will get you an email notification every time we post something new).

Too much hassle? Then don't bother to scroll down, but instead click on the Twitter or Facebook button at the top of the right hand column on the blog and follow us there.

Any way you do it, we don't think you'll be disappointed.

FHH - On the Job, On the Go

Anne Goodwin Crump was elected to the Board of Directors of the Association of Federal Communications Commission Engineers (AFCCE) at its annual meeting in June.

On July 22, **Kevin Goldberg** will be speaking on two panels at the Association of Alternative Newsweeklies convention. Kevin will be speaking about "WikiLeaks and What it Means for FOI" and also "What Can (or Should) Publishers Learn from Recent Legal Kerfuffles".

Also on July 22, **Frank Montero** will be serving as a Presiding Officer at the "Plenary on Entrepreneurship Accelerators—Turning Innovative Concepts into Successful Businesses" at the Minority Media and Telecommunications Council's 25th Anniversary Access to Capital and Telecommunications Policy Conference in Washington, D.C.

Lee Petro will be heading to Murfreesboro, Tennessee on August 3-4 to attend the Tennessee Association of Broadcasters Summer Convention. Lee will be appearing on the Legal, Legislative and Regulatory panel.

And traveling south on August 5 will be **Frank Jazzo** and **Dan Kirkpatrick**, who will present a seminar on the license renewal process for the Arkansas Broadcasters Association at their annual convention in Little Rock.

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provide media outlets with viewpoints the incentives to withhold information that runs counter to those viewpoints.

Ultimately, the researchers concluded that as the number of outlets in a market increases, the costs of withholding or garbling increase, which leads to less of those behaviors, resulting in better information for the consumer. The authors concluded that markets with four firms have better information transmission than those with two, and that there is a further increase with six firms in a market. (Although the authors don't precisely define what counts as a "firm," it appears to include any media outlet with an independent editorial viewpoint.) As a result, the authors suggested that traditional anti-trust analysis, while sufficient to address the Commission's concerns with competition, may not fully address its diversity and localism goals.

Even with the release of only five of its eleven studies, the Commission has provided interested parties with a significant amount of information and analysis to review. The validity of the studies' techniques and/or their conclusions are, of course, wide open for debate, but at least they are available to get that debate going. In its public notice, the FCC noted that, while it is releasing these studies now, it does not yet want to receive comments on them. Instead, it has asked that all interested parties hold their comments until after release of a Notice of Proposed Rulemaking in the proceeding. The public notice did not, unfortunately, give any indication as to when that NPRM may be published.

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the Commission itself still has a fair amount of homework to do – and the FCC is therefore not ready to tell EAS participants that they must comply with yet-to-be-developed rules. The Commission seems to acknowledge this, and asks specifically whether an extension of the current deadline is warranted – possibly to a date following announcement of FCC certification of CAP-compliant equipment. NOTE: the deadline for such compliance is still September 30, 2011, at least for the time being. If you think that that deadline should be extended, you should feel free to let the FCC know in response to the 3rd FNPRM.

And speaking of comments in response to the 3rd FNPM, heads up: the deadline for those comments has just been announced. Comments are due no later than ***July 20, 2011***; replies are due by ***August 4.***

(Continued from page 1)

"strict scrutiny" test: "The State must specifically identify an actual problem in need of solving, and the curtailment of free speech must be actually necessary to the solution." But California failed, said Scalia, to "show a direct causal link between violent video games and harm to minors." Scalia argued that violent video games don't *cause* harmful effects to minors, though there may be a *correlation*. The possibility of a correlation is not enough to restrict free speech, especially in a way that disfavors just one class of speaker: the sellers of video games. Finally, said Scalia, there is no real need for this law in the face of the video game industry's voluntary rating system, which he thinks works better than those used by the music and movie industries.

Concurring Opinion by Justice Alito (with Chief Justice Roberts joining):

Alito and Roberts concurred with Scalia, but their separate opinion feels more like a dissent than a concurrence. In their view, California has the authority to tackle violent video games, but they would require the State to define the term "violent video games" more precisely.

Alito agreed that society has been relatively tolerant of violent content, even where it is available to minors. This longstanding tradition of permitting violent speech to reach even the most sensitive eyes and ears provides all the more reason to clearly define a "violent video game" here. But *Stevens* is not controlling, he concluded, because that case involved the creation, possession or selling of animal cruelty videos by *any person*; by contrast, this case involved the sale or rental of violent video games *to minors*. He also felt Scalia's opinion was far too quick to dismiss the effect of the "first person shooter" aspect of most violent video games on children.

