Fletcher, Heald & Hildreth

Memorandum to Clients

July, 2011 News and Analysis of Recent Developments in Communications Law No. 11-07

Out for comment: major market carve-out for LPFMs

LPFM v. FM Translator: The FCC Moves to End the Stalemate

By Peter Tannenwald
tannenwald@fhhlaw.com
703-812-0404

It looks like the long-running stand-off between FM translator applicants and low power FM (LPFM) applicants may finally be heading toward some resolution. And from initial indications, it looks like the LPFMers are likely to get the first crack at available spectrum, based on a Third Further Notice of Proposed Rulemaking (3rd FNPRM) released in mid-July.

The FCC's action is, of course, an upshot of the enactment of the Local Community Radio Act (LCRA). The LCRA was Congress's effort to help sort out the translator/LPFM problem which has been festering for years.

The 3rd FNPRM invites comments on ways to increase the available opportunities for LPFM applications. In particular, the proposed new rules would favor LPFM over FM translators in the top 150 markets by ensuring some LPFM spectrum availability before any new translators are authorized. Score one for LPFM. But on the translator side, the Commission is proposing ***not*** to re-impose its on-again-off-again limit of 10 translator applications per party – at least not in areas where translator applications survive the new rules. (The Commission imposed a 10-application limit back in March, 2008, only to suspend it a month later.) Additionally, the freeze on the processing of translator applications would be lifted in "smaller markets and rural communities", *i.e.*, in places where there's space for both new LPFMs *and* new translators.

Inside this issue . . .

To determine where translators might be allowed, the 3rd FNPRM contemplates an LPFM channel "floor" in the top 150 markets: unless a certain number of channels are available for LPFM in any specific market, no new FM translator applications would be accepted in that market, and any pending translator applications for that market would be dismissed. In the Commission's view, "faithful" implementation of the LCRA entails insuring LPFM licensing opportunities in "spectrum-limited" markets – so, as the FCC sees it, favoring the creation of LPFM rather than translators in such markets (*i.e.*, most major markets) is the way to go.

After extensive analysis of data relating to possible LPFM spectrum availability in the top 150 Arbitron markets (and some additional markets with more than four translator applications pending), the FCC decided that the following floors would be appropriate:

Markets 1-20	8 LPFM channels
Markets 21-50	7 LPFM channels
Markets 51-100	6 LPFM channels
Markets 101-150 (and smaller markets with more than four pending translator applications	5 LPFM channels

The Commission issued a list of all markets studied, showing which ones could fit both LPFMs and translators, and which ones could accommodate only LPFMs. (Interested in just how extensive the FCC's analysis was? Check out the accompanying sidebar on page 18.)

Comments are invited on various important details, including the Commission's preliminary conclusions about floor levels and whether existing LPFM stations – or only channel availability for new stations – should be counted in determining whether the floor test has been met. Also, since the LCRA refers to "communities" rather than "markets", the Commission is looking for input on whether it is appropriate to rely on Arbitron markets. (Justifying its initial reliance on Arbitron, the Commission observes that, given the nature of the LPFM application process – in which applicants select their own proposed communities of license – it's impossible for the Commission to determine in advance precisely what specific

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Countdown to lo-po digital

Analog LPTV: The End is . . . September 1, 2015

By Peter Tannenwald
tannenwald@fhhlaw.com
703-812-0404

Apparently, when the Commission decides to crank out a groundbreaking item concerning some aspect of the DTV transition, the time to do it is Friday – late Friday. (Who can forget consecutive Friday the 13ths in February and March, 2009, for example?) So it shouldn't have surprised anybody when, around dinner time on Friday, July 15, the FCC released its long-awaited *Second Report and Order* (*2d R&O*) announcing a final end of the Class A TV, Low Power Television and TV Translators (we'll call all three "LPTV" for purposes of this article) digital transition. Mark your calendars – the analog LPTV curtain is now set to fall on ***September 1, 2015***, unless the LPTV operation (analog or digital) is on Channels 52-69, in which case the operation must shut down on ***December 31, 2011***, regardless of whether the licensee has been able to find an available lower channel. But if you have a companion channel or flash cut CP, you now have until September 1, 2015 to build.

Here's a summary of the primary aspects of the new rules governing the end of analog LPTV:

Analog Curtain Lowers. LPTV licensees have been in digital limbo for years, allowed to convert to digital voluntarily but not knowing for sure when they would be forced to join the DTV ranks. Getting the allotment of full power DTV channels squared away was one factor that had to be resolved first – but that occurred two years ago. In the meantime, though, the Commission has embraced the notion of "repacking" the spectrum to squeeze out more space for broadband use by removing up to 20 broadcast TV channels. The anticipated "repacking" process is almost certain to affect a sizable number of full power DTV allotments, which would in turn affect the spectrum available for digital LPTV.

Recognizing that it would be rather harsh to impose a digital transition deadline on LPTV stations before the effects of the anticipated "repacking" program can be known, the FCC figures that a four-year transition period, ending on September 1, 2015, should provide adequate time for all concerned. (The FCC does not agree with commenters who urged that marketplace forces should be allowed to dictate the pace of the transition.)

The FCC has encouraged NTIA to ask Congress to extend the existing program for reimbursing LPTV digital transition costs. Some $30 million remain in unspent funds in that program. The FCC does not discuss either: (a) the program's statutorily-mandated eligibility criteria, which strongly favor the most rural stations and completely exclude urban stations; or (b) the program's dollar limits of $6,000 and $20,000, neither of which fully covers conversion costs.

No More New Analog Licenses. The *2d R&O* affirms the FCC's earlier decision to dismiss all pending applications for new analog LPTV stations that were not amended by May 24, 2010, to specify digital operation. No surprises there.

Relief for the Nervous. Digital equipment is expensive, money doesn't grow on trees, and banks are not known for their generosity. To ease these burdens, the FCC has automatically extended all currently outstanding digital CPs for flash cuts (*i.e.*, on-channel conversion to digital) or digital companion channels for existing analog stations. No matter when those permits were issued or how many extensions were previously requested, all these permits have now been extended to September 1, 2015.

Construction permits for *new* stations have *not* been automatically extended. All such existing permits and future permits will expire three years after issuance. Moreover, if someone holds permits for analog and digital companion channels, both unbuilt, the *earlier* expiration date on the analog permit will remain the expiration date for *both* permits. However, the permittee need not build out the analog station to save the digital permit. Construction of just the digital facility will be sufficient; once the digital facility has been built and licensed, the associated analog permit will be canceled.

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FLETCHER, HEALD & HILDRETH P.L.C.

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
Tel: (703) 812-0400
Fax: (703) 812-0486
E-Mail: Office@fhhlaw.com
Web Site: fhhlaw.com
Blog site: www.commlawblog.com

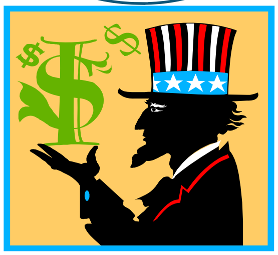
Co-Editors
Howard M. Weiss
Harry F. Cole

Contributing Writers
Anne Goodwin Crump,
Dan Kirkpatrick, Steve Lovelady
R.J. Quianzon, Lee G. Petro
and Peter Tannenwald

FCC determines Alaska is cold in winter — In December, 2005, the FCC issued a construction permit for a new AM station in Wasilla, Alaska. The FCC provided the standard three-year window within which to build the station and, as some broadcasters are prone to do, the new owner waited until the end of that window to complete construction, meaning that the station wasn't finished until December, 2008. We're talking Alaska here – winter comes early up north. When the station began operations in December there was three feet of snow on the ground.

Focus on FCC Fines

By R.J. Quianzon
quianzon@fhhlaw.com
703-812-0424



While the owner was building the new station, neighbors near the transmitter site tried to stop the construction. The FCC received complaints about the site and, in February, 2006 (*i.e.*, shortly after the station began broadcasting), an FCC agent paid the station a visit. During that inspection, the agent found that the station's tower was surrounded by a temporary snow fence which was anchored with concrete blocks and wooden stakes only partially sunk into the ground. The agent decided that the snow fence was not an effective enclosure around the tower and proposed fining the station $7,000.

