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Memorandum to Clients

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A decision as ambiguous as "aloha"

TV Shared Services Agreements: Danger Ahead!

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If you're looking for evidence of the Commission's ambivalence toward "shared services arrangements" involving TV operations, look no further than a Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture (*MO&O*) released by the Media Bureau the day after Thanksgiving. Although the Bureau acknowledged (as it had to) that such arrangements are not barred by any Commission rules and that the complained about three-station deal in Hawaii didn't violate any laws, the Bureau couldn't bring itself to fully bless the deal.

Instead, it ominously hinted that, come renewal time, the parties to the shared services arrangements might run into some rough water. The agreements may technically be street legal, the Bureau sniffed, but they are still "clearly at odds with the purpose and intent of the duopoly rule".

So just because those agreements might not violate any rules, the Bureau figures that the Bureau won't be precluded "from considering whether this or similar transactions are consistent with the public interest within the context of individual licensing proceedings" come renewal time. How's that for providing useful guidance to the folks who have already entered into, or who may be thinking about entering into, such arrangements? Sure, says the Bureau with its regulatory eyebrow raised to new heights, what you're doing may be legal and all, but that doesn't mean we won't try to find a way to whack you anyway.

Inside this issue . . .

How did such shared services arrangements come about in the first place? The Commission's multiple ownership rules constrain common ownership of multiple broadcast stations in a market. But for more than 20 years, the Commission has permitted licensees to enter into various types of contractual relationships that afford them many of the advantages of common ownership without actually crossing the formal "ownership" line. Such arrangements come in a variety of flavors. The earliest versions were dubbed "local marketing agreements", or "LMAs". Those often tended to be nothing more than "time brokerage agreements", or "TBAs", through which a licensee sold pretty much all of its broadcast air time to somebody else, often another broadcaster in town.

The gist of all such arrangements was (and remains) that, even though the licensee might be selling off the lion's share of its station's time, that licensee nonetheless remains the station's licensee and is ultimately responsible for its station's operations. The three key factors: the licensee must maintain control over the station's programming, personnel and finances.

In 1999 the Commission revised its ownership rules to permit some, but not all, TV duopolies (*i.e.*, common ownership of more than one TV station in a given market). A licensee of one station in a market could acquire another station in the same market so long as, at the time of acquisition, at least one of the stations was not ranked among the top four stations in the market. Those rules were also revised to treat certain types of LMAs as "attributable" interests. The combination of these changes meant that, in many cases, TV LMAs would be prohibited, thanks to the fact that the attributable interests arising from the LMA would put the licensees in question over the newly-revised multiple ownership limits.

But we all know that combining operations of separate stations can lead to substantial savings through the sharing of duplicative functions. That fact served as an incentive to TV licensees to come up with an alternative to LMAs that would still conform to the rules.

And so was born the shared services arrangement.

Your garden variety shared services arrangement generally consists of a bundle of separate agreements between two TV licensees in a market. Those agreements – often including a shared services agreement, a joint sales agreement, an equipment lease, possibly even an option – are carefully crafted

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No Urban/No Spanish . . . almost

A Closer Look at the 4A's Non-Discrimination Policy

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In late October, amid much congratulatory buzz, the American Association of Advertising Agencies (which sometimes refers to itself as the 4A's) adopted a new "best practices" policy recommending that ad agencies adopt "non-discrimination vendor policies and procedures". In the eyes of some – Commissioners Copps and McDowell, for two prominent examples – this move was just what the Commission had in mind back in 2007-2008, when it first announced that broadcasters would have to certify (in their renewal applications) that *they* (that would be the broadcasters) don't discriminate on the basis of race or ethnicity in their advertising contracts. The Commission's action was designed to put a stop to, or at least curb, so-called "No Urban/No Spanish" dictates in ad time buys.

The Commission's policy is not without its conceptual shortcomings. Not the least of those shortcomings is the fact that, since it's applicable only to broadcasters, the FCC's policy leaves a gaping hole in protection against the supposed discriminatory practices to which it is directed. After all, broadcasters are in the business of selling time for others' commercial messages; broadcasters are thus generally *not* the ones making the decisions as to which station's time will be purchased. Moreover, stations are often at least one step removed from those decisions, since advertisers frequently rely on ad agencies in crafting their campaigns, including the stations on which the ads are to be placed.

The new 4A's best practices statement would seem at first blush largely to fill that hole. As noted above, the announcement was met with laudatory statements from two Commissioners. Commissioner Copps effused that "[t]hese best practices from the advertising agencies will pave the way for more equal treatment," and that they will have "a positive impact in communities across the country."

Hold on there. Let's take a look at the actual language of the "Non-Discrimination Policy Related to Vendor Selection".

As it turns out, the policy includes some significant qualifying language which could cause it, in practice, to fall short of what the FCC had in mind. As announced by the 4A's, the policy reads (with italics we have provided):

> **NON-DISCRIMINATION POLICY RELATED TO VENDOR SELECTION**
>
> [Insert here name of agency: hereafter Agency] is dedicated to a policy of equal opportunity for all media vendors, suppliers and agents ("Vendors"). Subject to the protection of Agency's and its clients' confidential information, Agency will clearly communicate selection criteria to all appropriately qualified Vendors. *Consistent with each Agency client's marketing communications strategies, effective media target audience planning, and efficient media buying practices*, Agency policy is to grant equal opportunity to all such Vendors.
>
> **Complaint Review Process**
>
> A Vendor that feels it has been the victim of discriminatory buying practices by Agency shall be provided the opportunity to voice its dissatisfaction through Agency's complaint review process. For purposes of this review process, discriminatory buying practices shall be defined as any buying policy that is in conflict with FCC media regulations, and thereby negates equal opportunity.
>
> Agency will provide each of its Vendors with the opportunity to present in writing the basis of its dissatisfaction to Agency's Discrimination Complaint Review Committee. Based on its findings, the committee may request a meeting with the Vendor to discuss all pertinent information related to the complaint.

Consider that italicized language carefully: the equal opportunities to be accorded Vendors are to be "[*c*]*onsistent with each Agency client's marketing communications strategies,*

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A modest proposal

Time to Rethink FM Contour Protection?

