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Memorandum to Clients

September, 2011 | *News and Analysis of Recent Developments in Communications Law* | No. 11-09

A drop in the bucket, perhaps, but every billion or so helps . . .

White House Would Send $5 Billion Bill to Spectrum Users

By Steve Lovelady
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As it waves a metal detector over every inch of the country's economy, looking for any stray nickel or dime with which to fund its ambitious American Jobs Act (Jobs Act), the Obama Administration apparently thinks it's hit a minor jackpot: spectrum fees. That's probably not good news for spectrum users of any stripe (although TV broadcasters may get a pass, at least initially). As the national debate on the proposed bill develops, all spectrum users should keep their eye on this particular detail. Things could get pricey if this proposal finds its way into law.

The issue arises in Section 278, which would require the Commission to collect nearly $5 billion over the next ten years through such fees. The fees would come in through annual assessments for spectrum use. The universe of fee payers would include pretty much anybody who holds any kind of spectrum license – *except* broadcast television and/or public safety licensees, and initial licensees/permittees who got their authorizations through the competitive auction process. (But note – that last exemption for auction winners gets them only through the initial license term or until their license is modified, at which point they join the ranks of the fee-eligible.)

The Jobs Act doesn't say anything about the regulatory fees that licensees *already* pay, so presumably the proposed user fees would be *in addition to* reg fees. The likely rationale: regulatory fees are supposed to cover the cost of the FCC's regulatory operations; spectrum user fees, by contrast, constitute a tax on the commercial benefits licensees can realize through utilization of their spectrum.

How exactly would the spectrum fee be calculated for licenses in the various services?

First, the Jobs Act would set annual minimum dollar levels the Commission would be required to collect. For fiscal 2012 overall collections would be at least $200,000,000; that number would go up in hefty $100,000,000-plus increments until 2015, when it would top off at $550,000,000, where it would stay until 2021. While the Jobs Act doesn't say what would happen after 2021, it's probably a pretty good guess that the government, having experienced a 10-year ride on the spectrum user fee gravy train, would likely stay on board for another few laps.

So the Jobs Act sets the annual nut the Commission would have to make. But it would leave it up to the Commission to figure out just how to make that nut.

The FCC would set up a schedule of fees for various classes of authorizations. In doing so, the Commission would be permitted to consider:

- the highest value alternative spectrum use forgone;
- scope and type of permissible services and uses;
- amount of spectrum and licensed coverage area;
- shared versus exclusive use;
- level of demand for spectrum licenses or construction permits within a certain spectrum band or geographic area;
- the amount of revenue raised on comparable licenses awarded through an auction; and
- such factors that the Commission determines, in its discretion, are necessary to promote efficient and effective spectrum use.

The real wild card among those factors is the first one: the concept of "alternative spectrum use forgone". The Jobs Act doesn't explain precisely what that term means. But it's a pretty good guess that, under that rubric, the Commission would be free to consider not just how valuable the spectrum is to its existing licensees' operations (based, say, on actual revenues, etc.), but rather how valuable it *might be* if it were

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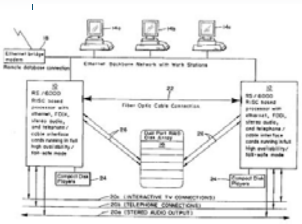

Patent (reconsideration) pending

PTO Taking Second Look at Mission Abstract Data Patents

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Has the United States Patent and Trademark Office (PTO) upended a litigation strategy that was threatening to upend the radio broadcast industry? It's still too early to tell, but word out of the PTO could be bad news for Mission Abstract Data. You remember the folks at Mission Abstract – they're the ones looking to obtain "licensing fees" from radio broadcasters using automated programming software (which at this point can be defined as "all radio broadcasters").

I wrote about Mission Abstract (we called them "MAD" back then – we'll keep doing it here) on our blog (www.CommLawBlog.com) back in July. To recap: MAD claims that it has patents covering pretty much any kind of computer-based radio program automation. Wielding that impressive claim, MAD filed a patent infringement lawsuit against several of the largest radio broadcast groups in the country. The case is still in its early stages.

But MAD may be looking to invite a lot more folks to its little party. As I reported, MAD had already been contacting a "second round" of broadcasters, mainly smaller station groups, to offer a "licensing agreement" containing a release from any legal action. And more recently, we understand that yet a third round of broadcasters have lately been receiving similar come-ons from MAD. (The third round includes smaller broadcasters, even some single station licensees.) While no overt threats of new lawsuits have been made in these latest contacts (as far as we've heard), it's not too hard to get the impression that declining the offer of a licensing agreement could get you a seat at the defendant's table if another round of lawsuits gets filed.

Best I can tell, none of the "second round" broadcasters have signed the proffered licensing agreement. (I'd have expected a MAD-issued press release issued by MAD if that had happened – what better way to spur others to go with the flow?)

Meanwhile, the patent infringement lawsuit against the really big broadcast groups has inched forward with no real surprises or important action points: discovery's gotten started, some court-ordered settlement conferences, too – but there's been no indication that either side has gained any advantage. Until now.

Acting on a couple of requests for "reexamination" of the two MAD patents (those would be Patent Nos. 5,809,246 and 5,629,867 – we've provided links to the underlying patent materials on our blog), the PTO is taking another look at those patents. In my July blog post I noted that one of the principal litigation defenses against MAD's claims is that the patents on which MAD is relying are invalid. With the PTO reopening the issuance of those patents, we are now moving toward an authoritative resolution of that question.

The reexamination requests lay out what many have claimed all along: MAD should not have been issued patents in the first place because there already was similar technology in place by the time MAD sought patent protection. After all, a patent is supposed to be issued only to the guy who "invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof" – so if the same (or closely similar) technology were already available before MAD made its patent claims, then MAD might not be entitled to the patents it received. No patent = no patent infringement = no lawsuit.