The station's licensee objected to the proposed fine. The station, after all, had been built in Alaska in December, for crying out loud. To drive the point home unmistakably, the licensee pointed out that there were three feet of snow on the ground during the construction process, and that the daytime temperature never got above zero. (It also offered the additional factoid that nighttime temperatures dipped to 20 below zero – although it's not clear why that was relevant, since presumably the construction process was accomplished during the day.) The station also noted that by the time spring arrived, a fully functional chain link fence had been installed (as the Commission inspector apparently confirmed on a return visit).

Upon review of the agent's decision, the FCC's regional director seemed persuaded that Alaska could be cold during the wintertime. Because of the licensee's efforts to do the best it could under difficult meteorological circumstances – and also because the licensee had gone into receivership in 2010 – the director ordered that the fine be eliminated.

North Carolina AM gets violation hat trick, nets $25K fine — If we were to prepare a Top Ten list of violations uncovered during FCC inspections, we'd guess that three particular items would appear on that list: improper public file maintenance; improper tower enclosures, lighting or painting; and improper EAS maintenance. All three are easily spotted during even the most cursory inspection – identifying improper tower maintenance can require little more than a slow drive-by, and it takes only a couple of questions and maybe a quick glance at some station records to detect public file and EAS shortcomings.

A North Carolina station was recently fined for all three violations.

In response to a complaint about the AM station, an FCC agent inspected the transmitter (twice) and the studio (once). The inspections turned up several violations and an interesting explanation from the station owner.

Upon approaching the transmitter, the FCC agent observed that the gate to the transmitter wasn't locked and the fence was in disrepair. That's a $7,000 violation right there.

A tour of the studio with the General Manager disclosed that neither EAS equipment nor any public file was available for inspection. EAS violations run $8,000, and public file violations add another $10,000, bringing the damage to a total of $25,000.

When the licensee responded to the FCC's initial written inquiry about the violations, it indicated that at the time of the inspection the EAS gear and the public file were in transit to the station's new studio. It also said that the EAS equipment needed to be repaired. But the GM hadn't mentioned any of that during the inspection. And even if the licensee's after-the-fact explanation were accurate, the fact remained that the station was plainly in violation of the rules at the time of the inspection. (The licensee didn't do itself any favors by: (a) advising the Commission that the licensee would submit evidence about both the need to repair the EAS unit, and its subsequent repair and re-installation; and (b) then failing to provide any such evidence.)

The licensee still has at least another opportunity to argue its case, but given what's gone down thus far, we're guessing that it's unlikely to come up with an explanation that will satisfy the Commission.

"Eligible entity", newspaper cross-ownership rules sent back to FCC

The Third Circuit Strikes Again

By Dan Kirkpatrick
kirkpatrick@fhhlaw.com
703-812-0432

Remember in the original *Planet of the Apes*, when Charlton Heston had gone through years of space travel and wild adventures, only to find after all that that (SPOILER ALERT) he really hadn't gone anywhere at all and was just back where he'd started from?

Welcome to the FCC's media ownership rules which in early July got deposited back at Square One by the U.S. Court of Appeals for the Third Circuit.

With one major exception (*i.e.*, the Newspaper/Broadcast Cross-ownership (NBCO) rule), the Court affirmed the Commission's 2008 Ownership Order. But bear in mind that, in the 2008 Ownership Order, the Commission largely (but not entirely) reversed its own 2003 Ownership Order in response to a 2004 Third Circuit decision. And bear in mind, too, that the 2008 Ownership Order was adopted by a Commission led by Kevin Martin, a Republican. The Third Circuit had stayed the effectiveness of the 2003 Ownership Order, and had continued that stay for the 2008 Order as well. (Last year the Court lifted that stay, allowing the 2008 revision to the NBCO rule to go into effect temporarily; in light of the new Third Circuit opinion, the issue of the stay is now moot.) In 2009, the Commission – now under new management, *i.e.*, Democrat Julius Genachowski – asked for that stay to remain in place, meaning that the current Commission is not necessarily keen on the 2008 decision which largely reverted to the pre-2003 ownership rules.

The Court's problem is with the process by which the Commission arrived at its latest approach.

Oh yeah – and in a move that could prove very problematic for some, the Court also rejected parts of the Commission's separate 2008 decision (the Diversity Order) providing enhanced opportunities for certain "eligible entities".

Confused? Join the club.

Some history might be useful here.

Congress has ordered the FCC to review its ownership rules every four years. In 2002, the Commission (under then-Chairman Powell) started such a review. It was a highly contentious proceeding, with hundreds of thousands (if not millions) of comments filed and much rancorous debate inside and outside the Commission. The upshot was the 2003 Ownership Order. Under that order, the ownership rules generally were abandoned and replaced by a different set of limits (dubbed "Cross-Media Limits") calculated through a "Diversity Index" applicable to all forms of media cross-ownership.

Numerous appeals were filed, ending up in the Third Circuit, which promptly stayed the effectiveness of the 2003 Order. In 2004, the Third Circuit shipped a number of aspects of the 2003 Order back to the Commission for further consideration. The Court did agree with the Commission that a complete ban on newspaper/broadcast cross-ownership (in effect since 1975) was no longer necessary. BUT the Court concluded that the new cross-ownership limits as a whole had not been adequately supported by the Commission. So with the stay still in place (and with it, the pre-2003 rules), the Court remanded cross-ownership back to the Commission.

In 2006 the Commission started work on its next quadrennial ownership review. Since the Commission was then still looking at the 2003 rules thanks to the 2004 remand by the Third Circuit, the Commission folded that into its 2006 review. The end result was the 2008 Ownership Order. In that order the Commission ditched its 2003 Cross-Media Limits/Diversity Index approach, opting instead for its pre-2003 rules and standards relative to broadcast ownership. With respect to the NBCO rule, however, it chose not to revert to the pre-2003 absolute ban on newspaper/broadcast cross-ownership. Rather, the 2008 Order permitted such cross-ownership on a case-by-case basis, with a presumption that some limited cross-ownership would be permitted in the largest markets.

Many of the parties who had appealed the 2003 Order also appealed the 2008 Order.

In its latest decision, the Third Circuit has again sent the NBCO rule back to the Commission. It's not that the Court necessarily disagrees with the FCC's case-by-case approach. The Court's problem is with the process by which the Commission arrived at that approach: while the Commission had issued a notice of proposed rulemaking generally indicating that it planned to revisit the NBCO rule, the Court felt that that notice didn't provide the public with enough of a description of the approach ultimately adopted.

[*Wonk Warning: Esoteric Legal Discussion Ahead. Proceed with Caution.* This aspect of the Court's ruling is particularly interesting to administrative lawyers. Agencies are required by the Administrative Procedure Act to describe "either the terms or substance of the proposed rule or description of the subjects and issues involved." Ordinarily that requirement has not been interpreted to require the agency to spell out its proposals in exhaustive detail; to the contrary, many agency rulemaking actions that don't conform to the specifics of the underlying notice of proposed rulemaking have been upheld as long as the actions were a "logical outgrowth" of the proposal. The Third Circuit's rejection of the "logical outgrowth" doctrine here will pro-

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The Third Circuit made us do it

Commission Slams Door on CP Extensions for Eligible Entities

By Anne Goodwin Crump
crump@fhhlaw.com
703-812-0426

From our Unintended Consequences File: The recent Third Circuit decision on multiple ownership rules – which took the Commission to task for failing to do more to promote minority and female broadcast ownership – has led to the abrupt termination of a Commission policy intended to (wait for it) promote minority and female broadcast ownership. While there remains at least a chance that that termination may be forestalled, a recent public notice from the FCC has set the termination process in motion.

Under the policy at issue, the Commission extended unbuilt broadcast construction permits by 18 months when they were assigned to "eligible entities". An "eligible entity" was generally defined as an entity that qualified as a small business under the standards of the Small Business Administration for industry groupings based on revenue. The policy was first announced in the Commission's Diversity Order released in 2008, as part of a wide-ranging agency effort to promote "diversity".

As we report elsewhere in this issue (check out page 4), the Third Circuit found that the FCC had not shown how its revenue-based definition of eligible entity would advance its goal of promoting minority and female ownership of broadcast stations. Accordingly, the Court tossed the policy, preventing the Commission from continuing to utilize it at all.