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It's been more than 50 years since the FCC adopted the contour protection approach which still governs (with some exceptions) the allotment of commercial FM channels in the U.S. Maybe it's time to change that approach.

At least, that's what Matthew Wesolowski is suggesting in a petition for rulemaking filed a couple of months ago. Wesolowski, a broadcast engineer and station owner, thinks that the FCC's non-reserved FM channel allotment rules should be revised to protect an FM station's actual signal contour rather than the theoretical maximum contour which is protected under the current system. The current system was adopted, at least in part, in order to afford licensees plenty of opportunity to maximize their coverage. But since then, existing stations have had plenty of time to maximize their coverage out to their theoretical maximums. Why not declare that the era of contour protection has served its purpose, but now it's time to allow stations to expand their service area so long as that expansion does not encroach upon the actual signal contours of other stations?

Whether any of the many issues raised will be answered is another question entirely.

An intriguing idea, to be sure, but not to everybody's liking. The National Association of Broadcasters (NAB), for instance, objected to the Wesolowski petition, arguing that his proposed approach would lock FM stations into their existing operating parameters. Stations would no longer have the ability to shuffle around within their protected contour in response to population changes or transmitter site availability. Furthermore, according to the NAB, the proposed system would allow new stations to wedge themselves into currently-protected areas that are outside other stations' contour areas, thus increasing congestion in the FM band. In many broadcasters' minds, contour protection equates to the "AM-ization" of the FM band, inviting all the interference problems that have plagued the AM service for decades. The NAB also observed that such a rule would make it difficult for FM stations to begin operations with reduced facilities and then upgrade at a later date without exceeding their interference protection limits.

Hold on there, countered Wesolowski. He figures that the FM market has matured to the point that the original rationale for the rule no longer applies. Yes, the contour protection system was intended to allow stations to gain a foothold in a market before upgrading, but that's not the common scenario these days. It doesn't make sense to protect stations that may never reach maximum operations. It would be better, he argues, to allow other stations to improve their service to a broader service area. As for interference, actual contour protection has been proven in practice for decades in the NCE reserved band.

Clearly, Mr. Wesolowski's proposal raises a raft of difficult issues. How much additional service could really be expected from his approach? What types of markets would be most likely to benefit? Is concern about "AM-ization" valid, or are the AM and FM services so technically and historically distinct that the comparison isn't valid? How would the change affect the Commission's ability to process applications quickly? Would the FM service as a whole be harmed or improved by actual contour protection? Would the proposed rule benefit consumers?

Whether any of those issues will be answered is another question entirely. Wesolowski's petition is just that – merely a petition. While the Commission has assigned it a "rulemaking number" and invited preliminary comments on it, those are mainly ministerial acts. The assignment of a rulemaking number does not bind the Commission to taking the next step – which would normally be the issuance of a notice of proposed rulemaking. Many petitions for rulemaking never get to that stage, and instead languish indefinitely in their dockets, like Schrödinger's cat, simultaneously alive and dead.

The industry opposition which has already surfaced (in, *e.g.*, the NAB's comments on the petition) seems to reflect a lack of industry consensus, which could discourage the Commission from moving forward on this any time soon. Also, tinkering with the broadcast rules is not high on the FCC's list of to-do items these days, since most of the oxygen at the agency is being consumed by that other "b" service – broadband.

Focus on FCC Fines

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Fine, fine . . .

Looking for our usual reportage about FCC enforcement activities, the stuff that traditionally greets the reader arriving at Page 3? According to our beat reporter on the Fines and Forfeitures Desk — that would be the inimitable R.J. Quianzon — all was quiet on the enforcement front this past month.

It's quiet out there . . . maybe too quiet. Check back next month to see if things pick up.

Hill's Bills Drill Process Ills

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On November 2, Rep. Greg Walden (R-OR), Chairman of the Energy and Commerce Subcommittee on Communications and Technology, and Senator Dean Heller (R-NV) took the wraps off legislation aimed at improving regulatory process at the Federal Communications Commission (FCC). Just how might that be accomplished? According to the bills' sponsors, by imposing a number of procedural constraints on the Commission that would force it to act more transparently, more efficiently, and within more predictable time frames.

As we've previously reported (for instance, in the April, 2011 *Memo to Clients*), over the last several years FCC process has at times been a source of bipartisan frustration. Concern about the absence of certainty in how – and how fast – the process will run has developed into a mini-movement to revisit agency process. Agency practices that have given rise to this alarm include: texts of orders not being released until weeks or months after their nominal adoption; "shot clocks" for agency action that are inconsistently applied (when they exist at all); and unilateral control of the Commission's agenda being wielded by the Chairman (allowing the Chairman to prevent action on matters that a majority of Commissioners might prefer to vote).

Over the last several years FCC process has at times been a source of bipartisan frustration.

And, perhaps, the attention of a divided Congress is more easily attracted to an agency that asserts itself into areas where its statutory authority is at best indirect and, in the eyes of some, even nonexistent (hard to believe? Check out the D.C. Circuit's 2010 *Comcast* decision on net neutrality).

These bills are not the first evidence of Congressional unrest in this area. Chairman Walden has repeatedly expressed an interest in improving transparency, predictability, and consistency at the FCC. Other Republican members have been vocal in their dissatisfaction with FCC net neutrality proposals and the conduct of merger reviews. Democrats, too, have had their say on how to best improve process, including Rep. Anna Eshoo (D-CA), sponsor of the Federal Communications Commission Collaboration Act, aimed at changing the statutory sunshine rules that some say inhibit Commissioners from interacting in the most efficient way.

The latest step has been the introduction in the House and Senate of two pairs of essentially identical bills: S.1784 (Heller) and H.R.3309 (Walden), intended by their sponsors to increase transparency and efficiency in FCC procedures; and S.1780 (Heller) and H.R. 3310 (by Rep. Steve Scalise (R-LA) with Walden as cosponsor), which would consolidate the reporting obligations of the FCC in order to improve congressional oversight and reduce reporting burdens. Walden's Communications Subcommittee marked the legislation two weeks after it was introduced. The sponsors have released a summary of the bills' goals; we've included a link to that summary on our blog (www.CommLawBlog.com).