I'm not a patent attorney, so I'm not in a position to opine on the likely result at the PTO. But I can for sure speculate about the likely impact of PTO action on the existing lawsuit and the licensing agreements MAD has continued to put before broadcasters.

The simple answer is that the outlook is likely bad for MAD.

Of course, the PTO could ultimately declare MAD's patents to be valid. That would be big but would not, in and of itself, mean MAD will win its patent infringement lawsuit.

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Focus on FCC Fines

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EAS inspections ahead of nationwide EAS test – In advance of the nationwide EAS test this November (we've written about the test frequently in past issues – and again on page 12 of this issue), FCC agents are out scouring broadcast stations and cable systems to make sure that the EAS will actually work. Agents recently inspected stations in Hawaii, Oregon, New Mexico, Kansas, Wyoming, and South Dakota for EAS compliance and found nearly two dozen stations and systems that were ill-prepared.

In addition to a simple review of a station's EAS gear, FCC inspectors normally pore through a station's EAS logs. The logs provide a self-reporting (or self-incriminating) written record of a station's compliance with the FCC's EAS rules. FCC agents know when EAS tests are conducted in their region and therefore know where to start looking in a station's logs to quickly determine whether there might be a compliance problem.

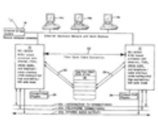
Stations should expect heightened scrutiny from the government during weekly and monthly tests leading up the November nationwide test (which will reportedly feature none other than the President himself). As tests are being conducted in your region, stations must be certain to relay the tests and record their compliance. Stations should also review their records to ensure that they have been in compliance with EAS testing and equipment monitoring in the past. Finally, stations that have equipment problems should bring their gear into compliance and immediately make a note of any equipment anomalies.

If the FCC Orders you to shut-down, follow directions – Here's a helpful tip: If an FCC inspector stops by your station, notices something amiss, and tells you to turn your station off, you're probably better off following that particular instruction. About $7,000 better off, it looks like. Don't take our word for it – just ask the licensee of a low power FM station in Dunnellon, Florida.

The lo-po's problems started when the local FCC Field Office got a call from the local airport complaining about interference to an Air Traffic Control frequency. That kind of call generally gets the FCC's attention pronto. Using direction-finding gear, they tracked the offending signal to the LPFM station. The Feds showed up at the station's doorstep, explained the situation to the only station staffer in sight, and asked him to turn the transmitter off. The guy refused. They got the station's owner on the phone, and the inspectors asked him to direct his employee to turn the station off. The owner refused to do so unless the station's engineer was present. The owner was finally convinced (after about half an hour) to get his sweet self down to the station, at which point he agreed to let the FCC folks inspect the operation. The inspectors found that the station was operating with a transmitter not certified by the Commission. The owner turned the transmitter off, and the interference to the airport ended.

The standard fine for operating with unauthorized equipment is $5K – and that's exactly where the Enforcement Bureau's Notice of Apparent Liability started. But the Bureau then tacked on an "upward adjustment" of $7,000 – a bump amounting to nearly 150% over the starting point – because the interference caused by the unlawful operation affected the safety of life and property and because the owner and his employee refused to comply with the inspectors' request that the station be turned off immediately. Total fine: $12,000. Make you check payable to the FCC. Thanks for your business.

This isn't brain surgery. Congress has given the FCC the authority to inspect broadcast stations (really – it's in Section 303(n) of the Communications Act), and the FCC can exercise that authority. If FCC inspectors show up at your station, the best policy to follow 99.99% of the time is to invite them in, make them comfortable, and do what they tell you to do. As tempting as it might be to try to tell The Man where to get off, that's bound to be a losing proposition no matter how you slice it.



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But the fact that PTO is taking another look at the patents strongly suggests that the PTO has serious questions about the validity of these patents. If those questions go the wrong way for MAD, the patents could get invalidated. And that would almost certainly put an end to the lawsuit and any other MAD efforts to put the squeeze on the second and third groups of broadcasters already in their sights (not to mention any others that could get dragged in later). At the very least, it seems likely that the U.S. District Court in Delaware, where MAD's lawsuit is pending, will put a hold on the case until the PTO completes its reexamination of the patents. The big broadcaster defendants have requested that the case be stayed for that reason. A hearing on that stay request had already been scheduled for October 27. A stay, if granted, could last for months or even years – easily enough to seriously hinder MAD's momentum.

I'm guessing that many of the second and third groups of broadcasters will be way less enthusiastic about signing the licensing agreements currently sitting on their desks, while the defendants in the lawsuit will view settlement with similar skepticism.

Of course, anybody receiving a communication from MAD should *not* ignore it. Rather, if MAD contacts you, it's probably best to reach out to your own attorney (or lawyer yourself up if you haven't already). Also, make sure you collect all relevant information, including invoices and licensing agreements already in place with your current software provider (the idea there being to invoke indemnification by that software provider if that becomes an issue).

But make sure your attorney knows about the PTO's reexamination of the MAD patents and the impact that reexamination is likely to have on MAD's bargaining position.

Compliance deadline – July 1, 2012

Video Description: Back in the Books

By Christine E. Goepp
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Let's have a big "welcome back" for the video description rules – they've been gone for years, but as we reported last March, Congress figured it was time to bring them back and now, voilà!

As required by the behemoth "21st Century Communications and Video Accessibility Act of 2010," the FCC has adopted rules requiring the provision of video description. ("Video description" involves voice-overs describing a program's key visual elements. Check out the post on our blog from last November for a quick refresher course on video description.) The FCC tried almost ten years ago to impose such rules on broadcasters and certain multichannel video programming distributors (MVPDs), but the rules were struck down by the U.S. Court of Appeals for the D.C. Circuit. The court concluded that Congress hadn't given the Commission the necessary authority.

That was then, this is now: the FCC now has authority in spades, with explicit instructions from Congress to reinstate the original rules – with a few tweaks.