Any grant of a CP-extending "eligible entity" assignment that has not become final as of the issuance of the court's mandate has big problems.

In response, the Commission has issued a public notice alerting potentially affected permit holders and prospective permit assignees of the effect of the Court's decision.

To understand the way the shut-down will work, you have to understand the concepts of (a) "finality" of FCC actions and (b) issuance of the "mandate" relative to the court's action.

A grant of an "eligible entity" assignment application – along with the corresponding extension of the underlying permit – becomes final 40 days after public notice of the grant (barring any petition for reconsideration, application for review, or other intervention by the Commission on its own motion).

The court's decision becomes effective when the court issues its "mandate" to the Commission, telling the Commission that the agency's got to comply with the court's decision. Under the Federal Rules of Appellate Procedure (Rule 41, if you're checking), an appellate mandate is supposed to issue seven days after the deadline for seeking rehearing has passed or, if rehearing is sought, then seven days after rehearing is denied. The deadline for seeking rehearing is 45 days after the court's opinion is issued. Note, however, that parties can also ask the court to hold off on issuing its mandate. The Third Circuit decision was issued on July 7 – which means that the deadline for seeking rehearing would ordinarily be August 21 and, if rehearing isn't sought and the issuance of the mandate isn't delayed, we can expect to see the mandate pop out on August 29 (August 28, technically the seventh day after August 21, being a Sunday).

Applying those concepts to the problem at hand, the Commission has come up with the following.

CP-extending "eligible entity" application grants that become final prior to the issuance of the Third Circuit's mandate are safe – they will *not* be affected by the Third Circuit's decision. This means that any such application whose grant showed up on a public notice issued at least 41 days prior to August 29 should be OK. (We do the math so you don't have to: 41 days prior to August 29 is July 19.)

But any such grant that has *not* become final as of the issuance of the mandate has big problems. In such cases, the expiration date of the construction permit at issue will automatically revert back to its original, non-extended date. If that non-extended date has already passed and the permit has, thus, expired, the staff will rescind the grant of the assignment application and dismiss the application (since, technically, there's nothing left to assign). If the non-extended date has not yet passed, the grant of the assignment will remain in effect – but the assignee will be subject to the permit's original construction deadline, and the likelihood of getting that deadline extended is negligible.

For any CP-extending "eligible entity" assignment application that hasn't yet been acted on, the news is equally grim. Any such application involving a permit that has already expired will be summarily dismissed. If the permit hasn't expired, the Commission will process the assignment, but the buyer will be getting the permit as is, without any extended construction deadline. Again, the likelihood of any such extension is negligible.

Is there any ray of hope here? If the Third Circuit's mandate is delayed, presumably the Commission's ax won't

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2011 Reg Fees Set

Sometimes the best surprise is no surprise at all. And the FCC has surprised at least some of us with its release of the final 2011 regulatory fee schedule. The surprise? As it turns out, with one very minor exception, the final fees are identical to the fees the Commission proposed back in May. (The one exception: the fee associated with satellite TV construction permits is $670, which is a whopping $5 less than the fee that was proposed back in May.) This is a surprise because last year, the Commission's initially low (relatively speaking) proposed fees got jacked up when the final fee schedule was published, but to the disappointment of many.

On the opposite page you can find a handy table listing the final 2011 reg fees. We've also included in the table listings of the differences between this year's fees and last year's, in case you're interested in that kind of thing.

If you wade into the fine print of the Report and Order accompanying the new fee schedule, you find some routine caveats. For instance, you'll be expected to use the FCC's Fee Filer system to pay your reg fees (no real surprise there), and the Commission will not be sending out hard copy "pre-bills" to let everybody know what they're on the hook for (ditto). (Helpful tip: the information that you would have received in a paper pre-bill will be available at Fee Filer, but don't forget to double check that information – the Commission has been known to make mistakes, and its calculations have historically *not* included fees for any auxiliary licenses you might have.)

> *The Commission hasn't announced the deadline for payment yet, but it does allude in passing to a "September 2011 filing window".*

The Report and Order does include an interesting statement relative to low power TV/Class A/TV translator fees.

Because of the on-going transition to digital operation in that particular sector, LPTV/Class A/Translator licensees may be operating a single analog station, or a single digital station, or two companion stations (one analog, one digital). Regardless of the mode you're in (*i.e.*, digital or analog), the FCC will be looking for a reg fee from you. That's not unreasonable. But then the Commission adds: "In instances in which a licensee is operating in both an analog and digital mode as a simulcast, a single regulatory fee will be assessed for this analog facility that has a digital companion channel." Note, in particular, the phrase "as a simulcast". It's not clear exactly what that is intended to mean.

Presumably, if you have two companion channels, each broadcasting identical programming (one in analog, one in digital), you'd only owe a single reg fee. And if you have two such channels but provide completely different programming on each, we're guessing that the Commission expects you to pay two separate fees, one for each.

But what if you're using the digital station to provide not only a digital version of the analog's programming, but also streams of other, completely separate programming? Arguably you'd be operating the two stations as a simulcast, meaning you'd only be stuck with a single fee. But the fact that you're providing additional programming on the digital station might mean that it's not a "simulcast" as the Commission means it. We don't know what the answer to this seeming conundrum is, but if you're in this situation, it would probably be a good idea to get the answer tied down before you decide how much to pay.

And speaking of paying, heads up. The Commission cautions that the fees are due when they are due, payable in full, thank you very much. (Late filers get hit with a 25% late fee.) If you think you're entitled to a full waiver, or even just a reduction, you're supposed to tender the full amount by the deadline, along with your request for waiver/reduction. If you'd rather not tender any payment at all with your request, you've got to request a deferral of the deadline – and that request must be accompanied by a showing of financial hardship. In other words, you can't just plead poverty and expect to avoid having to pay by the deadline; rather, you have to document your hardship at the time you request the waiver/reduction.

Which brings us to the question of deadlines. When are this year's fees due? The Commission hasn't announced that yet, but it does allude in passing to a "September 2011 filing window". Looks like we may not have to forfeit the deposit on that August beach house rental after all. (Check back at www.CommLawBlog.com for updates on the deadline front.)

Finally, the Commission wraps up its Report and Order with a commitment to revisit "the nature and extent of all changes that need to be made to our regulatory fee schedule and calculations". That inquiry – which the FCC assures us will be initiated before the end of 2011 – may lead to a "reassess[ment of] the regulatory fee burden of all fee categories" as well as a "rebalancing of regulatory fees among existing service providers". The Commission has been toying with the notion of such a proceeding for years, but this time it seems to be serious about it. We'll see.

Fee Category	Final 2011 Annual Regulatory Fee (USD)	Change from final 2010 Fees
TV VHF Commercial Stations		
Markets 1-10	**84,625**	**(+3,075)**
Markets 11-25	**68,175**	**(+4,900)**
Markets 26-50	**40,475**	**(-2,075)**
Markets 51-100	**22,750**	**(-1,000)**
Remaining Markets	**6,100**	**(-25)**
Construction Permits	**6,100**	**(-25)**
TV UHF Commercial Stations		
Markets 1-10	**34,650**	**(+2,375)**
Markets 11-25	**32,950**	**(+2,875)**
Markets 26-50	**20,950**	**(+2,050)**
Markets 51-100	**12,325**	**(+775)**
Remaining Markets	**3,275**	**(+225)**
Construction Permits	**3,275**	**(+225)**
Low Power TV, TV/FM Translators/Boosters	**395**	**(-20)**
Other		
Broadcast Auxiliary	**10**	**NC**
Earth Stations	**245**	**(+5)**
Satellite Television Stations		
All Markets	**1,250**	**(-50)**
Construction Permits	**675**	**NC**