In the nitty-gritty details of the bills there are some interesting highlights. When issuing a notice of proposed rulemaking (NPRM), the Commission would have to:

- provide comment *and* reply comment periods of *at least* 30 days each;
- expressly identify a previous action (*e.g.*, Notice of Inquiry, prior NPRM, court order) in the preceding three years from which the new NPRM is a "logical outgrowth". Alternatively, the FCC could make a finding that the new NPRM will create no "additional burdens on industry or consumers" or that an NOI would be "impracticable, unnecessary or contrary to the public interest";
- include the specific language of the proposed rule or rule amendment; and
- propose "performance measures" by which the effectiveness of the new/amended rule would be measured.

In adopting new rules or amending existing ones, the Commission would: first have to identify and analyze the "specific market failure, actual consumer harm, burden of existing regulation, or failure of public institutions that warrants the adoption or amendment"; and then provide a "reasoned determination" that the benefits of the proposal would outweigh its costs. Adopted rules/amendments would also have to include "performance measures" based (to the extent possible) on data already collected by the Commission.

Presumably to avoid the problem encountered particularly during the tenure of former Chairman Kevin Martin – when Commissioners complained of not receiving proposals on which they were expected to vote until immediately before the vote was to be taken – the Commission would be required to adopt rules providing for "adequate deliberation". These would include making the text of agenda items available to the public "in advance" of open meetings.

Out of concern that existing sunshine rules may sometimes create less, not more, openness, a bipartisan majority of Commissioners could hold a closed-door meeting if: there were no votes; participation is limited to Commissioners, staff, members of joint boards or their staffs; and an attor-

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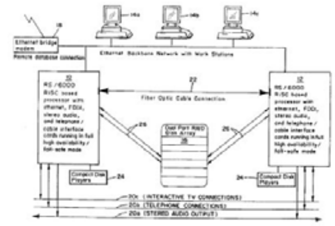
Down, but not necessarily out

Mission Abstract Infringement Suit Stayed



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Mission Abstract Data (previously, now, and always, to us: "MAD") has been dealt another setback. MAD is the company trying to hold pretty much the entire radio broadcast industry accountable for alleged patent infringement. Now, less than a month after the United States Patent and Trademark Office (PTO) rejected several of the claims underlying MAD's patents (those would be Nos. 5,629,867 (the *867 patent*) and 5,809,246 (the *246 patent*), the U.S. District Court for the District of Delaware has granted a stay sought by radio broadcasters who are on the wrong end of MAD's patent infringement suit. As a result, that case is now on hold pending final resolution of the PTO's reexamination.

But broadcasters might want to hold off on the celebrations just yet.

While many figured that a stay in the Delaware infringement action would effectively resolve that litigation in favor of the defendant broadcasters (and secondarily kill off MAD's efforts to extract licensing fees from the rest of the industry), we're not convinced that you can read that much into the court's opinion. Sure, it's a blow to MAD, which could have used a victory to put further pressure on the defendants and potential licensees to settle rather than litigate. But it's not the slam dunk that many expected.

> *Sure, it's a blow to MAD, but it's not the slam dunk that many expected.*

In assessing the parties' arguments for and against a stay, the court focused on three factors:

> Whether a stay would simplify the issues and trial of the case;
>
> Whether discovery is complete and a trial date has been set; and
>
> Whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party (MAD, in this case).

Obviously, the court could address all of these without tipping its hand about the ultimate merits of the case . . . and that's just what the court did.

The closest the court came to addressing the merits of the case occurred in its analysis of the first factor. The court noted that five of the six patent claims that form the core of MAD's lawsuit have been have been rejected by the PTO. If these rejections stand, the lawsuit will certainly be simplified, since MAD will then be left with only one claim. (That would be Claim No. 5 under the *867 patent*, covering situations "wherein said disk array storage comprises a dual-port RAID disk array".) The court even suggested that the litigation might be "mooted" if all MAD's claims were tossed by the PTO. So that factor seemed to weigh in favor of a stay.

There was also the possibility that MAD's claims might be modified as a result of the PTO proceeding. That, too, seemed to favor a stay – why push ahead with litigation of claims that might get revamped?

The second factor was a no-brainer. The discovery process has just begun, and no court date has been set – so it's not like the parties have already invested much in the development of facts and issues. Meanwhile, the PTO has moved quickly in the reexamination process, giving rise to at least a hope that the remainder of the PTO's deliberations will be similarly quick.

Finally, the court concluded that a stay would not unduly prejudice MAD or give the broadcasters a clear tactical advantage. MAD still gets to litigate its case – it just might take a little longer. And while MAD will first have to successfully navigate the PTO process, that's not the defendants' fault: the PTO reexamination process was initiated by Broadcast Electronics, a manufacturer, and not any of the broadcast licensees who are parties to the Delaware litigation.

The court's analysis of this last factor included an interesting observation. The court suggested that, if MAD were in fact competing in the marketplace with the broadcast defendants, then the court might be less inclined to delay MAD's litigation. But MAD is not a real competitor. Rather, in the words of the court, it's a "non-practicing entity, which does not manufacture or sell the products covered by the patents in suit and seeks to collect licensing fees". (While the court didn't use the term "patent troll", that's probably what it meant by "non-practicing entity".)

So what are the larger implications?

Obviously, the ongoing PTO reexamination remains crucially important (arguably even more so now that the broadcast defendants have agreed to abide by the result of the PTO's final decision). If the initial PTO rejection of the majority of MAD's claims stands, MAD will have only one claim from the *867 patent* on which to base its entire lawsuit, leaving the defendants in a good position. Not rock solid (because MAD could theoretically still prevail on that one remaining claim), but certainly favorable. On the other hand, if MAD can convince the PTO to reverse the initial rejection (which happens often enough to be a

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Tip our hat to the new (or old) constitution? Apparently not . . .

Meet the New Form 355 . . . Same as the Old Form 355?

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Hot on the heels of its formal abandonment of the "enhanced disclosure" reporting form (the ill-fated Form 355) (*see* related article in last month's *Memo to Clients*), the Commission has made good on its promise to come up with a replacement. Ladies and gentlemen, please put your hands together for the 2011 edition of "Standardized Television Disclosure Form 355".