> *The FCC now has authority in spades to reinstate the original rules – with a few tweaks.*

The new rules are nominally being "reinstated" as of October 8, 2011 – that's what Congress required, and the Commission timed Federal Register publication of the rules accordingly. (One exception: Section 79.3(d) and (e) have to be run through the Paperwork Reduction Act drill before they can become effective.) But take heart – broadcasters and MVPDs have until *July 1, 2012*, to come into full compliance.

Broadcaster and MVPD obligations under the new rules include the following:

ABC, CBS, Fox, and NBC affiliates located in the top 25 television markets (as of January 1, 2011) must provide 50 hours per calendar quarter of video-described prime time or children's television. (Fuzzy on exactly what the current TV market rankings are? We've included a link to the 2010-2011 Nielsen listings on our blog version of this article.) When the list of top 25 markets will be updated remains to be determined. Note that by the end of 2016, the 50-hour rule will apply to the top 60 television markets.

To count toward the 50-hour requirement, the programming must not have been previously aired with video description, on that particular channel or station, more than once. Only programming on the primary stream of digital broadcasters counts toward the 50-hour requirement. If another top-four network is carried on a secondary stream, however, it also must meet the 50-hour requirement, as though it were carried by a separate station.

Multichannel video programming distributors (MVPDs) with more than 50,000 subscribers must also provide 50 hours per calendar quarter of video-described prime time or children's television on the five most popular cable channels: USA, the Disney Channel, TNT, Nickelodeon, and TBS. (The list of "top five popular cable channels" will be revised at three-year intervals, if ratings change.) ESPN and Fox News are not on the list because they provide fewer than 50 hours per quarter of programming that is not live or near-live (*i.e.*, broadcast within 24 hours of recording). Live and near-live programming is exempted from the rules due to the difficulty in furnishing video description in such a short time frame.

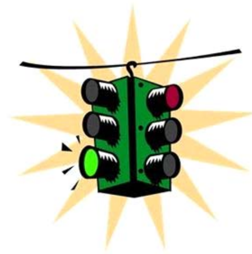
All network-affiliated broadcasters and all MVPDs must "pass through" video described programming to their viewers if the network provides it, so long as they have the technical capability to do so and that capability is not being used for another purpose related to the programming (such as an audio stream in another language). "Technical capability" means having all the necessary equipment except for items that would be of minimal cost. This requirement extends to secondary digital streams and to low power broadcast stations. Any programming aired with description must always include description if re-aired on the same station or channel.

If a station or MVPD becomes newly-obligated to provide video description (through a new affiliation or by gaining more than 50,000 subscribers), it will have three months to come into compliance.

The FCC declined to carve out any special exemptions from the above obligations for local programming, news programming, and the like. The rationale: since only four hours of programming a week must be video described, and stations and systems can choose what programming to describe, they can simply choose not to describe any programming that poses any particular difficulty. However, if a video described program is interrupted by a breaking news bulletin, it will still count toward the 50 hours.

The rules are not without additional complexities, subtleties and possible surprises. They spread over six single-space pages, after all. So TV licensees and MVPDs would be well-advised to spend the next several months familiarizing themselves with the ins and outs of the new rules. Their requirements are likely to be with us with us for some time.

Less power consumption = lower power bills



Media Bureau Green Lights MDCL Technology for AM Stations

By Harry F. Cole
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AM broadcasters who have grown tired of forking over big bucks to the power company – rejoice! The Media Bureau is facilitating a cost-saving opportunity that could reduce power consumption (and thus, presumably, power bills) by 20%-40%.

Can you spell "MDCL"? That's the Bureau's shorthand for "Modulation Dependent Carrier Level", which refers to various types of transmitter-control technology. It's been in use internationally for some time, mainly by high-powered AM stations. With increases both in energy costs and in the ease of implementing MDCL algorithms, use of such technology has become more attractive in the U.S. Don't expect a technical explanation of how it works from us – it involves algorithms, for crying out loud – but as best as we can decipher things, MDCL gear senses a station's modulation levels on a continual basis and automatically adjusts transmitter power down (and up again) depending on modulation.

The problem is that MDCL technology can cause a station's transmitter power to dip below the minimum level required by the FCC's rules – *i.e.*, 90% of the station's nominal license power. But not to worry – the Bureau has now announced that it will routinely waive that requirement. (*See* below for more details on the showing that will be required.)

> *The Bureau should be congratulated for opening this particular door, which could mean significant savings for AM licensees.*

As with anything in life, MDCL is not perfect.

In the Bureau's delicate phrasing, the power reduction at certain modulation levels "inevitably exacts some penalty upon audio quality". In other words, audio distortion or decreases in the signal-to-noise ratio in the receiver may occur, along with slight erosion of coverage at the fringes of the station's protected service area. But experience abroad and some experimental operations in Alaska indicate that such negative effects are "generally imperceptible", according to the Bureau. Plus, MDCL-based equipment available for the U.S. market permits the broadcaster to adjust the power-reducing algorithm to minimize such negative effects.

Another caveat: while the effect of MDCL technology is apparently minimal in consumer receivers, it may have a more noticeable effect on field strength readings. Accordingly, anybody taking such readings on an AM station is cautioned to make sure that the MDCL gear has been disabled before the readings are made. (The Bureau makes clear that licensees operating with MDCL technology will be expected to cooperate by disabling their gear even when the measurements are being taken by some other licensee.)

And finally, while testing is still on-going relative to the compatibility of MDCL with hybrid AM IBOC on various types of receivers, the Bureau will nevertheless permit hybrid AM IBOC stations to use MDCL as long as (a) the hybrid signal continues to comply with spectral emissions mask requirements in Section 73.44 and (b) the relative level of the analog signal to the digital signal remains constant.