Commercial Radio Stations						
Population Served	**AM Class A**	**AM Class B**	**AM Class C**	**AM Class D**	**FM Classes A, B1 & C3**	**FM Classes B, C, C0, C1 & C2**
<=25,000	**700 (+25)**	**575 (+25)**	**525 (+25)**	**600 (+25)**	**675 (+25)**	**850 (+25)**
25,001 -75,000	**1,400 (+50)**	**1,150 (+75)**	**800 (+50)**	**900 (+25)**	**1,350 (+25)**	**1,500 (+50)**
75,001 -150,000	**2,100 (+75)**	**1,450 (+100)**	**1,050 (+50)**	**1,500 (+50)**	**1,850 (+25)**	**2,750 (+25)**
150,001- 500,000	**3,150 (+100)**	**2,450 (+150)**	**1,575 (+75)**	**1,800 (+75)**	**2,875 (+75)**	**3,600 (+50)**
500,001 -1,200,000	**4,550 (+150)**	**3,750 (+250)**	**2,625 (+125)**	**3,000 (+125)**	**4,550 (+100)**	**5,300 (+75)**
1,200,001- 3,000,000	**7,000 (+250)**	**5,750 (+350)**	**3,950 (+200)**	**4,800 (+200)**	**7,425 (+175)**	**8,500 (+150)**
>3,000,000	**8,400 (+300)**	**6,900 (+425)**	**5,000 (+250)**	**6,000 (+250)**	**9,450 (+200)**	**11,050 (+200)**
AM Radio Construction Permits	**490 (+100)**					
FM Radio Construction Permits	**675 NC**					

(Continued from page 4)
vide fodder for law review articles and appellate arguments for some time to come.]

The Court's dissatisfaction with the process leading to the 2008 NBCO rule may have been a reaction to the untidiness of that process. The FCC's underlying NPRM plainly put everybody on notice that some change to the NBCO rule was on the table. But no specifics surfaced until then-Chairman Martin authored an op-ed piece in the New York Times disclosing what he personally had in mind. That piece appeared barely a month before the 2008 Ownership Order incorporating Martin's approach was adopted. The Court seemed troubled by this chronology, even though the op-ed was accompanied by a simultaneous invitation for comments on Martin's suggested NBCO rule. Further complicating matters were the facts that drafts of the 2008 Order were circulating before the comment period relative to Martin's proposal wrapped up, and the final vote occurred just one week after the close of the comment period.

According to the Court, the FCC was obliged to (a) remain "open-minded" about the issues raised and (b) engage with the substantive responses submitted. As the Third Circuit saw it, the 2008 process fell short of those obligations, at least with respect to the NBCO rule. So back to the Commission goes the 2008 revision to the NBCO rule, with instructions to ensure that the APA is followed in any further revisions. As a result, the Commission's outright ban on newspaper/broadcast cross-ownership, first adopted in 1975, is now back in force.

Having sent the NBCO rule back, the Court next addressed the five permanent waivers of that rule that the Commission granted in the 2008 Ownership Order. Despite "several concerns" with these waivers, the Court has left them in place because the folks challenging the waivers in court hadn't sought reconsideration of the waivers at the FCC first – so the Court doesn't have jurisdiction to consider them on appeal.

Despite its unhappiness with the NBCO aspect of the 2008 Order, the Court upheld the Commission's decision to retain, essentially unmodified, its other primary media ownership rules: the radio/television cross-ownership rule; the local television ownership rule; the local radio ownership rule, including AM/FM subcaps; and the dual network rule. In a very brief discussion, the Court concluded that the FCC adequately justified the retention of each of these rules. Note, though, that these rules are essentially the same that were in effect prior to 2003.

The Court also rejected, almost in passing, constitutional challenges to the cross-ownership rules as a whole. In particular, the Court adhered to the decades-old "scarcity doctrine" as a justification for broadcast regulation. Despite the proliferation of new media voices in recent years, the Court concluded that the scarcity rationale – *i.e.*, that "more people would like to access the [spectrum] than can be accommodated" – remains valid. As a result, the broadcast media continue to receive limited First Amendment protections.

Now, about that Diversity Order.

Back in 2004, when the Third Circuit remanded the 2003 Ownership Order, the Court devoted particular attention to what it described as the "the Commission's obligation to make the broadcast spectrum available to all people 'without discrimination on the basis of race.'" Among other things, the Court was critical of the FCC's failure to address a number of minority-oriented proposals that had been advanced by the Minority Media and Telecommunications Council in 2002.

In response to that criticism, on the same day that it adopted the 2008 Ownership Order, the Commission also adopted the Diversity Order in which it adopted 13 proposals intended to enhance minority/female ownership opportunities. So the Court should be happy, right?

The tossing of the "eligible entity"-dependent provisions may place the FCC in an awkward position.

Apparently not. Many of the Diversity Order's enhanced opportunities were limited to "eligible entities" – a universe defined by reference to revenue factors. Even though the race/gender-neutral universe of "eligible entities" might logically include a significant number of minorities and women, the Third Circuit rejected rule changes based on that definition of "eligible entities". According to the Court, the Commission had made no showing that expanding opportunities for "eligible entities" would expand opportunities for women and minorities. The Court is insisting that the Commission explain why it should use the revenue-based "eligible entities" definition rather than a "socially and economically disadvantaged business" (SDB) definition that might "better promote the Commission's diversity objectives".

In its 2004 decision the Court had directed the Commission to consider SDB-based regulations in its 2006 quadrennial ownership review (*i.e.*, the proceeding that culminated with the 2008 Ownership Order). The Commission, however, did not do so, opting instead to rely on the "eligible entity" approach.

But that wasn't good enough for the Court, which has now concluded that the FCC hasn't explained how a revenue-based "eligible entity" definition would increase female and minority ownership. (In part, the Court noted that this failure stems from the fact that the Commission simply doesn't have any reliable data on female and minority ownership, although the Court acknowledges that the Commission is working to address that problem.)

So the Court has vacated and shipped back to the FCC all of the Diversity Order's provisions based on the "eligible entity" definition. (Still alive and kicking are the Diversity

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Rural Radio: Certification Requirements Now In Effect For Proposed Community of License Changes

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

Last March (as we reported in the March *Memo to Clients*) the Commission took aggressive steps to stem the flow of radio stations away from rural areas and into urban areas. A central aspect of that action was a set of modified priorities by which the acceptability of proposed community-of-license changes by AM and FM applicants is to be assessed. The new priorities are to be applied to proposals for new and modified AM and FM facilities already in the pipeline as of the new policy's adoption back in March, as well as all further such proposals (one exception: the new priorities *won't* be applied to any still-pending new/major change AM applications filed during the Auction 84 window in 2006). In our article last March we spelled out the details of the new priorities, including the overriding "Presumption" of service that serves as a cornerstone to the new approach. (You can find a copy of the article on our website at http://www.fhhlaw.com/resources/Memo/2011/00270442.pdf, or on our blog at www.CommLawBlog.com.)

As we have reported on our blog since last March, the precise effective date of the new priorities has been a bit hazy. But never fear, the haze has now lifted. The new priorities – complete with required certifications – have all formally taken effect as of ***July 19, 2011***. This is thanks to (a) prompt and favorable review by OMB relative to the new allotment drill, and (b) publication of a Federal Register notice announcing OMB's blessing.

The official effectiveness of the new priorities and related Presumption/certification requirements means that the Commission's staff is now free to require pending applicants to demonstrate that they comply with the priorities and Presumption. Since the staff has been working with the new policies for some time already (hey, they're the ones who cooked up the new priorities in the first place), the staff has a pretty good idea of which pending applications comply and which don't – and we're guessing that lots of those applications don't.

The FCC staff is now free to require demonstrations of compliance with the new priorities.

We understand that pending applicants may expect to receive "deficiency letters" in the not-too-distant future. These *billets doux* from the staff will be directed to any applicant whose currently pending showing fails to establish that the proposed change in community of license satisfies the new priorities. We're guessing that the deficiency letter will afford the applicant an opportunity to demonstrate that its proposal does comply with the new allotment approach. Failure to make that showing will result in the dismissal of the application.

One other aspect of the new allotment priorities – creating a "tribal preference" designed to increase the number of radio stations owned by Native American tribes – has also now taken effect. That preference, though, is likely to have a greater impact on future applications than on many (if any) applications already in the pipeline.

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Order provisions that don't hinge on "eligible entity" status – *i.e.*, the ban on discrimination in broadcast transactions; the "zero tolerance" policy for ownership fraud; non-discrimination provisions in advertising sales contracts; longitudinal research on minority and women ownership trends; local and regional bank participation in SBA guaranteed loan programs; "Access to Capital" conference; and guidebook on diversity.)