Actually, all we have at this point is a *proposed* Form 355 and a Notice of Inquiry posing numerous questions about that proposal. But it's a good bet that the proposed form is pretty much already a done deal destined for prompt adoption. Implementation may be a different story, as we all learned from the 2007 Form 355 that never quite got off the ground. While the new version suffers from many of the problems that presumably stalled out the old version, the Commission is try, trying, again.

The FCC appears to be wearing its 2007 blinders when it says the 2011 Form 255 substantially reduces the burden on broadcasters.

That process has now begun, with the release of a Notice of Inquiry (*NOI*) requesting comment on a new and "improved" version of the Form 355.

As currently proposed, that form would be required only of television stations (both commercial *and* noncommercial), although the Commission does say that it expects "eventually" to adopt similar requirements for radio. The proposed form looks a lot like the 2007 version, which should not be surprising, since both came from the same source. That would be the Public Interest, Public Airwaves Coalition (PIPAC), which designed and championed the 2007 version and has now returned with the 2011 version.

You may recall that the 2007 Form 355 required detailed reporting of all TV programming (per quarter) in a bunch of categories (including national news, local news, local civic affairs, local electoral affairs, local programming, public service announcements, paid public service announcements, underserved communities programming, religious programming and independent produced programming). Additional information – about such things as closed captioning, video description, emergency advisories – was also required.

Even the Commission now acknowledges that the 2007 Form 355 was "overly burdensome". That the 2007 Form 355 was indeed overly burdensome was obvious from the get-go, of course, so the fact that it has taken the Commission some four years to get to this point is not especially comforting. And sure enough, the FCC still appears to be wearing its 2007 blinders when it characterizes the 2011 Form 255 as "substantially reduc[ing] the burden". (Although, since the 2007 version had set the bar so low, the Commission had plenty of ways to go before getting to something not overly burdensome.)

The Commission now proposes requiring reporting on programming in three categories: Local News, Local Civic/Governmental Affairs, and Local Electoral Affairs. The definitions of these categories would be (according to PIPAC, which appears to be the source authority for most of the Commission's proposals here):

- *Local News*: Locally produced programming that reports on issues about, or pertaining to, a licensee's local community of license.
- *Local Civic/Governmental Affairs*: Coverage of government meetings, legislative sessions, conferences featuring elected officials, substantive discussions of civic issues of interest to local communities or groups, and interviews with or statements by governmental officials and policy experts on issues of importance to the community.
- *Local Electoral Affairs*: Candidate-centered discourse focusing on the local, state and federal races for offices to be elected by a constituency within the licensee's broadcast area. Local electoral affairs programming includes broadcasts of candidate debates, interviews, or statements, as well as substantive discussions of ballot measures that will be put before the voters in a forthcoming election.

The Commission requests comment on whether these categories are appropriate, whether the definitions are clear and workable or need refinement, and whether additional or different categories should be included. The NOI also asks whether, in addition to the specific categories, the Commission should include an opportunity to report on programming in other "optional" categories (which it turns out – here's a surprise – track very closely the other categories the Commission had included in the PIPAC-designed 2007 Form 355).

The Commission does not propose a specific form for the report. Instead, it refers the reader to the proposed form prepared – and posted online – by (wait for it) PIPAC.

These reports would be quarterly and would cover two "composite weeks" from each quarter. (What's a "composite week"? It's a week's worth of days, but not from a single calendar week. So for the first quarter of a year, the composite week Sunday might be the Sunday from the first week of January, the Tuesday from the third week of March, Wednesday from the second week of February, etc.

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The Commission would select the component days of each composite week, and then broadcasters would have to use available station records for those dates to prepare the report.)

The *NOI* suggests that the information to be reported for each item of programming has yet to be tied down. It requests comment on whether entries should be by entire program (*i.e.*, Local News at 5:00 for 30 minutes) or by program segment (*i.e.* one-minute piece on local school board election). The Commission also requests comment on its tentative proposal to allow a given program or segment to be included in only one category.

As to the specific reportable information, the NOI (following PIPAC's lead) suggests that licensees would have to include a title or topic, airdate and time, channel (primary or multicast), whether the programming is first-run, and the length of the segment without commercials.

While some of these basic items may not be terribly controversial, two other suggested items might be. First, the PIPAC proposal would require broadcasters to identify whether any of the programming described in the Form 355 was subject to sponsorship identification requirements, and, if so, who sponsored the programming. Second, unlike the 2007 version of Form 355, broadcasters would be required to disclose whether any of the reported programming was produced under a shared services agreement, local marketing agreement, news sharing agreement, or any other arrangement with another broadcaster or a local newspaper. A link to the relevant agreement covering that production would also have to be provided.

The Commission appears already to have concluded that Form 355 is needed.

PIPAC (and, therefore, the FCC) would also require licensees to:

- include in their reports various other links (*e.g.*, to their online public file, their most recent ownership reports, and their most recent children's programming reports);
- indicate whether the programming reported in their Form 355s is closed captioned (if so, the type of captioning – *e.g.*, live, electronic newsroom – would also have to be disclosed);
- report on all of their "local electoral affairs programming" during the lowest-unit-charge windows before primaries (45 days) and general elections (60 days); and
- report on any programming (even if not otherwise included in the Form 355) that is exempt from captioning.

All of these proposals are technically open for comment, according to the *NOI*. Are the program categories appropriate? Are two composite weeks per quarter enough, too many or just right? When should the Commission clue broadcasters in to the precise dates selected for each composite week? What exceptions (if any) to all these requirements should be considered? Should reporting on video description be required? How about the PIPAC proposal that would require reporting of the number of complaints received regarding captioning and accessibility of emergency programming?

The Commission also devotes a section of the *NOI* to the question of cost/benefit analysis.

The problem here, though, is that the Commission appears already to have concluded that Form 355 is needed. The FCC is convinced that there is a "systemic problem", that the public somehow lacks access to "consistent and uniform" information about broadcasters' programming. Working from that premise, the Commission claims that a standardized disclosure form will help enable members of the public to be more involved in ensuring that stations address their needs. In particular, the Commission believes that the lack of consistency between various stations' issues/programs lists makes "assessment and comparison" between broadcasters difficult.

Of course, broadcast programming is by definition totally public and accessible. And it's in each broadcaster's interest to do what it can to maximize the number of people who watch its programming. So the notion that information about programming may somehow be inaccessible is odd.