The Bureau's announcement identifies two manufacturers with MDCL-friendly gear already available to the U.S. market: Harris Corporation and Nautel Limited. Harris offers two MDCL features (Amplitude Modulation Companding and Adaptive Carrier Control) on its new transmitters, and it can add such features to some older models. Nautel's approach, dubbed Dynamic Carrier Control, is available on its NX series of transmitters, and can be installed on other models. Should other manufacturers develop similar technology, the Bureau will be open to waiving the rules for use of their gear as well.

AM licensees intrigued by the cost-saving possibilities of MDCL can take one of two approaches, as far as the FCC is concerned.

For those cautious, toe-in-the-water-first types who aren't inclined to go all in all at once, there's the experimental license approach. Under Section 73.1510, you file an informal application (*i.e.*, a letter) describing your proposed set-up, which would involve operation with MDCL for purposes of evaluating the technology. No form, no fee. Plus, even though experimental licensees are normally required to submit a report to the Commission on the results of their experimental operation, the Bureau has decided that no such reports will be required from licensees evaluating MDCL technology.

On the other hand, for those cannonball-off-the-high-board types who are comfortable diving into the deep end, the Bureau will happily modify your license on request. All you need do is send a letter requesting waiver of Section 73.1560 (that's the minimum power level rule mentioned above) to:

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Stop the hop!

Good News/Bad News for FM Translator Licensees

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It's been a tough year so far for FM translator licensees, who have seemed repeatedly to get stuck at the back of the line – behind, in particular, would-be LPFM applicants – as the quest for spectrum ratchets up. But a decision by the Audio Division appears to loosen at least one of the regulatory provisions that have limited the efforts of existing translator licensees to improve their facilities. That's the good news.

The bad news is that the Division has now also explicitly declared *verboten* a practice by some translator licensees that the Division has historically condoned (if only tacitly) and that the Division concedes has not been (and is not now) prohibited by any specific rule. The now-taboo practice involves the filing of serial applications – or "hopping" – in order to relocate a translator away from its original, usually less-than-desirable smaller community to a distant-but-bigger community.

Let's start with the back story.

If you've got an FM translator, your ability to change facilities depends on whether the proposed change is "major" or "minor". To be "minor", the 1.0 mV/m contour of the proposed modification must overlap at least a little of the previously authorized 1.0 mV/m contour. Additionally, the frequency specified must be, with respect to the translator's authorized frequency, either (a) the same or (b) three channels higher or lower or (c) 53 or 54 channels (10.6 or 10.8 MHz) higher or lower.

Any mod application proposing a bigger change in geographical location or frequency is classified as a "major change". Major change applications can be filed only during a filing window – which is a real problem, since the last FM translator filing window was in 2003 and it's far from clear when the next one will be. Minor changes, by contrast, may be sought anytime – no need to wait for a window to open.

Against that regulatory background, other developments have occurred. With the FCC now formally allowing AM stations to be rebroadcast on FM translators – and informally allowing FM stations to rebroadcast their digital HD-2 and HD-3 channels on analog FM translators – the demand for FM translators has risen sharply. But the supply of available translators has been limited by the fact that the grant of new permits, until very recently, has been frozen for years. A further complication: many of the translators already on the books don't happen to be located within a minor mod of the larger communities where the increased demand has been greatest.

A number of enterprising translator operators took a close look at the rules and noticed something interesting. While the major change rule prevented them from moving their translators as far as they might like in one fell swoop, the rules ***did*** permit them to achieve a move of "major change" proportions by breaking up the move into minor-mod-sized chunks or "hops". As long as each of the incremental hops was a "minor change" under the rules, a patient translator licensee could file a series of applications designed to move its translator a very considerable distance from its original site.

When such licensees tried out this approach, sure enough, the Commission granted their "serial applications" without question or hesitation.

But now the Audio Division says it has had enough. In its recent decision, the Division states broadly "the filing of serial modification applications represents an abuse of process". The Division acknowledges that no rule specifically prohibits the practice. But as the Division sees it, the process of "hopping" a translator to a distant, but more lucrative, site constitutes an effort to abandon its present service area. Since the minor mod rule is intended to prevent such abandonment, the Division has now announced that serial applications evidently designed to achieve that purpose can and must be discouraged under the broad "public interest" standard.

> *Audio Division: "[T]he filing of serial modification applications represents an abuse of process".*

The Division is also troubled by the fact that serial modification applications implicate the 66-year old *Ashbacker* doctrine. The theory there is that serial applicants are closing off the opportunity for applicants in the next filing window – whenever that may be – to file for the desirable facilities being gobbled up through the serial modification process.

Still, the Division acknowledges that *some* translator moves may be warranted even if they would exceed the current "minor mod" limitations. And to demonstrate that, in its decision the Division has granted a waiver permitting a translator to relocate beyond the "minor mod" standards.

The translator licensee in question wanted to move its translator to the town where it also owns an AM station; the translator would serve as a fill-in for the AM. But the town was too far away for a single "minor mod" move. Rather than hop its way there with serial minor mod applications, the licensee instead proposed a single move, which would require waiver of the minor mod limitation. And the Division was happy to accommodate that request. The waiver was justified on the basis of the interplay of several factors:

- The licensee in question had no history of filing serial mod applications;

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Forgotten, and now gone

RIP: The Fairness Doctrine (1949-2011)

It's official. The Fairness Doctrine is gone, purged from the FCC's rule book. The Commission's terse order deleting the Fairness Doctrine (and a couple of other moribund rules), initially released last month, has now been published in the Federal Register. That publication marks the final step in the exorcism of the Fairness Doctrine demon. We can call the time of death: September 9, 2011.

Before we crack open the champagne and toast this event – which a number of folks, including Chairman Genachowski, would have us celebrate – let's think about that for a minute.

The Fairness Doctrine was abandoned by the Commission, with the approval of the courts, some 20 years ago. The other two sets of rules excised from the books along with the Doctrine had similarly died quiet regulatory deaths years ago. As the Commission's order correctly says, all these rules were already "obsolete" and "without legal effect". So their formal removal now has at most nothing more than symbolic meaning.