Dissenting Opinion by Justice Thomas:

A few years back Justice Thomas, in the "Bong Hits for Jesus" case, put forward the (to me) astounding theory that, since schools act *in loco parentis*, they can restrict student speech however they see fit. In *Brown* he has taken a similarly wide-ranging and paternalistic stance here: "The practices and beliefs of the Founding generation establish that 'the freedom of speech,' as originally understood, does not include a right to speak to minors (or a right of minors to access speech)." I wonder how Thomas would describe the attitudes toward women and minorities around the time of the Bill of Rights, and how those attitudes play out in current First Amendment law.

Dissenting Opinion by Justice Breyer:

Justice Breyer's dissenting opinion runs 35 pages, about half of which is an appendix listing studies purported to demonstrate a link between violent video games and violent behavior in children. Breyer feels that the California statute clearly explained what is prohibited because, he says, the words "kill," "maim," and "dismember" are no more vague than the word "nudity" as it appeared in an obscenity statute the Court upheld. In fact, said Breyer, the California law is quite similar to the Court's *Miller* test for unprotected obscenity, with only a handful of words differing between the two. In his view, the California law is indeed narrowly tailored to a compelling government interest in protecting children.

Implications for Indecency

As previously noted, the Court has agreed to review *FCC v. Fox Television Stations*. At issue there, of course, is whether the FCC's indecency regime is constitutional under the First Amendment. That regime is meant to protect children from, among other things, "fleeting expletives" and the sight of a woman's unclothed derrière, the allegedly indecent elements in *Fox*. After *Brown*, how will that case come out?

The Swami sees at least five votes against the FCC. Here's what my crystal ball shows, viewed in the light of *Brown*:

Kagan, Sotomayor, and **Ginsburg** will rule for Fox. They were likely to do so anyway; their signing on to the majority in *Brown* only solidifies that in my mind. The fact that Justice **Kennedy** was part of the majority opinion here has me believing he is in the Fox camp as well, because he has generally been strong on First Amendment issues recently.

The Swami sees FCC v. Fox as a 6-3 or 7-2 victory for the broadcasters.

The others are all wild cards to some extent, mainly because their position in *Brown* seems diametrically opposite to positions each has taken in earlier First Amendment cases. Still, any of them could provide that all-important fifth vote for Fox; in fact, it's more likely than not that two or three of these five will side with Fox:

Scalia wrote the majority opinion in *Brown*, so you'd naturally believe he'll take a similarly strict approach to indecency regulation. In fact, he's been one of the strongest supporters of unpopular speech, back to his deciding vote in the *Texas v. Johnson* flag burning case.

But Scalia also seems to have an intense distaste for bad words, and might find a way to rule in favor of the FCC without being (at least in his mind) intellectually inconsistent. For example, in his *Brown* opinion he placed great emphasis on the fact that violent speech is not a subset of already-restricted obscene speech; indecent speech is more closely related to obscenity, which Scalia might see as a meaningful consideration. Similarly, in *Brown* he relied on the traditional tolerance for violent speech in this country, a tolerance not shared with indecent speech.

Still, I'm relatively certain Scalia will put those considerations aside – much as he put aside the avowed distastefulness of these video games – and rule, as he did in *Brown*, that there is no "free-floating power to restrict the ideas to which children may be exposed."

You might expect **Thomas** to vote for the FCC, given his extreme dissent in *Brown*. But don't forget he was the lone Justice in an earlier *Fox v. FCC* case (on administrative procedure issues) to question not only the legality of the indecency regulations, but also the entire underpinning of the

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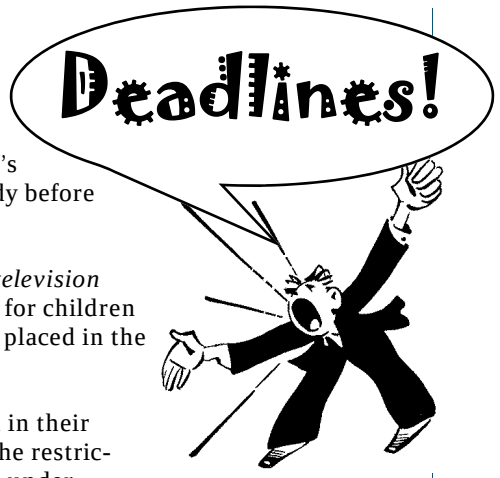

July 10, 2011

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the second 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 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 *commercial* and *noncommercial 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.

August 1, 2011

License Renewal Applications - *Radio* stations located in **North Carolina** and **South Carolina** 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.

Post-Filing Announcements - *Radio* stations located in **North Carolina** and **South Carolina** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on August 16, September 1, September 16, October 1, and October 16.

License Renewal Pre-Filing Announcements - *Radio* stations located in **Florida**, **Puerto Rico**, and the **Virgin Islands** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on August 16, September 1, and September 16.