But the Commission's real goal here appears to be to create a Commission-maintained database of programming available for slicing, dicing and second-guessing by "researchers" – both on the FCC's staff and in the private sector – who could "assess" and "compare" broadcasters' programming. The FCC contemplates that Form 355 information would ultimately be submitted in some "machine-readable" format that would facilitate computer analysis.

It is not much of a stretch, notwithstanding Commission disclaimers, to imagine the Commission using the data to try to pressure broadcasters (explicitly or by "raised eyebrow") to air programming to the agency's liking. That, of course, would raise serious constitutional problems, as previous Commissions have recognized. The *NOI* ignores those problems, even though Commissioner McDowell raised them and suggested that the *NOI* expressly address them.

The Commission also claims, somewhat counter-intuitively, that a new standardized disclosure form will help minimize FCC oversight of broadcasters. Professing that it's really just here to help, the Commission claims that a new Form 355 will help solve the alleged "communications breakdown" between broadcasters and the public.

The *NOI*'s proposals reflect an effort by the Commission to return to a regulatory approach harkening back to the 1970s. Back then broadcasters (TV *and* radio) were re-

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Making a list, checking it twice

Copyright Office Working On Latest "Specialty Station" List

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Like Santa Claus, Oskar Schindler, David Letterman and Joe McCarthy, the Copyright Office (CO) has a list. The CO's list consists of TV stations which claim to be "specialty" stations, a desirable status for some in the copyright world (more on that below). The CO is in the process of updating its list, and it has invited comments on some possible changes.

Not that the CO is in the business of deciding who should or shouldn't be on the list.

But before we get into all that, a bit of history may be in order. Back in the 1970s, the FCC's regulation of the cable TV industry included limits on carriage of TV stations beyond the reach of their over-the-air service (known as "distant signals"). Those rules had been adopted against the background of a continuing policy debate about the implications of extended-area cable carriage for copyright owners, who like to be able to restrict distribution of their product, and the public, which likes to be able to watch more stations. Generally speaking, if a cable system carried a distant signal, the system had to pay more in copyright fees. But the FCC recognized that cable carriage of certain "specialty stations" might be desirable even if they originated far away from the cable system, because specialty stations are usually not locally available outside the largest markets. Accordingly, the Commission established a regulatory classification for such stations, which were defined as stations that

> generally carrie[d] foreign language, religious, and/or automated programming in one-third of the hours of an average broadcast week and one-third of the weekly prime-time hours.

With the enactment of an overhaul of the copyright law in 1976 that largely eliminated prohibitions on distant signal carriage while imposing a higher royalty premium for such carriage, the need for Commission involvement waned, and in 1981 the FCC repealed its distant signal carriage rules and generally stopped worrying about "specialty stations". A station's self-identification as a "specialty station" may still come into play in some limited circumstances before the FCC – for example, if such a station seeks to be added to a DMA for must-carry purposes, its burden might be a tad lighter – but for the most part it's a dead issue at the FCC.

Not so in Copyright Land.

Under the CO's rules, a cable system carrying a distant "specialty station" is obligated to pay only the "base [copyright] rate" for such carriage, rather than the higher 3.75% rate that would otherwise apply (a discouraging 3.75% of gross revenue from the entire cable tier on which the station is carried). So "specialty" designation is desirable from the point of view of a cable system that carries such a station: the cable system has to pay less in copyright royalties, and that factor in turn makes it easier for cable operators to carry such distant "specialty stations".

But with the FCC out of the business of keeping a "specialty station" list, the CO has no ready source to consult when it needs to know which stations qualified as "specialty". Accordingly, since 1989 the CO has used a kind of honor system. Stations who believe that they would have qualified for "specialty status" under the FCC's definition last in effect in 1981 can so certify in an affidavit to the CO. The CO will put each such self-certifying station on the CO's "specialty station" list – but not before (a) other potentially interested parties are invited to comment on the claim and (b) the claiming station has a chance to respond to such comments.

The CO has no ready source to consult when it needs to know which stations qualified as "specialty".

What happens when that barrage of pleadings and counter-pleadings has ended? The CO simply adds all claimant stations to the list. If objections have been raised about any particular station, a notation of the objection(s) is included in the listing. The CO does not itself try to resolve any disagreements: its position for more than 20 years has been, and remains, that the CO "should not itself verify the specialty station status of particular stations".

This seems like an odd bureaucratic exercise all around. Why, after all, maintain a list which seems to carry no official imprimatur? According to the CO, the goal of the list is to "establish a set of facts so that cable systems can make an informed decision as to whether copyright owners might continue to contest the carriage of a particular station on a specialty basis." It's not clear how much the list might really contribute to such an "informed decision".

And how useful is such a list when the CO's updating efforts are lethargic at best. Since 1989, the CO has issued a total of five versions of the list (in 1990, 1991, 1995, 1998 and 2007). The version currently out for comment would be Number Six (although the CO itself seems to have lost count: a notice it issued last January listed only four previous versions). Note that a lot has happened in the televi-

(Continued on page 9)

Asymmetric sideband – the Next Big Thing?

HD Radio: Yet Another Tweak Proposed

By Peter Tannenwald
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As the HD Radio slogan says (see illustration next to the headline, above), it's time to upgrade . . . again. In the latest effort to get HD radio's actual performance to come close to its original promise, some of the system's cheerleaders have advanced a new approach: asymmetric sideband operation for FM stations. And less than a month after the idea was pitched to the Media Bureau in an *ex parte* meeting, the Bureau has invited comments on a couple of reports that were left behind after the meeting. While it's still a bit early to say, there's reason to believe that this could be a happening thing before too long.

First, some technical background on HD radio. FM radio stations that transmit hybrid analog and digital signals do so by placing digital carriers on the first-adjacent frequency on each side of their licensed analog channel. For example, a station whose analog signal is on 97.1 MHz and places digital carriers on 96.9 and 97.3 MHz. The existing rules require both digital carriers to be at the same power level (-14 dB with respect to the analog carrier).

The twist in the asymmetric sideband proposal: a different power level would be permitted on each digital channel.