The tossing of the "eligible entity"-dependent provisions may place the FCC in an awkward position. A number of "eligible entities" who happen to be minority and/or female have been taking advantage of those provisions for some time, and have applications in the pipeline to continue to do so. The Third Circuit's decision would appear to put the kibosh on such applications – even though tossing such applications would also appear to be contrary to the Court's underlying goal. Whether the Commission can come up with a way to save the baby from getting thrown out with the bathwater remains to be seen. (*See* related story on page 5.)

It also remains to be seen how the Court's insistence on explicit consideration of racial and gender factors can be squared with the Supreme Court's case law on affirmative action. The Supreme Court did (21 years ago) uphold some earlier FCC policies on minority ownership in the face of an equal protection constitutional attack. But that decision was expressly overruled by the Supremes in *Adarand*, which imposed very heavy burdens on any federal agency attempting to justify race-based decision making. The Third Circuit acknowledges *Adarand* but seems to insist that the FCC can and should nonetheless consider race and gender in its licensing policies. At the least, according to the Court, the FCC must do more than cite the difficulty of complying with *Adarand* in deciding not to consider race and gender factors. Reliance on the race/gender-neutral concept of "eligible entity" was designed to get the Commission around *Adarand* problems. It will be interesting to see how this issue will now evolve.

(Continued from page 2)

Any digital permitee who can't get its digital facilities built by September 1, 2015, will have one last opportunity to apply for an extension (based on factors such as Acts of God, unforeseeable circumstances, circumstances beyond the permittee's control, and financial hardship). All such extensions must be requested no later than ***May 1, 2015***; any extensions granted will expire ***March 1, 2016***. Anyone needing more time than that will have to request "tolling" of their construction period under Section 73.3598.

Out of Core, Out of Luck. Stations (analog *or* digital) operating on "out-of core" Channels 52-69 will ***not*** enjoy the benefit of either the 2015 deadline or the extension process. They ***must*** stop operating by ***December 31, 2011*** – no exceptions – and must file an application for an "in-core" channel (Channels 2-51) by ***September 1, 2011***. ***Channel change applications filed after that date will be dismissed.***

Waivers of the filing deadline may be requested; but ***in no event*** will continued operation above Channel 51 be permitted after the end of 2011. The FCC believes that clearing LPTV operations from the out-of-core channels will facilitate the prompt deployment of 4G LTE services in the 700 MHz band. As has been the case for some time, wireless 700 MHz band licensees ready to operate can still force LPTV stations to vacate out-of-core at any time on 120 days notice, even before December 31, 2011.

In no event will continued operation above Channel 51 be permitted after the end of 2011.

The Commission means business when it comes to clearing the out-of-core channels: stations still awaiting approval of new in-core channels at the end of this year must go dark and risk permanent loss of their license if they remain dark for more than one continuous year. Stations facing that draconian fate may escape the noose by requesting Special Temporary Authority to operate on an in-core channel pending grant of a permanent grant.

Let the World Know You Are Moving. Veterans of the 2009 full power DTV transition will recall the extensive consumer education campaigns mandated by the Commission to alert viewers to the practical consequences of the transition. The FCC contemplates a similar campaign as LPTV stations complete the transition, but details have been left for later. While the FCC may eventually adopt most (if not all) of its 2009 approach, for now the only requirement is that licensees broadcast announcements 30 days before terminating analog operation if they have program origination capability. (Stations lacking such capability must find another way – *e.g.*, newspaper notices– to publicize their transition.) Broadcast announcements must be aired at the time of each station's peak viewing, but frequency and content are left to individual station discretion. Stations already transmitting digital signals (having already shut down their analog service) do not have to make any announcements.

Minor Change Definition Tightened. LPTV stations applying for displacement to a new channel are restricted to a 30-mile change in transmitter site. Other changes may exceed that distance and still be classified as "minor" as long as there is any overlap of licensed and proposed protected service contours. The FCC will now impose the 30-mile limit on *all* minor changes *in addition to* the contour overlap requirement: any application not meeting *both* standards will be deemed a "major" rather than a "minor" change. That distinction is crucial here, since there's a freeze on major change applications (as well as new applications) currently in effect – so absent a waiver of the freeze, a major change application will be returned by the FCC.

More Juice in the Lowlands. The FCC's spectrum repacking proposal may include moving LPTV stations to available VHF channels. VHF has not been favored by full power TV stations who feel it's inhospitable for digital service generally and mobile services in particular. Not surprisingly, LPTV stations – most of which are not on cable or satellite – see any move to herd them onto the VHF band as another way to crush them, although some have talked about possible use of VHF for alternative modulation schemes. The 300-watt LPTV VHF power limit has also proved vexing for LPTV stations, compared to the 15 kW UHF power limit.

To enhance the attractiveness of VHF, the FCC has increased the LPTV power limit by 10 times, to 3,000 watts, on all VHF channels. (The Commission did not address proposals to allow more power to high-band VHF Channels 7-13, but the universal 3 kW limit should still be attractive to many stations. The Commission also declined to increase the 15 kW UHF power limit since most LPTV stations can already cover their communities of license amply at that power level.)

More Masking Choices. All TV stations wear "emission masks" which curtail unintended signal radiation outside of their assigned channels. Historically, LPTV stations have had only a choice of a "simple" or a "stringent" mask, both of which are more relaxed and less expensive than the mask used by full service stations. The FCC will continue to allow simple or stringent masks but will now also allow LPTV stations to use a full service mask on a voluntary basis. A full service mask will allow more LPTV stations to find available channels or to improve their facilities, as it will reduce instances of interference to first-adjacent channel stations.

Antenna Pattern Flexibility. LPTV stations currently file information about their directional antenna patterns in the horizontal plane, but the vertical pattern values are assumed under Section 74.793(d). Reliance on assumed values keeps some stations from complying with interference requirements. To counter that, the new rules permit stations use of their actual vertical pattern in interference calculations. Application forms will be revised to accommodate individual station pattern values. Submission of

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actual vertical pattern data will be voluntary; stations not submitting actual data will continue to be evaluated based on an assumed pattern. (Interesting unresolved strategy question: The FCC does not say whether a station that would benefit from the use of an actual pattern by another station can file the pattern for the other station if the other station does not submit its own pattern.)

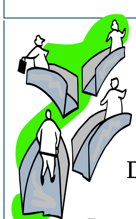
Class A Stations Get To Choose their Channel. An LPTV station with both an analog and a companion digital channel is already permitted to choose either channel as its permanent digital home when analog service is terminated. If it wants to stay on its digital companion channel, it only has to file an electronic notice that the analog station has gone dark with an exhibit electing the digital channel. If it wants to move its digital operation to its analog channel, it must file a flash-cut construction permit application and then shut down the companion channel when the application for a license to cover digital operation on the analog channel is filed.

Class A stations have not previously enjoyed this flexibility: only their analog channel had primary spectrum (*i.e.*, Class A) status, while their companion digital channel was deemed to have the same secondary status as LPTV stations. Class A stations with both analog and digital operations will now be free to elect *either* of their channels for permanent digital operation. They can apply for a construction permit to flash-cut their analog channel or they may migrate their primary status to their digital channel without a CP by simply filing a Form 302-CA license application for the digital channel. That application must include a certification that the digital channel complies with all Class A interference requirements.

Pay the Piper. Both full power and LPTV licensed stations that provide non-broadcast ancillary services (such as digital data) in addition to video program streams are required to file Form 317 in December of each year and pay 5% of their gross ancillary services revenues to the government. Digital LPTV stations operating under an STA without a license have been exempt, but no longer. All digital LPTV stations must now file Form 317 each December. If they have no ancillary services, they may so state and pay nothing. (While some licensed stations without any ancillary services have historically not filed Form 317, the form is so easy to complete that it seems more prudent to file than to risk an FCC inquiry as to why no report was submitted.)