Is this cause for celebration?

It's as if a local Animal Control Officer claimed with some fanfare that he had greatly protected the public – but it turned out that his claim involved not saving the community from dangerous wild animals, but rather merely cleaning up a couple of harmless roadkill carcasses that had been bleaching in the gutter for years. Big deal. To be sure, removal of such carcasses – much like removal of the Fairness Doctrine – neatens things up a bit. But was it necessary? Not really. And, more to the point, did it have any perceptible impact on the greater public interest? Not in the least.

The Chairman touts this regulatory clean-up effort as "clearing the path for greater competition, investment and job creation". But it's impossible to imagine that anybody's path to greater competition, investment and/or job creation was hindered in any way by the ghost of the Fairness Doctrine flickering faintly in some obscure and unread passages of the rules. If we have allowed the Doctrine to hinder anything in the past 20 years, that says a lot more about us than about the Doctrine.

Still, the official removal of the Fairness Doctrine from the rules does constitute something of a milestone, at least for communications lawyers of a certain age who came into the practice when the Doctrine was alive and kicking. That once fearsome Doctrine is now gone. Let's happily bid it good-bye – not farewell, and certainly not *au revoir* . . . just good-bye.

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- The proposed modification would have been mutually exclusive with the station's authorized facilities, even though there was no overlap of the proposed and authorized 1 mV/m contours;
- The market into which the translator would be moved had not been identified as "spectrum-limited" in the recent LPFM/FM translator decision, and the proposed move would not foreclose any future LPFM licensing opportunities there; and
- The move was intended to facilitate the use of the translator as a fill-in for an AM station.

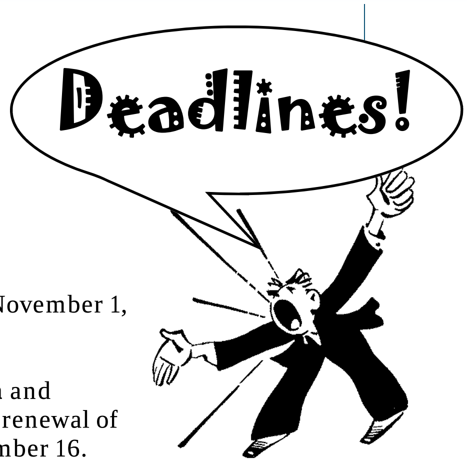
So the good news for translator licensees is that the Division is open to permitting, as "minor mods", at least some relocations that do not involve 1 mV/m overlap. This should expand opportunities for translator licensees who have historically been unwilling to undertake a series of "hops". The bad news, of course, is that licensees who *were* willing to go the "hop" route can no longer avail themselves of that device.

Since the Division has opted to announce this change in policy in the context of an individual waiver request (as opposed to, say, a more broadly applicable declaratory ruling or policy statement), the precise metes and bounds of the new policy won't be developed and refined until more waiver requests are submitted and acted on. As a result, we can't say for sure how such future requests will fare. For instance, might mutual exclusivity along with a record free of serial applications be enough to justify waiver, regardless of market and regardless of proposed rebroadcast of an AM signal? Would the presence of any three of the four factors do the trick? Such questions abound, but none of them can be answered for sure at this point.

Interestingly, the Division does not explain precisely what circumstances will be sufficient to cause a translator licensee to be deemed to have a "history of filing serial modification applications". If such a history is going to disqualify a licensee from eligibility for future waivers, it would be nice to know how the Commission is going to make that call. And why should such a history be disqualifying in the first place? After all, the practice of "hopping" is ***not*** prohibited by the rules and has been effectively condoned by the Commission for years. Why should a licensee be penalized after the fact (or, as they say in the Constitution, *ex post facto*) for engaging in conduct that was legal at the time?

The aftermath of the Division's ruling remains to be seen. But you can be reasonably safe in predicting that the price of translators that happen already to be located where prospective buyers want them will go up.

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 11, 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 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 during the past quarter 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.

December 1, 2011

DTV Ancillary Services Statements **-** All *DTV licensees* and *permittees* must file a report on FCC Form 317 stating whether they have offered any ancillary or supplementary services together with its broadcast service during the previous fiscal year. ***Please note that, for the first time, the group required to file Form 317 includes Class A TV, LPTV, and TV translator stations***. If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report on Form 317 specifically asks for a list of any ancillary services, whether a fee

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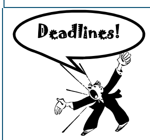
MDCL Waivers
Federal Communications Commission
Audio Division, Media Bureau
445 12th Street SW, Room 2-B450
Washington, DC 20554

The letter must specify the particular MDCL technology you're planning to use and set out how that technology is going to be implemented at the station. Be sure to email a PDF version of the letter request to Audio Division engineering ace Ann Gallagher (Ann.Gallagher@fcc.gov). Once the request is granted, the Bureau will issue a modified license specifying that a waiver has been granted to permit use of a specific MDCL technology, resulting in the variation of transmitter power to levels below 90 percent of the station's nominal licensed power. (Notwithstanding that waiver, the licensee will still be required to achieve its full licensed power at some audio input level, or when the MDCL is temporarily disabled. This is because the Bureau does ***not*** want such waivers to be deemed to authorize simple overall power reductions which would reduce the station's licensed coverage area.)

The Media Bureau should be congratulated for opening this particular door. For AM licensees, it could mean significant savings. That alone is to be cheered. But the way the Bureau has done that is equally impressive. No need for a notice of proposed rulemaking, general inquiry or other time- and labor-consuming bureaucratic process. Rather, the Bureau examined the information already available, satisfied itself that any potential harm would be outweighed by the benefits to be gained, and let fly with its announcement welcoming MDCL requests. Such a streamlined approach to regulatory relaxation makes sense here. Hats off to the Bureau.