Digital signal levels are far below analog levels. That's partly because digital signals need less power generally. But more importantly, it's because the digital carrier signals on the transmitting station's adjacent channels pose an interference threat to other stations. Stations operating under the FCC's original digital rules (with power levels limited to -20 dBc) found their coverage to be inadequate. The FCC responded by allowing increased digital power to – 14 dBc for most stations and – 10 dBc for stations that can show no interference. But some stations with "super-powered" status or that are short-spaced to adjacent-channel stations have not been able to take advantage of maximum digital power levels.

Recent experimentation conducted on a few FM stations under special temporary authority indicates that digital reception improves with a power increase even if the increase is on only one of the two digital frequencies. Thus, in our 97.1 MHz example, it might be OK to increase digital power on 96.9 MHz, even though an increase on 97.3 MHz would unduly interfere with another station. Of course, the results may not be optimal. As one of the reports concluded, "broadcasters are best off maintaining symmetrical sideband levels" – but "coverage improvements are possible with an increase of only one sideband."

Historically, the Commission has tended to be very accommodating when it comes to HD radio.

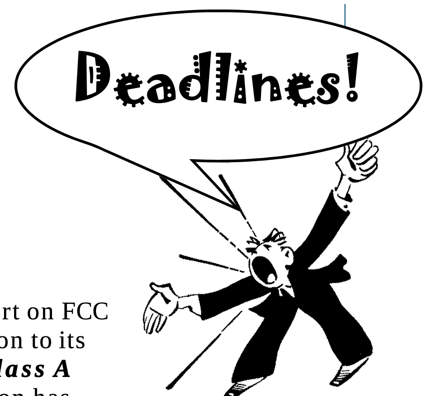
After chatting with iBiquity reps (iBiquity being the primary mover and shaker behind HD radio) and some of their supporters and looking at test results, the FCC has decided to invite comments on regularly licensing asymmetrical digital operation for those who want it. Comments are due by ***December 19, 2011***; reply comments are due by ***January 3, 2012***. Historically, the Commission has tended to be very accommodating when it comes to HD radio, so anyone interested in HD radio – whether as proponents or nay-sayers – should pay attention here, as this looks like it may move quickly.

(Continued from page 8)
sion industry since 1990.

Whatever may be the case, the CO's most recent public notice apprises us all that the Motion Picture Association of America has objected to a number of stations' claims of "specialty" status. MPAA's members benefit from a smaller list if "specialty stations", since exemptions from distant signal copyright royalties reduce the pool of revenue available to be distributed to program producers. (MPAA questions that status for: stations broadcasting all syndicated programs; translators for PBS affiliates; home shopping stations; silent stations; English language stations in Puerto Rico; LPTV stations on Channel 6 broadcasting audio targeted at FM radios; and stations that made no supporting showing.)

Also, a number of additional claims to that status have arrived at the CO's door since it initially started this latest update process last January. It's all open for comment. If you've got something to tell the CO about it, you've got until ***January 9, 2012***.

Meanwhile, if your cable carriage is being restricted now because you do not want to reimburse cable operators for the distant signal copyright fees they would incur and you believe that your station is entitled to specialty status – but you have not filed with the Copyright Office – it's time to start thinking about the next round of revisions to the list. Let us know if you would like our help in exploring your options.



December 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 *all* licensees – including (in addition to corporations, LLC's and other organizations) sole proprietorships and partnerships composed entirely of natural persons – must file reports. All reports must be filed electronically. The Ownership Report must reflect the respondent's ownership as of October 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 in addition to its broadcast service during the previous fiscal year. ***Please note that, for the first time, Class A TV, LPTV, and TV translator stations are required to file these reports***. 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 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.

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.

December 27, 2012

Nationwide EAS Test - Form 3, which reports the results of the Nationwide EAS Test for each station, must be filed with the FCC.

January 10, 2012

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

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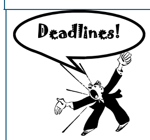
quired to provide detailed analyses of various types of nonentertainment programming in their renewal applications. The Commission even imposed "guideline" percentages for such programming; renewal applicants failing to achieve the minimum levels were theoretically subjected to greater scrutiny. But historically, even such "greater scrutiny" had no perceptible effect, and it was abandoned in the deregulatory actions of the early 1980s. Why the Commission could possibly expect any difference now is a mystery.

Obviously, the potential resurrection of the Form 355 should be a matter of concern to broadcasters. The NOI provides the opportunity to submit comments on the Form to the Commission, although if 2007 is any guide, the adoption of some version of the form may be a foregone conclusion. However, since we are only at the NOI stage, once the Commission receives and reviews the comments filed in response to the NOI, it will still have to issue a notice of proposed rulemaking, inviting another round of comments, before the new Form 355 can take effect. As we learned from the 2007 experience, even if the Commission puts a new form on the books, that's no guarantee that the form will ever be implemented.

Comments will be due 30 days after the NOI is published in the Federal Register, with reply comments due only 15 days later. (Check on our blog at www.CommLawBlog.com for updates as to the deadlines.) Even if the Commission appears already to have made up its mind here, anyone with data countering the FCC's various assumptions would be well-advised to take the time to bring those data to the Commission's attention now (and at any further opportunities that may present themselves).



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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.

January 18, 2012

Closed Captioning Petitions Due - Any *television station* or *television programmer* that had a closed captioning waiver request based on undue burden considerations and was filed prior to October 20, 2011, must re-file its waiver petition by this date or commence offering the program(s) in question with closed captioning by the next day.

February 1, 2012

License Renewal Applications - *Radio* stations located in **Arkansas**, **Louisiana**, and **Mississippi** 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 **Arkansas**, **Louisiana**, and **Mississippi** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on February 16, March 1, March 16, April 1, and April 16.

License Renewal Pre-Filing Announcements - *Radio* stations located in **Indiana**, **Kentucky**, and **Tennessee** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on February 16, March 1, and March 16.

EEO Public File Reports - All *radio* and *television* stations with *five (5) or more full-time employees* located in **Arkansas**, **Kansas**, **Louisiana**, **Mississippi**, **Nebraska**, **New Jersey**, **New York** and **Oklahoma** 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 **Kansas**, **Nebraska**, and **Oklahoma** 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 **Arkansas**, **Louisiana**, **Mississippi**, **New Jersey** and **New York** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

(Continued from page 1)

not to create "attributable" interests while nevertheless providing most, if not all, of the economic benefits of an LMA. While the Commission has thus far not formally addressed shared services arrangements in its rules, it has had a number of opportunities to consider them in case-by-case situations. And in those cases, the Commission has generally concluded that such arrangements are permissible.