Enough is Enough. Interested observers will note that the *2d R&O* leaves unresolved a number of proposals, including: refusing to accept supposedly unrealistic antenna patterns that may not be achievable in practice; authority to lease part of a TV channel to wireless service providers; classification of analog Channel 6 operation as an ancillary service, to permit it to continue after 2015; relief from the freeze on applications for new stations and major changes; relaxation of eligibility requirements for Class A status; and authorization for alternative forms of signal modulation other than the current ATSC digital standard.

When Does the Race Start? The new rules are currently set to take effect on ***August 26*** (*i.e.*, 30 days after publication in the *Federal Register*. That does *not* count Section 73.624(g), which expanded the collection of fees for ancillary services to include digital LPTV station that are on the air but have not year received a final license. Since that change entails an information collection, it has to be approved first by the Office of Management and Budget. Check back here for updates on that front. We hope to learn shortly whether applications proposing full service emission masks and Class A channel elections may be filed immediately or must await the effective date of the new rules.



FHH - On the Job, On the Go

Frank Jazzo has been named Co-Chair of the Federal Communications Bar Association's Mass Media Committee.

On July 28, **Kevin Goldberg** presented a webinar to the Maryland-D.C.-Delaware Broadcasters Association on the statutory ins and outs of webcasting.

Last month we mentioned that **Frank Montero** was going to be serving as a Presiding Officer for one aspect of the Minority Media and Telecommunications Council's 25th Anniversary confab in Washington in July. Turns out that **Frank** was also added to a second panel (title: "Telecom Asset Acquisitions and Transactions") at the same event.

On August 3-4, **Lee Petro** will be attending the Tennessee Association of Broadcasters Summer Convention in Murfreesboro. He'll be on the Legal, Legislative and Regulatory panel.

On August 19, **Frank M** and **Dan Kirkpatrick** will be in San Juan presenting a seminar on the license renewal process for radio stations in Puerto Rico and the U.S. Virgin Islands. The seminar is being organized by the Puerto Rico Radio Broadcasters Association. (Anyone interested in registering for the seminar can contact the Association or **Frank M**.)

The NAB Radio Show is coming up in September. Already we've confirmed that **Frank M** and **Matt McCormick** will be toddling off to the Windy City for that annual must-attend. Other FHH folks will be joining them – check back here next month for a complete list.

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.

October 1, 2011

***License Renewal Applications* -** *Radio* stations located in **Florida**, **Puerto Rico**, and the **Virgin Islands** 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 **Florida**, **Puerto Rico**, and the **Virgin Islands** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on October 16, November 1, November 16, December 1, and December 16.

***License Renewal Pre-Filing Announcements* -** *Radio* stations located in **Alabama** and **Georgia** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on October 16, November 1, and November 16.

***EEO Public File Reports* -** All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** 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 **Iowa** or **Missouri** 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 **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, or **Washington** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

October 10, 2011

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

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Cable and Satellite Copyright Royalty Claims Due August 1

By Lee G. Petro
petro@fhhlaw.com
703-812-0453

Last minute heads up!! As July slips into August, it's time again to remind television broadcasters that Copyright Royalty Claim forms – for cable retransmission copyright royalties and/or satellite copyright royalties earned during 2010 – are due at the Copyright Royalty Board ***by August 1, 2011*** (since July 31, the normal deadline, falls on a weekend this year). This is your opportunity to lay claim to a share of the annual fund from which television broadcast stations get paid for their programming that is retransmitted by cable and satellite service providers outside of their respective service areas.

In general, TV stations that are carried on cable systems as a distant signal, and those stations that provide programming to other stations that are carried as a distant signal, are entitled to royalty payments. A cable system is "distant" vis-à-vis a station if the system is: (1) outside the station's DMA; ***and*** (2) at least 35 miles from the station's city of license; ***and*** (3) outside the station's predicted Grade B contour. Stations whose programming is carried on satellites to subscribers outside the station's DMA are also entitled to royalty payments.

Even though time may be short, never fear. The Copyright Office encourages stations to file their Claim Forms online. The forms can be found at: http://www.loc.gov/crb/claims/.

If you need our assistance in preparing the forms, please let us know.

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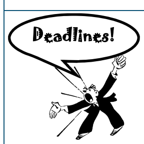
start to fall right away, which could afford some valuable time in some instances. What are the prospects for such a delay? Who knows? The Third Circuit's decision was expansive and, at least to some, controversial. It's possible that some private parties, or maybe even the Commission, might be inclined to seek rehearing. That could delay the issuance of the mandate by several months, possibly affording relief to some. So, too, could an effort to bring the case to the Supreme Court (although that alone would not necessarily stay issuance of the mandate – a request to hold off on that issuance might need to be filed).

The Commission's public notice does not address that delay possibility, presumably because the one thing we know for sure at this point is that, absent rehearing efforts, the rules provide for issuance of the mandate on August 29. And while the possibility of delay may exist in theory, it's a very thin reed on which to rest any hopes.

So a policy designed to increase diversity in broadcast ownership is being deep-sixed by a court decision which complained of the lack of diversity in broadcast ownership. And so it goes.



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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.

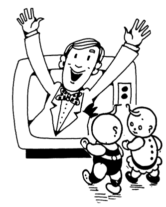
Website Compliance Information - *Television* station licensees must place and retain in their public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

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.

November 1, 2011

Biennial Ownership Reports - All licensees and entities holding an attributable interest in a licensee of one or more *AM*, *FM*, *TV*, *Class A television*, and *LPTV stations* must file a biennial ownership report on the FCC Form 323. Please recall that sole proprietorships and partnerships composed entirely of natural persons (as opposed to a legal person, such as a corporation) must file reports, as well as other licensee entities. All reports must be filed electronically.

Update from Planet Kidvid



Assignment to FCC: more research, more reports!

GAO to FCC: Room for Improvement On Children's TV Enforcement Front

By Anne Goodwin Crump
crump@fhhlaw.com
703-812-0426

A recent Government Accountability Office ("GAO") report has found that the FCC should: (a) step up its enforcement of the limits on commercial time during children's programming with regard to cable operators and satellite TV providers; (b) work with industry to develop voluntary guidelines for assessing the educational content of children's educational/ informational ("E/I") programming; and (c) find a way better to inform parents about the existence of and requirements for such programming on broadcast television stations. In response, the FCC has stated that it will go back to auditing compliance with commercial limits, particularly for cable operators and satellite providers, and will continue to try to improve its efforts to inform parents.

The GAO report was prompted by a request from various members of Congress that it analyze trends in children's television programming, FCC efforts to enforce the Children's Television Act of 1990 ("CTA"), and the extent to which parents value and use "core" children's programming for their children. Core programming is defined as E/I programming for children ages 16 and under which is aired between 7:00 a.m. and 10:00 p.m., shows the E/I logo throughout the program, and meets certain other requirements. In order to compile the report, GAO looked at data from eight markets of different sizes and in different regions of the country. It also met with parent focus groups from those markets, spoke with station personnel there, and met with FCC staff.

On an encouraging note, the report found that substantially more children's educational and informational programming is available on broadcast TV stations now than was the case at the time of enactment of the CTA, 20 years ago. According to the GAO, some of this increase can be attributed to the additional channels of programming that have entered the market as the result of digital multicasting. (Some of those multicast channels air so much children's TV programming that they add up to more than all other stations in a local market combined.)

The GAO report also revealed that, despite the actual increase in availability of children's E/I programming on TV stations, many parents remain woefully ignorant of this fact and of the CTA and its requirements generally. A number of parents didn't even know that E/I programming can be found on broadcast TV and most could not identify what the E/I symbol means. Perhaps as a result, many of them steer their children away from commercial broadcast stations and toward PBS affiliates or cable/satellite channels.

When it comes to program content, the majority of parents interviewed by GAO expressed concern about how a program is determined to be or not to be E/I. Currently that decision is left to the discretion of TV stations which, as a practical matter, generally rely upon the rating assigned by the network or other program provider. Parents were surprised to learn that there are no fixed standards for making this determination and worried that station involvement creates something of a conflict of interest. Rather, many parents think that either "experts" on children's programming or governmental agencies should set standards and make judgments to determine what programs count as educational. It is not clear how those who favor government involvement in specifying what content should be included in educational programming square that view with the First Amendment. Moreover, educational value, like beauty, is in the eye of the beholder. It should be easy enough to find some "expert" in the field to bless just about any program. Therefore, it is not quite clear how expert participation will truly advance the ball here.