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was charged, and the gross amount of revenue derived from those services. Ancillary services do not include broadcasts on multicast channels of free, over-the-air programming for reception by the public.

Biennial Ownership Reports* -** All *licensees* and *entities holding an attributable interest* in a licensee of one or more *commercial 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.

***License Renewal Applications* -** *Radio* stations located in **Alabama** and **Georgia** 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 **Alabama** and **Georgia** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on December 16, January 1, January 16, February 1, and February 16.

***License Renewal Pre-Filing Announcements* -** *Radio* stations located in **Arkansas**, **Louisiana**, and **Mississippi** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on December 16, January 1, and January 16.

EEO Public File Reports* -** All *radio* and *television* stations *with five (5) or more full-time* ***employees **located in Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota**, **Montana**, **New Hampshire**, **North Dakota**, **Rhode Island**, **South Dakota**, and **Vermont** 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 **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** 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 **Alabama**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

A chance to kick the tires

First "White Space" Database Ready for Testing

By Mitchell Lazarus
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703-812-0440

Those long-promised "white space" devices, delivering super-Wi-Fi performance on locally unused TV channels, are moving a small step closer to reality.

The delay in actual availability – initial rules were adopted almost three years ago – results from the fact that these devices must protect several other services from interference. The main mechanism to achieve that protection is a set of databases that list the locations and frequencies of the services entitled to protection. A white space device is supposed to check in with a database for a safe frequency assignment before transmitting. The first of those databases is now ready for testing.

The services that qualify for protection, and which hence must be listed in the databases, are:

- broadcast television stations (including full power, TV translator, low power TV, and Class A stations);
- fixed broadcast auxiliary service links;
- receive sites (and received channels) of TV translator, low power TV and Class A TV stations and multichannel video programming distributors (MVPDs);
- private land mobile radio service and commercial mobile radio service operations
- offshore radio telephone service operations;
- radio astronomy operations at specific sites; and
- certain wireless microphone operations.

The FCC has approved ten database administrators to keep track of these services. The idea is for each administrator to set up its own separate database. Each of the ten will extract information on protected services from the FCC's licensing databases, or from the rules (except for some MVPD and wireless microphone information, which must be entered by hand by interested parties). This information need be entered into only one database, which will automatically share that information with the other nine – so that, as a result, all ten reflect the same protected services. Thus, no matter which of the ten databases a white space device chooses to consult, it should get back the same information on available channels.

That is the theory, at least. Coordinating ten very large, constantly changing databases, each of a different fundamental design, is likely to present problems in practice.

The first of the ten databases is now ready for a 45-day period of public testing. Beginning on September 19, anyone can visit this site to test the white space channel availability calculator, the cable headend and broadcast auxiliary temporary receive site registration utilities, and the wireless microphone registration utility. Unfortunately the all-important sharing function among databases is not yet ready to try out.

Give it a try, and let us know what you find.

(Continued from page 1)

being put to some better – *i.e.*, more lucrative – use.

Such an approach echoes elements of the debate that has been swirling for the last couple of years around the possible re-purposing of TV spectrum for broadband use. The argument there is that, in the eyes of some, broadband constitutes a higher and better use of the spectrum than does broadcast television. Because of that, so that line of thinking goes, TV operators can and should be forced off their current space on the band in favor of broadband.

Factoring the concept of "alternative spectrum use forgone" into the calculation of user fees could provide an effective way for the Commission to "encourage" licensees to embrace Commission-favored services.

Of course, even if the Jobs Act were to be enacted today, TV licensees could breathe easy, since the Act would exempt them from spectrum user fees. How long that exemption would last – if it were to survive the legislative process in the first place – is anybody's guess.

Under the Jobs Act, the Commission would be expected to act fast to get the spectrum user fee machine up and running. Within 60 days of the Act becoming law, the agency would have to initiate a rulemaking proceeding looking to devise the nitty-gritty details of methodology for determining and assessing the fees. And that wouldn't be one of those lazy take-as-much-time-as-you-want rulemakings, either – the Jobs Act specifies that the Commission would have to be set up to collect the first round of fees no later than September 30, 2012.

And in case you might be tempted just not to pay the user fee, you might want to think again: the Jobs Act specifically authorizes the Commission to revoke authorizations for failure to make timely payment.

It's way too early to be able to reliably predict whether the Jobs Act is likely to be enacted (and, if it does make through the process, whether the spectrum user fees will still be part of the final package). But it's clear that the Administration sees such fees as a source of cash, and cash is what it needs, even if the projected collections over the first ten years – *i.e.*, about $5 billion – would be relatively small potatoes when stacked up against the Jobs Act's overall cost of $447 billion. So we can expect spectrum fees to be actively in play as the federal government works to address the country's economic problems.

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Gettin' back to bid-ness

Auction 93: 123 New (or Nearly New) FM Allotments Up For Grabs Next Spring

By R. J. Quianzon
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703-812-0424

With several months still to go in 2011, the FCC is already looking ahead to Spring, 2012 – it has announced that, come ***March 27, 2012***, 123 new FM construction permits will be trotted out on the auction block. You can find a link to a list of the available allotments on our blog (www.CommLawBlog.com).

While the Commission refers to 123 "new" permits, watch out. Of the 123 permits, 16 are actually unsold left-overs from Auction 91, conducted earlier this year, and one goes back to Auction 70 (in 2007). (That last item was sold in Auction 70, but the buyer defaulted.)

If you've followed the Commission's auction process, you know that there's plenty of paperwork to get out of the way before the bid paddles start going up on March 27 and the gavel starts coming down some time later. The first step? A request for comments on proposed procedures, upfront payments and minimum opening bids. Comments are due by ***October 7, 2011***, replies by ***October 17, 2011***.