Despite that, a group calling itself Media Council Hawai'i (Media Council) complained that a shared services arrangement entered into by the licensees of three Honolulu TV stations went TOO FAR.

To be sure, this particular arrangement was extensive. Exchanges of a variety of "non-license assets" (including network affiliations, some non-network programming, call signs, some real property); a "term loan note"; an option; a studio lease. There was also a shared services agreement calling for one of the licensees (let's call it the Main Mover) to: provide the other licensee (let's call it the Other Guy) certain "back-office support"; produce local newscasts for the Other Guy; and collect from the Other Guy a monthly "performance fee" and 30% of the other's cash flow. As a result of the swap of network affiliation agreements, the Main Mover became both the NBC and CBS affiliates in the Honolulu market (both in the top four in the market); the Other Guy got MyNetworkTV.

It may look like the Main Mover was driving the bus and the Other Guy was just along for the ride BUT, importantly, the Other Guy retained his license, and the bundle of agreements comprising the shared services arrangement reserved to the Other Guy the right to exercise editorial control over its station's programming content.

In Media Council's view, the shared services arrangement constituted a *de facto* transfer of control, violated the duopoly rules, harmed diversity, competition and the public interest. Media Council's bottom line: revoke all the licenses! The licensees countered that deal was necessary to put each of the parties' stations on a "less precarious economic footing", thereby allowing them "to *sustain and improve* (not diminish) service to the community" (those emphases are the licensees', not ours).

Looking at the extensive record developed over two years' worth of back-and-forth pleadings from the licensees and Media Council, the Bureau staff concluded the arrangement did leave the Other Guy with control over its programming and that the Other Guy had, in fact, exercised that control. The Main Mover supplies less than 15% of the Other Guy's programming (a key parameter used by the FCC to determine whether the control over programming factor has been ceded). Additionally, the Other Guy retains financial control of its station, largely because the financial terms align "the profits arising from operation of the station with [the Other Guy's] ownership and, thus, [the Other Guy] has had sufficient economic incentive to control programming" on its station. The Hawaii contracts were structured so that the Other Guy keeps 70% of the free cash flow from his station (another key benchmark considered by the Commission when evaluating deals like this one).

So the deal was consistent with Commission rules and precedent. (The Bureau did slap the licensees' wrists for some mundane public file violations.) End of discussion, right?

Not so fast. The Bureau obviously had reservations. In its view, even if the deal is legal, the Bureau can still consider "the impact such [shared services] agreements have on competition and diversity may be relevant in determining whether license renewal for one or either of the stations that are the subject of the transaction would be consistent with the public interest." Exactly how the Bureau might calculate that "impact" is far from clear. And why it might be appropriate for the Bureau to consider such questions at renewal time but not before is equally unclear.

The deal was consistent with Commission rules and precedent. End of discussion, right?

Not so fast.

The Bureau was clearly troubled that the Main Mover wound up as the licensee of two of the top four ranked stations in the Honolulu television market. Because the deal didn't involve an assignment of licenses – just a swap of network affiliation agreements – the new duopoly rule wasn't invoked because it applies only "[a]t the time of application to acquire" a station. Licensees are not required to get FCC consent to change network affiliations; in such cases, licensees are required only to file copies of the affiliation agreements with the Commission.

For what it's worth, the Bureau says it will include these issues in the ongoing 2010 quadrennial review of all media ownership limits.

Most troubling, though, is the Bureau's explicit threat to yank one or more licenses at renewal time because of conduct which the Bureau expressly concedes is consistent with the rules and precedent. What are the two licensees in question – or any other licensee, for that matter – supposed to do now? Obviously, the Bureau's threat seems designed to discourage shared services arrangements. But if such arrangements aren't illegal, where does the Bureau get off making that threat?

If the Bureau believes that shared services arrangements raise public interest problems, shouldn't the Bureau address those problems squarely – perhaps in a stand-alone rulemaking, or a declaratory ruling, or maybe even a policy statement – and get them resolved so that all affected licensees can know what is expected of them. After all, aren't folks who are required to comply with regulatory rules and policies entitled to know what those rules and policies are *before* they can be penalized for failing to comply with those rules and policies?

(Continued from page 2)

effective media *target audience* planning, and *efficient* media buying practices" (we added that emphasis.) What does that mean? Doesn't it expressly acknowledge that "audience target[ing]", "marketing strategies" and consideration of "efficien[cy]" are factors which are to be accommodated in the quest for "equal opportunity" for vendors?

How would that work in practice?

For example, what if a promoter hoping to sell season tickets to the opera believed, based on reliable and objective market research, that he could more efficiently reach his target audience by advertising on, say, a news/talk station rather than on one with an Urban format? This isn't to say that no Urban listener would ever buy a ticket to the opera; but if you're looking to reach a lot of opera buffs all at once, assume that the available research strongly indicates that by far your best bet is with news/talk audiences and not with Urban audiences. If the advertising agency representing that promoter acted accordingly and imposed a "No Urban" limitation on its ad buys, would that still be OK according to the 4A's non-discrimination policy?

What about an importer of a food product considered a delicacy among some South American cultures who wishes to advertise that product exclusively on Spanish-language stations – to the exclusion of other foreign-language or English language stations, including Urban music stations – would that be acceptable?

Both approaches would seem to pass muster under the new 4A's policy – since the buys in question would be (a) in line with the client's marketing strategies and (b) designed efficiently to deliver the client's message to the client's chosen target audience. And neither approach appears to be motivated by any pernicious racism. But both approaches would, at least arguably, discriminate on the basis of race or ethnicity, and both would appear to involve the type of express "No Urban" order that the FCC seems intent on stamping out. Is that what the Commission had in mind?

And beyond that, when a Vendor believes it has suffered from discriminatory buying practices, the 4A's policy statement affords that Vendor an opportunity to express its concerns through a complaint review process. For purposes of this process, discriminatory buying practices are defined as "any buying policy that is in conflict with FCC media regulations, and thereby negates equal opportunity." But there are no FCC rules (or "media regulations") whatsoever on this subject. Nor are there likely to be. Sure, the FCC has raised its eyebrows at buying practices that exclude certain stations, and it has required broadcast stations to certify that they themselves maintain nondiscriminatory contracting practices, but the FCC has no jurisdiction over either the advertisers or the advertising agencies that make the actual buying decisions. So the 4A's policy on its face does not impose any blanket prohibition against any particular type of advertising restriction.