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **California**, **Illinois**, **North Carolina**, **South Carolina**, and **Wisconsin** 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 **Illinois** and **Wisconsin** 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 **California**, **North Carolina**, and **South Carolina** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

(Continued from page 12)

"scarcity doctrine" that to date has justified heightened regulation of broadcasters.

Roberts has been very strong on free speech, having written the opinions in both *Stevens* and *Snyder v. Phelps* (involving the even more unpleasant conduct of the Westboro Baptist Church). Until his concurrence here, I would have said he's a lock for Fox. I still believe he is going to rule that way, but he seemed ready to distinguish his own opinion in *Stevens*, and could find the FCC's rules more acceptable than the California law in *Brown*.

At the same time, I'm perplexed by **Alito**'s vote to strike down the video game law, since he has been (to my mind) the weakest of the current Justices on speech issues. I think, though, that when push comes to shove, he'll find a way to uphold the FCC.

Finally, there's **Breyer**. Also generally strong on free speech issues, but the most likely of the Court's "liberal bloc" to depart from the others, as he did in *Brown*. He has now shown that he can be persuaded by empirical evidence. Expect those on the FCC's side in *Fox* to try to rely on such evidence. He really could go either way.

In the end, while the names and perhaps the justifications might change, I see *FCC v. Fox Television Stations* as a 6-3 or 7-2 victory for the broadcasters. Watch this space (or check back on our blog at www.CommLawBlog.com).

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FCC can interpret its rules, possibly shifting their emphasis to some degree or extending them to fit novel situations. But you can't really change "thou shalt not" to "of course thou shalt" and call that an interpretation or a shift in emphasis . . . or a "clarification".

So the Commission's effort to downplay this change – an effort which appears to have been totally successful, since the proposed change attracted no comments from the public – might be seen as ever so slightly disingenuous. That's especially so in view of the refund that was issued pretty much simultaneously with the understated *NPRM*. That refund establishes the fact that successful bidders for broadcast facilities were "not required to pay [application] fees". But since 2004 the Commission has routinely advised auction participants that they have to file application fees, and the Commission has apparently collected those fees without notifying the payers that the fees would be refunded on request.

Wouldn't it be the Right Thing To Do for the FCC to simply issue prompt and voluntary refunds?

This seems odd behavior for an agency which has recently railed against the sneaky imposition of unauthorized charges on consumers' phone bills. How exactly is the extended solicitation and collection of unauthorized application fees different?

It seems odd, too, that an agency supposedly committed to "transparency" would fail to address this issue head-on, and would instead use plainly inaccurate language (*e.g.*, "clarify", "possible inconsistency") seemingly designed to distract the reader from the real facts.

Looking for other inaccuracies? How about in the FCC's Order adopting the revised version of Section 1.2107(c), where the Commission explicitly says that the change "does not substantially affect the rights or obligations of non-agency parties". Come again? If successful bidders (those would be "non-agency parties", right?) did *not* have to pay application fees *before* the change, but *will* have to pay them *after* the change, how can the FCC say with a straight face that the "obligations of non-agency parties" aren't being "substantially affected"?

The Commission may be hoping all of this just slides on past without any serious attention from any folks who paid unnecessary fees. Sleazy, perhaps, but the path of least hassle.

Maybe. But wouldn't it be better – indeed, wouldn't it be the Right Thing To Do – for the Commission to go through its records, identify which applicants paid unnecessary fees and how much they paid, and simply issue prompt and voluntary refunds? The Commission surely has records which should provide it all the necessary information to accomplish that task. And a voluntary refund will spare the affected payers the need to engage counsel to file for refunds on their own (a process which will net them less than 100% of what they paid, unless their counsel work for free).

It's difficult, if not impossible, to sort out just where the train left the tracks in this situation. Somebody obviously dropped the ball when the FCC's 1998 passing statement about application fees didn't make it into the rules. In 2004, others failed to realize that, despite that 1998 statement, the rules still prohibited application fees for successful broadcast bidders filing long-form applications – and those others began inserting into auction notices the admonition that such fees *were* required. From 2004-2010, still others neglected to catch that oversight, leaving the same admonition in repeated auction notices. And even in 2009 – nearly two years ago – when we know for sure that, thanks to Colby, the Managing Director was aware of the problem, it *still* took 16 months for the Commission to start to take action. (It's possible that other payers had previously sought and received refunds, and had gone away quietly – we don't know. But if that did happen, the Commission is even more blameworthy for failing to address the problem at that point.)

In the view of this writer, if the FCC wishes to claim the high ground on the transparency and fairness fronts, it for sure owes refunds to those who paid the unnecessary fees – and it also owes the rest of us an explanation.