It isn't clear how expert participation will truly advance the ball here.

Nonetheless, one of the recommendations of the report is that the FCC work with the media industry to develop voluntary standards for judging whether a program qualifies as E/I. Such an approach would, at least in theory, better enable parents to rely on the E/I rating to determine the programs their children may view. Unfortunately, the report did not recommend the surest method for parents to determine which programs are sufficiently appropriate and educational for their children – *i.e.*, sitting down for a few minutes and watching the TV with them.

Another recommendation is that the FCC work to identify additional mechanisms – such as the FCC's recently updated "Parents Place" website – better to inform parents about core programming. And once that's done, the FCC should implement these mechanisms, and then assess their effectiveness. (Helpful suggestion from the *Memo to Clients*: the Commission might start by providing simple links on the Parents Place site back to the Children's Television Program-

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ming Reports (FCC Form 398) that area already available elsewhere on the FCC's site. Speaking of effectiveness, this author cannot help but note that on her recent visit to the Parents Place website, this author found no such links.)

In looking at enforcement of CTA advertising limits, the GAO report found a huge disparity in cited violations and penalties between broadcast stations on the one hand and cable operators and satellite providers on the other. The CTA imposed a limit on advertising time within programming aimed at children 12 and under of 10.5 minutes per hour on weekends and 12 minutes on weekdays. That limit was applied not only to TV stations, but also to cable and, later, satellite outlets.

For CTA enforcement purposes with broadcast stations, the FCC relies primarily on self-reporting of violations at license renewal time. During the past two license renewal cycles, the FCC issued notices of about 7,000 violations to over 600 stations and imposed fines of almost $3 million. Of course, these violations included some missing children's TV reports, failures to publicize, and the like, but according to GAO, most of the violations had to do with advertising length. In any event, the numbers are big, even if the violations themselves often involve extraordinarily small overages resulting from hypertechnical readings of the rules.

In contrast, cable operators and satellite providers don't have primary operating licenses akin to broadcast licenses that need to be renewed periodically. As a result, there is no obvious mechanism already in place through which to require the non-broadcasters to certify compliance with the CTA or identify violations. During the Commission's monitoring period, in 2003, it found two cable operator violations involving networks carried nationwide. One of them related to advertising content (host selling or program-length commercial) and was repeated 31 times during about a year and the other involved exceeding the advertising time limits 591 times, with over 1,000 30-second commercials. These two rather egregious and nationwide violations netted the Treasury $1.5 million. Since the FCC discontinued its monitoring activities, no cable or satellite operators have self-reported violations of commercial limits – no surprise there – and the FCC staff admitted that that it has no way of knowing for sure whether there were further violations – though it seems likely that there were probably at least a few. Between 2005 and 2010, the FCC did inspect cable operators' and satellite providers' public inspection files for required records to substantiate compliance and found five instances of incomplete records. In stark contrast to its approach to broadcast public files, it imposed no penalties.

The GAO report reflects the same general sensibility that underlies the Children's Television Act.

The FCC's response to these findings was to report that it has already reinstated its audit procedures to oversee cable operators' and satellite providers' compliance with the advertising limits. Of course, given its meager track record (FCC audit processes turned up only two extreme cable violations and one broadcast violation during a five-year period, that program; over the same time frame, broadcasters reported many hundreds of problems) one could question just how effective the revived program will be.

The take-home message from the GAO report seems clear: the CTA has been largely ineffective at allaying parental concerns about children's TV programming. But that appears to be due to parental ignorance and an unwillingness on the part of parents to spend much time checking out the shows their kids watch. While the report speaks of parents wanting programming that is educational, appropriate in content, and not filled with commercials, the report also reveals parental practices seemingly at odds with these claimed wishes.

Many parents reported that they instruct their children to tune away from broadcast television channels to cable or satellite channels. But hold on there. Broadcast stations are subject to multiple requirements designed to assure the availability of precisely such programming – in ways that should assist the parent in identifying such programming. On cable and satellite, however, no educational content requirements exist, compliance with commercial limits is unenforced and unknown, and there are no limits on content beyond the bounds of obscenity laws and whatever the cable channel thinks is appropriate. So directing kids to cable/satellite would seem to be sending them in precisely the wrong direction (and we're not even talking about the supposedly more vulgar, more violent and more sexual content of other programming to be found in the non-broadcast universe).

The GAO report reflects the same general sensibility that underlies the CTA: that is, government knows best about what's good for kids, and parents can and should depend on government to facilitate the parenting process. But the report also reflects the sad truth that many parents, while claiming to want only the best for their kids, still don't seem willing or able to take the necessary time or make the necessary effort to inform themselves on their own. It's unlikely that any amount of improvement to the FCC's "parent's place" – or any other governmental initiative, for that matter – will remedy that problem.

Shhhhhhh

Revised CALM Act Standard Announced

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

Talk about moving targets! On July 18, the FCC extended (to August 1, 2011) the reply comment deadline in its CALM Act proceeding. (For a trip down Memory Lane vis-à-vis the CALM Act, check out the May, 2011 *Memo to Clients* – or just go to www.CommLawBlog.com and search for "CALM Act".) The original reply comments deadline had been July 18, but that had been extended at the last minute to July 21.

But the deadline, while obviously fluid, is not the most important moving target here.

The latest extension was granted at the request of the Advanced Television Systems Committee, Inc. (ATSC). ATSC, of course, are the folks who brought us the DTV technical standards. Those standards include the A/85 Recommended Practice (*A/85 RP*) which Congress has ordered the Commission to use as the regulatory standard for controlling loud commercials. But get this – according to ATSC's request for extension of the reply comment deadline, a new version of the *A/85 RP* was set to be approved (by ATSC) on July 26. And sure enough, on that day the Commission issued a public notice reporting that the new *A/85 RP* was in fact available for review on the ATSC's website. We checked; it was.)

So it turns out that all the folks who chose to file comments addressing the proposed mandatory standard by the comment deadline (*i.e.*, July 8) were addressing a standard that might not be entirely applicable after July 26.

Remind us again what the point of filing those initial comments was?

Of course, the new *A/85 RP* may not be substantially different from the old one. But interested parties weren't set to get their first official look at the revised *A/85 RP* until July 26. Hey, isn't that a tad late? No worries, since folks were given until August 1 – that's six days, total, including a weekend – to prepare and submit comments on it. Get out the Red Bull and stock up on No-Doz.

The Commission's stuck between a rock and a hard place when it comes to the CALM Act. Congress has told the FCC (a) what to do (*i.e.*, incorporate the *A/85 RP* into the rules, and then enforce it), and (b) when to do it by (*i.e.*, December 15, 2011). But, through the Administrative Procedure Act, Congress has also instructed the FCC to engage in a notice-and-comment rulemaking proceeding as part of the process. Such a proceeding is designed – in theory, at least – to provide interested parties a meaningful opportunity to chip in their two cents' worth on the proposed rule change.

When the guts of the proposed rule revision change on the eve of the final reply comment deadline (*i.e.*, *after* comments have been filed), and when interested parties are then given less than a week to track down the revised proposal and get their thoughts together about it, it's difficult to see that as a meaningful opportunity to comment. Rather, the Commission's activities begin to resemble a parody of the administrative process.

Again, this is not entirely the Commission's fault. But the Commission might have at least pretended to care about the interests of commenters by providing another week or two.

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communities may ultimately be proposed. Using a somewhat broader "market" approach provided the Commission a more "workable" analysis.)

The Commission intends to open a window for new LPFM applications once the availability of spectrum has been established through the market-floor process. That could be the final window for either LPFMs or FM translators if, as anticipated, applications filed during the window completely exhaust the available spectrum. The filing window won't likely open until comments and reply comments in response to the 3rd FNPRM have been submitted and the Commission has released a report and order adopting new rules.

While that process would ordinarily be expected to take a year or more, Chairman Genachowski expressed hope that the LPFM window could be opened in the summer of 2012. That schedule is optimistic in any event – even more so in view of the fact that, in addition to the various questions posed in the 3rd FNPRM, the Commission will also have to resolve, in a separate proceeding, a number of other issues necessary for the implementation of provisions of the LCRA. And let's not forget about the possibility of appeals that might interfere with (or at least discourage) the immediate implementation of any new rules that might be adopted within the next year or so.