Except for some tinkering with some really granular stuff (*e.g.*, the auction activity requirement and similar minor items), the procedures the Commission has put out for comment don't contain anything different from past FCC broadcast spectrum auctions. Perhaps most notably, the FCC's notice includes the standard four-paragraph disclaimer warning potential bidders that the government cannot guarantee that the spectrum at auction will actually work. While such disclaimers are regrettable – hey, if the government's going to sell you spectrum to use for a broadcast station, shouldn't you be able to assume that the spectrum can in fact be used for that purpose? – *caveat emptor* is the way to go here: you don't want to end up like the guy in Auction 37 who spent more than $4 million on a permit in scenic Pacific Junction, Iowa, only to discover that the spectrum couldn't be used because it would interfere with nearby FAA communications. Oops. (Happy Ending, sort of: The Pacific Junction applicant ultimately got his money back, about six years *after* he paid it to the Commission.)

Given the FCC's bold-faced disclaimer, potential bidders should take the time and make the effort ***now*** to investigate thoroughly any permits they may have their eye on. The Commission suggests that prospective bidders watch out for "anomalies such as site restrictions or expense reimbursement requirements", and that they also check out the availability of potential sites. Oh yeah, and bidders should for sure be familiar with the rules regarding the National Environmental Policy Act, which can throw a monkey wrench into the best-conceived of plans.

Proposed starting bids go all the way from $750 to $100,000 – although the Commission is inviting comments on the opening bid levels it has come up with. The vast majority of proposed openers come in at $25,000 or less, and 14 of the permits are priced to move at a low, low $750. The priciest allotment – a Cloverdale, California Class A – will kick off at $100K. Don't assume, though, that the final bids will necessarily be in the same ballpark as the opening bids: it only takes two determined bidders to goose the price of any permit skyward.

One thing to watch for this time around: the possible effect of the revisions to the "move-in" rules that kicked in earlier this year. Historically, an FM auction provided an opportunity for creative folks to figure out how an up-for-grabs channel in some obscure and distant community might be leap-frogged or hop-scotched into a more populous, and thus lucrative, situation. Last Spring the Commission sought to slam the door on such things. As a result, Auction 93 is likely to be a "what-you-see-is-what-you-get" affair, with little if any post-auction jockeying of channels and communities. It's probably a good guess that that will drive the ultimate dollar values of these channels down, but you never know.

The FCC's release doesn't mention bidding credits for new entrants, but in any FCC auction you must figure that such preferences will be available. Generally, a 35% bidding credit is available to bidders who own no other broadcast stations and a 25% credit is given to bidders who own three or fewer stations (provided that none of those stations is in the same market as the target auction permit).

Check back with CommLawBlog for updates.

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Besides the proposed spectrum user fee, the Jobs Act includes other spectrum-related proposals. The spectrum user fee provision (Section 278) is only one of 27 sections contained in Subpart H of the Jobs Act, entitled "National Wireless Initiative". The other sections deal with granting the FCC authority to conduct incentive auctions (similar to other bills that have previously been introduced in Congress), reallocation of federal government-held spectrum to private use, reallocation of the "D Block" for public safety use, establishment of a new Public Safety Broadband Corporation and many other matters. While none of those provisions may have the dramatic and near-universal reach of the spectrum fee concept, they nevertheless still warrant careful attention. We'll keep our eyes out and report back as warranted.

CAP Compliance Postponed Until June 30, 2012

By Lee G. Petro
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The Commission has announced that the deadline for complying with the Common Alerting Protocol (CAP) requirements has been extended until June 30, 2012. Good thing, too, since the announcement came a scant two weeks ahead of the then-operative deadline of September 30, 2011. Of course, given the number of still unresolved issues on the CAP front, most observers figured that an extension was an odds-on mortal lock, but "most observers" don't carry quite the same clout as five (or even just three) Commissioners.

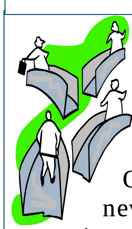
If you're still unclear on what CAP entails, you can find details in a an item we posted on our blog (www.CommLawBlog.com) back in April, 2010. The fact that all EAS participants are going to have to be CAP-ready eventually has been a given since at least 2007. However, the transition to CAP technology has involved both the FCC and the Federal Emergency Management Agency (FEMA), a lethal mixture when it comes to scheduling anything. Both agencies had to adopt new rules and standards, and before the FCC could do its thing it had to wait for FEMA to do *its* thing. As a result, while the Commission's rules currently mandate that "all EAS Participants must be able to receive CAP-formatted alerts", even the Commission admits that nobody can comply with that requirement just yet, because the Commission still hasn't finalized the specs which will establish precisely what it means to "receive CAP-formatted alerts".

The Commission may be on the final lap of its work, but until it hits the finish line, loose ends will remain. Because of that, the deadline for EAS participants to comply has been put off twice already – from the original March, 2011 date to September 30, 2011, and now to June 30, 2012. While that should be plenty of time for the Commission to wrap things up, we won't know for sure until we get closer to the deadline. For planning and budgeting purposes, all affected folks should probably assume that the June, 2012 deadline will stick this time.

One word of caution. Since the Commission doesn't have its new CAP rules in place, it also is not in a position to certify any particular equipment as CAP-compliant. But that hasn't stopped some equipment suppliers from marketing "intermediate" devices designed to provide some CAP capabilities. With such devices in mind, the Commission has "reminded" all EAS participants that

> equipment that meets the definition of an encoder or a decoder under our rules must be certified under Section 11.34 of the Commission's current rules. In addition, equipment used to receive CAP-formatted EAS alerts must, at a minimum, comply with the CAP requirements the Commission adopted in the *Second Report and Order*.

Bottom line – anybody that has bought some such "intermediate device" should be sure to verify, with the gear's manufacturer and/or vendor, that the gear does in fact comply with Commission rules that are already on the books.



FHH - On the Job, On the Go

On September 22, **Frank Jazzo** moderated a panel of FCC, FEMA, NAB and Monroe Electronics officials in a discussion of the FCC's EAS CAP extension and implementation and the November 9 National EAS Test.