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broadcasters to "license" MAD's supposedly patented system. (Wordsmith tip: The term "settle" is apparently *not* being used, presumably because no lawsuit has yet been filed or directly threatened). MAD's offer has in some (but not all) cases included a proposed one-time fee based on a combination of (a) the number of stations owned by the broadcaster, (b) the number of years the broadcaster has been operating those stations using allegedly infringing automated programming software, and (c) the company's revenues.

What should you do if you receive such a letter? We're not in the business of giving legal advice through the *Memo to Clients* (and to the extent you might even thing about relying on anything you read in this article or any others in the *MTC* as legal advice, ***DON'T!***). But, if you *have* been contacted by MAD or one of its representatives – and even if you haven't been contacted but your radio programming operations are automated – you may want to think about contacting your legal counsel to determine your options. If you have been contacted by MAD, it would probably be a good idea to respond to the MAD person who contacted you, if only to open lines of communication that might delay the filing of a lawsuit.

One other potentially useful chore: collecting any paperwork relating to your programming software and showing it to your attorney. It's possible that your software provider might be required to indemnify you in the event that you are sued (or even if you merely incur additional costs by signing onto some licensing/settlement agreement with MAD).

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FCC should determine how much each licensee is entitled to, the bill specifies that, at least three months before any incentive auction is conducted, the FCC Chairman must notify Congress of the methodology the FCC plans to use. The bill also indicates that the FCC's methodology must "consider[ ] the value of the spectrum voluntarily relinquished in its current use and the timeliness with which the licensee cleared its use of such spectrum."

- No less than five percent of the PSTF – but no more than $1 billion – would be set aside in a new Incentive Auction Relocation Fund (IARF). The IARF would be available to the National Telecommunications and Information Administration (NTIA) which would, in consultation with the Commission, dole out funds to licensees (and MVPDs) to reimburse them for the "reasonable costs" of equipment, installation and construction necessary to accommodate any re-packing that is ordered.

So like most (if not all) of the other incentive auction bills that have been tossed into the mix thus far, S.911 would give the FCC broad discretion with respect to how much any licensee is likely to get for voluntarily giving up its spectrum. The bill does appear to mandate that payments to such volunteers would be pegged to the spectrum's value as it is currently being used – which would in many instances likely result in a lower number than if it were pegged to the anticipated value of the spectrum in the hands of a wireless operator. And by assigning a priority to folks who clear out quickly, the bill obviously encourages those who are willing to act fast.

As far as reimbursement for costs arising from re-packing go, we are similarly in the dark: we know that those costs would get paid out of the IARF, and we know that the IARF would be no less than five percent of all incentive auction proceeds, but no more than $1 billion. Beyond those very wide parameters, though, we can only speculate.

In other words, the size of the pot of gold at the end of the incentive auction rainbow is still anybody's guess.

While S.911 includes considerably more detail than other spectrum re-purposing bills we've seen, it's still way too early to draw reliable conclusions about what the re-purposing process will eventually look like. How come?

First, the version of the bill that's been available for review is the initial version offered by Rockefeller and Hutchison. It was subject to multiple proposed amendments in Committee before being voted on. While we believe that none of the Committee amendments directly affected the provisions described above, we haven't yet reviewed the "approved" version of the amended bill to be sure.

Second, even if the amended bill doesn't change the provisions we have described, it's always possible that the full Senate might change them as the bill works its way through the legislative process. And let's not forget the House, which could also insist on changes.

Third, even if the bill were to be enacted exactly as originally drafted, it still provides few if any reliable details about just how the re-purposing process would affect TV licensees. From the currently available draft it's impossible to say:

- ☑ how much a licensee would get for voluntarily turning in its spectrum;
- ☑ what kind of involuntary spectrum location might be in store for those who don't turn in their channels. (Remember, the bill would require only that the FCC make "reasonable efforts" to achieve particular results – like identical amounts of spectrum, etc. – and then only if such results are "technically feasible" and "in the public interest". That's a heap of wiggle room.)
- ☑ how much a licensee would get reimbursed for such involuntary relocation.

Of course, there's also the practical reality that the bill might not be enacted at all. Again, the focus of the bill is not on TV spectrum but rather on establishment of a public safety wireless network. TV re-purposing would just be one of several preliminary steps on the way to that goal. Importantly, a core proposal in the bill – *i.e.*, creation of a new corporation that would hold the nationwide license for that network – could prove to be controversial. Ditto for the way(s) in which the bill proposes to allocate the funds that would be realized from incentive auctions.

All of which is to say that S.911 is far from the last word on any of this. But it does give us all something to focus on, and it reminds us that the juggernaut of spectrum re-purposing is still a force that we are likely to have to reckon with, sooner or later.