Other to-be-resolved questions include: how the Commission plans to address the issue of second-adjacent channel protection for full-power stations, and the related issue of how LPFM applicants may use signal contour plotting (as opposed to fixed mileage separations) to demonstrate that they won't cause interference. Once such issues have been ironed out, we should all have a better fix on precisely how many channels may be open for filing in the LPFM window (and, thus, about how many applications might be expected).

Processing of long-pending FM translator applications is expected to resume right away in rural areas and larger communities where the LPFM channel floor is met – but, again, that won't happen in larger communities until the conclusion of the just-started rulemaking, at the earliest, and it may be tricky even in rural communities while open questions re-

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Reminder for Video Programming Distributors: Emergency Information Must Be Available to Everyone

By Steve Lovelady
lovelady@fhhlaw.com
703-812-0517

The FCC has issued yet another reminder to ***all*** distributors of video programming (the FCC is talking to you, all you broadcasters, cable operators, satellite TV providers and anybody else who distributes video programming to residential audiences): if you choose to provide local emergency information, you must make such information available to ***all*** audience members, even ones with seeing or hearing disabilities.

This means that, during emergencies, video programming distributors (let's call them VPDs) must make the audio portion of any emergency information accessible to persons with hearing difficulties by providing some type of visual presentation such as closed or open captioning.

And similarly, VPDs must accompany the video portion of non-newscast programming (for example, a text crawl announcing a weather emergency) with an aural tone, to alert vision-impaired folks in the audience to the fact that an emergency is occurring. (Those folks can then find an alternative source of information about the emergency.)

Note, however, that if the emergency information is presented during a newscast (whether regularly-scheduled or one that interrupts regular programming), the video information must be accessible to persons with vision impairments. For example, if a list of areas subject to emergency evacuation is shown on the screen during a newscast, that list must also be read aloud so that vision-impaired audience members will get the same heads up as their fully-sighted neighbors.

As far as the FCC is concerned, "emergencies" include not only obvious natural disasters (tornados, hurricanes, floods, tidal waves, earthquakes, ice/snow storms, wildfires, etc.), but also less-expected events, like the release of toxic gases, widespread power failures, or civil disorders. Information about school closings and changes to school bus schedules arising from any of these situations is also emergency information subject to the rule.

The FCC means business when it comes to this requirement. In 2008, for example, a San Diego television station was fined $25,000 for failing to provide to people with hearing disabilities certain emergency information relating to wildfires in the area when that information had been provided aurally. When announcers discuss anything emergency-related – even such seemingly routine matters as tips about what to do if flames are spotted near the viewer's residence – the substance of such discussions must be provided visually as well. This can be difficult when a station is providing full-time emergency coverage and on-air newscasters engage in extensive banter with each other and various interviewees. Nevertheless, the FCC has historically enforced its rule rigorously, and it's unlikely to change in the foreseeable future.

Any VPD that provides emergency programming should heed the FCC's repeated reminders about complying with this rule. Compliance with the visual and aural requirements should be a central factor in any planning, training or drills preparing for emergency events. You can't say you haven't been warned.

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main about how much spectrum will be reserved for LPFM.

The NPRM also includes proposed limitations on the sale of FM translator licenses. The FCC apparently believes that many FM translator applications were filed by speculators whose primary objective is to sell rather than to operate stations. Whether the FCC will require construction and operation for a minimum period of time or simply restrict sales as it does for LPFM stations remains to be seen. The Commission presumably hopes that it can discourage many such speculators into simply walking away from their applications.

The NPRM would also open up more translators for potential use by AM radio stations. The present rule allows the rebroadcast of an AM station on an FM translator *only* if the translator's underlying permit (or license) was issued prior to May 1, 2009. The Commission invites comment on whether to eliminate that restriction and allow AM stations to use any translator for which an application was filed in the 2003 window, no matter when granted.

Since there remain a significant number of pending translator applications which might still be granted, the elimination of that restriction would obviously expand the universe of translators available to AM primary stations. Of course, since it's reasonably certain that many FM translator applications will be dismissed to preserve room for LPFM stations in the top 150 markets, that expansion might be limited to very rural areas. And, since no new translator window is expected until after the next LPFM window – and, as noted, it's entirely possible that there will be no further new windows for either LPFM or translators if the next LPFM window sucks up all the spectrum – it is extremely unlikely that AM licensees will have an opportunity to file for new translators of their own.

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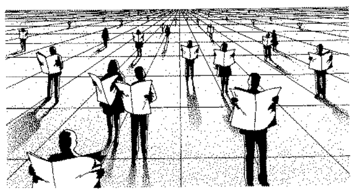
Updates On The News

A second chance to do the right thing. Last month we reported on the FCC's long-running practice of demanding application fees when successful bidders in broadcast auctions filed their long-form 301s. As we pointed out, that practice was contrary to the Commission's own rules – a fact which had been tacitly conceded by: (a) the Managing Director, who refunded such a fee in March; and (b) the Commission itself, which hustled up a rulemaking proceeding aimed at amending the rules to permit, rather than prohibit, such fee collections.

The FCC's apparent haste in cranking up that rulemaking may have had something to do with the fact that payments for long-forms due from successful bidders in Auction 91 were set to be filed by June 30. Maybe it was just a crazy coincidence, but the Commission managed to complete the rulemaking in a near-miraculous three and a half months – with a Federal Register notice proclaiming its immediate effectiveness published on June 28. Did we mention that Auction 91 long-forms were due June 30?



Call us conspiracy-obsessed wack-jobs, but it's irresistible to figure that the Commission, realizing that the legality of its earlier fee collections was, um, dubious, decided that it could spackle over that problem, at least for Auction 91, by racing to get the rule changed days ahead of the long-form deadline.

As our dear mother often told us, haste makes waste. Upon closer inspection of the Commission's June 20 decision amending the rule, the FCC may have failed to cross a couple of T's and dot a couple of I's. Things like the Regulatory Flexibility Act analysis, and compliance with the Congressional Review Act and the Administrative Procedure Act. A number of parties have sought reconsideration of the rule change, raising these and other questions. We'll keep you posted.

Happy birthday to us! Hey, it's almost August already, and we have somehow let the first half of the year slip by without making sure that everybody knows that 2011 marks Fletcher Heald's 75th year. That's right, FHH opened its doors (under the name of Spearman & Roberson) in 1936, a mere year after the FCC opened *its* doors. (The Commission was established by Congress in the Communications Act of 1934, but it didn't actually start work until 1935.) We've been going strong ever since, representing a broad range of clients in all areas of communications law – and we look forward to continuing to do so.

Another Memo to Clients sidebar!!!

How the FCC determined that LPFM channels might be available.

The hunt for "available" spectrum can be brutally hard – but the Media Bureau had to slog its way through that chore before it could start to come up with even a preliminary rough-cut approach to sorting out the LPFM/FM translator problem. How did it go about it? In the Commission's words:

> [T]he Bureau centered a thirty-minute latitude by thirty-minute longitude grid over the center-city coordinates of each studied market. Each grid consists of 931 points – 31 points running east/west by 31 points running north/south. Grid points are located at one-minute intervals of latitude and longitude. The Bureau analyzed each of the 100 FM channels (88.1 MHz – 107.9 MHz) at each grid point to determine whether any channels remain available for future LPFM stations at that location. Only channels that fully satisfy co-, first- and second adjacent channel LPFM spacing requirements to all authorizations and applications, including pending translator applications, are treated as available.

If our math is right (and there's a reason we went to law school), the Bureau's study involved about a squadrillion (well, almost 14,000,000) separate calculations – if we treat as a "calculation" each separate analysis of each of 100 channels at each of 931 grid points in each of 150 markets. (Note that we would have thought that a 31 x 31 grid would have contained 961 points, rather than the 931 the FCC mentions, but really, who's counting?)

Of course, the Bureau's approach, while impressively comprehensive, was still rough-hewn. No effort was made to determine site availability, for example. But it at least provided the Commission with an empirical base from which to start its work.