On October 5, **Dan Kirkpatrick** (assisted by **Frank J** and **Harry Cole**) will present a webinar on the license renewal process for members of the Arkansas, Louisiana and Mississippi state broadcast associations. (Got renewals coming up soon? Dan and his crew can help walk you through the ins and outs in a one-hour presentation. Give him a call.)

On October 6, **Howard Weiss** will moderate a panel for FCBA members on legal ethics.

On October 11, **Peter Tannenwald** will speak on a panel at "Wispapalooza", a three-day meeting of the Wireless Internet Service Providers Association. You'll have to travel to Las Vegas to attend. Peter will address (among other things) opportunities for wireless Internet service providers possibly arising from the FCC's TV spectrum repacking proposal.

On November 4, **Frank Montero** will be presenting a seminar on public file maintenance and ownership reports to the Puerto Rico Radio Broadcasters Association. Hey, that reminds us of an item that inadvertently missed our last issue: **Frank M** was featured in an interview in the August 22 edition of *Radio Ink* magazine, waxing eloquent (as always), this time on the subject of changes that might be in store for the FCC's ownership rules. A full-page devoted to **Frank**, complete with full-color photo (suitable for autographs). Yo, Frank, you're looking good there — so good, in fact, that you're our *Media Darling of the Month*!

Don't look now but . . .

The FCC Is Watching You . . . or At Least Your Website

By Anne Goodwin Crump
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703-812-0426

A couple-three years ago, we warned our blog readers that the staff of the FCC's Media Bureau appeared to be browsing the websites of broadcast stations, checking for compliance with the EEO rules. Actually the FCC staffers were then apparently checking for compliance with an imaginary EEO requirement that didn't – and still doesn't – exist, but the important take-home message was the same regardless: FCC staffers were inspecting broadcasters' websites.

It appears that that practice continues.

Recently, an FCC staff member emailed us, questioning whether one of our clients had posted its annual EEO report on its website. (As noted below, the rules ***do*** require such posting.) The staffer reported that she had been unable to find the report on the site. Happily, we were able to confirm (and demonstrate) that the report had in fact been posted – albeit not necessarily in the most obvious place on the station's site – and the staffer apparently went away satisfied.

But that encounter prompts us to remind broadcasters that their websites are wide-open for inspection by anybody, including FCC staffers. And nowadays those staffers are apparently motivated to engage in such inspection in connection with the license renewal process, which is swinging into high gear. (Two batches of renewals have been filed already, with more to come at two-month intervals for the next few years.)

The Commission's rules currently specify only one type of "public file" document that must be included on a station's website (assuming, of course, that the station has elected to have a website): the licensee's most recent annual EEO report, the specs for which may be found in Section 73.2080(c)(6) of the rules. (Obscure regulatory factoid: The public file rule technically still requires that DTV transition education reports – Form 388 – be posted on websites. However, since the retention period for those reports is only one year, and since all but a dozen or so TV stations completed their move to digital more than a year ago and thus no longer have to file Form 388, the continuing impact of that particular requirement is minimal at this point.)

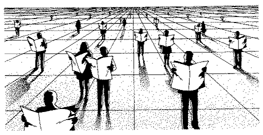
Of course, stations with fewer than five full-time employees are exempt from the annual EEO report requirement. But if you are not exempt, and if you do have a website, it would be a good idea to be sure that your most recent EEO report is posted there. While the rule does not specify how prominently the report is to be posted, it would probably be a good idea to make it pretty darned easy to get to the report from the station's home page. That should assist FCC staffers in locating the report at your site – thus enabling them to move on to somebody else's site that much quicker.

Our recent interaction with the staff did not indicate that the FCC plans to dole out fines to stations that don't happen to have posted their reports as required. But you never can tell.

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

Updates On The News

Life in the trenches, 2011 – The Commission has released the results of the latest survey of its employees' "viewpoints". We've enjoyed the two previous such surveys – released in 2009 and 2010, but at odd intervals that makes you wonder about the rhyme or reason of their scheduling – and the 2011 version does not disappoint. Last year, of course, OMB (which apparently conducts the survey) declared the FCC the "most improved" agency, so the pressure was on this year to keep up the good work. And sure enough, things are looking good, sort of. A couple of examples:



Role models 'r' us: Presented with the statement "My organization's leaders maintain high standards of honesty and integrity", 63.6% of the FCC's respondents agreed (strongly or otherwise). Of course, that means that more than 36% didn't agree, but what the heck – the numbers are better than 2010, when 62.2% agreed, and 2009, when only 60% agreed. And the percentage who ***dis***agreed strongly this year dropped to 5.4%, nearly half the level of strong disagreers (9.2%) in 2009 (although not too far off – but still better than – last year's 7.0%).

Fair and balanced – "Arbitrary action, personal favoritism and coercion for partisan political purposes are not tolerated." In 2009 only 51% agreed with this, strongly or otherwise. That number zoomed up to 51.1% in 2010. And in 2011? Huge progress – the "agree" level rocketed to 54.4%! But wrap your mind around that. Nearly half of the survey respondents weren't able to agree with what should be a slam dunk proposition. And a total of 21.2% affirmatively disagreed (with 10% *strongly* disagreeing), meaning that more than a fifth of the respondents apparently think that arbitrariness, favoritism and politically-motivated coercion ***are*** tolerated.

Clearing the deadwood **–** The FCC showed some improvement with respect to the statement that "[i]n my work unit, steps are taken to deal with a poor performer who cannot or will not improve". Total agreement reached 29.5%, up from last year's 25.3%. But nearly 40% ***dis***agreed, 18.3% strongly (as opposed to the 5.3% who strongly agreed). So while the respondents were apparently happy to kiss up to their "organization's leaders" (*see* above), they weren't so inclined with their fellow staffers.