This is ***not*** to say that we think for a minute that the 4A's promotes improper discrimination or that its new policy is just a cleverly worded effort to sidestep the FCC's wishes while seeming to embrace them.

Rather, the 4A's policy appears to be a genuine, good faith effort to acknowledge and address the fact that the purchase of advertising, by its very nature, is a fundamentally discriminatory activity. Not "*bad*" discriminatory, but discriminatory in the sense that the advertiser has to decide where to spend his/her/its limited advertising dollars, and that decision-making process requires the drawing of lines. And when an advertiser draws lines, discrimination is occurring – discrimination based not on bias against race or ethnicity, but on the advertiser's ability to achieve his/her/its particular commercial goals.

With that in mind, perhaps it's time to take another look at this whole issue, starting with the unarguable premise that all players in the advertising game are in it to make money. From the advertiser's point of view, the goal is to sell as much of the advertiser's product as possible. No non-discrimination policy will deter advertisers from attempting to meet that goal as efficiently as possible. Perhaps the 4A's new policy, with its less-than-absolute language and its apparent acknowledgment of the priority of advertisers' strategic interests, may be the best policy after all.

Now if only the FCC would recognize the practical reality that not all "discrimination" – including some discrimination which might arguably be based on race, ethnicity, gender or other factors – is necessarily unlawful, inappropriate or even undesirable.

We wish you the happiest of holidays
and peace in the new year.

Fletcher, Heald & Hildreth ®

Takin' care of bid-ness

Auction 93 - The Dates Are Set

By R. J. Quianzon
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703-812-0424

The FCC has released a notice setting the procedures for Auction 93, the FM sell-a-thon set for next spring. Get out your calendars . . . and your checkbooks.

With only minor changes to auction rules from the past, the auction will look the same as previous sales conducted by the FCC, at least in terms of the procedures. But if you're in the market for a channel in Llano or Centerville in Texas, or Dermott, Arkansas, or Cleveland (the one in Mississippi, *not* the one in Ohio), get set for some heartbreak: the Commission has removed those from the catalog of available channels up for bids. Because of pending rulemaking petitions proposing (among other things) substitution frequencies in those towns, the Commission pulled the four channels off the table for this auction. But that still leaves 119 channels up for grabs.

And there's good news if you've got your heart set on the Grants Pass, Oregon channel. Originally priced to move with an opening bid of $35,000, that channel has been marked down to $15,000. One commenter argued that the original opening price was too high. Of course, that commenter's suggested alternative price – a risibly paltry $750 – was a non-starter, as far as the Commission was concerned. Still, a reduction of more than 50% is nothing to sneeze at. (Note, though, that it would take only about nine rounds of spirited bidding for the price of the channel to get back to $35,000.)

All of the remaining 118 permits will start with the same prices proposed by the FCC back in September. (We've included a link to the FCC's list on our blog at www.CommLawBlog.com.)

Potential bidders should mark their calendars with the following important dates:

January 3, 2012 – 12:00 noon ET – Short-Form Application (FCC Form 175) filing window opens.

January 12, 2012 – 6:00 p.m. ET – Short-Form Application (FCC Form 175) filing window deadline. The deadline for applications marks the beginning of the FCC's very strict anti-collusion period. Bidders that intend to form consortia or otherwise partner with other bidders should have reached an agreement and disclosed it to the FCC by this deadline. Auction communications between or among bidders after this date could expose bidders to disqualification and hefty fines.

February 22, 2012 – 6:00 p.m. ET – Upfront Payments (via wire transfer). Based upon the markets that a bidder has selected in its January Short-Form Application, funds must be wired to the FCC as an upfront deposit to prove that the bidder is genuinely interested in participating in the auction.

March 27, 2012 – Auction Begins

In mid-March, the FCC will let bidders know how many rounds of bidding will take place during the first few days. Depending upon the level of participation, it may take as little as a few days or as many as several weeks for the auction to end. The FCC's anti-collusion rules will remain in effect throughout the auction (and for some time beyond the close of the bidding -- keep an eye out for an announcement of when the coast is clear). Those rules should be carefully followed.

Anyone interested in bidding should be sure to do due diligence about any channels they've got their eyes on.

Anyone who has any potential interest in participating in Auction 93 should review the notice in detail. While there's still more than four months to go before the bidding starts, anyone interested in participating should take advantage of the time to perform due diligence about the channels they've got their eyes on. Remember what the Commission has said repeatedly in the past (and has said yet again in the Auction 93 Notice):

> **The FCC makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that an FCC auction represents an opportunity to become an FCC permittee in a broadcast service, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular service, technology, or product, nor does an FCC construction permit or license constitute a guarantee of business success.**

(And yes, the Commission itself made that ominous advisory even more ominous with the **boldface** emphasis.)

The Commission is also offering an online auction tutorial, which should be available as of January 3, 2012. (Look for an "Auction Tutorial" link on the FCC's Auction 93 webpage.) It's for newbies or folks who want to regain their auction chops. (The online tutorial replaces the bidder seminars which the Commission offered in the run-up to previous auctions.)

Additionally, the Commission will conduct a "mock auction" on March 23, 2012, again to permit folks to dust off any cobwebs and be ready to jump right in when the bidding starts for real on March 27.

FM Minor Mod Freeze Announced

(Thanks to Auction 93)

Holy Epiphany!

No FM minor mods will be accepted from January 3-12, 2012!

Last month we reported on a freeze, imposed in light of the impending Auction 93, on certain types of FM-related proposals. As we observed there, the notice was a bit unusual because it did not follow the Media Bureau's standard operating procedure for FM auctions in at least one respect. That is, in past auctions the Bureau has frozen any and all minor mod applications (for commercial or noncommercial stations) during the filing window for short form (Form 175) applications for the auction channels.

Never fear – the standard operating procedure is still standard and still operating. With the release of the separate order establishing the dates and procedures for Auction 93, the Bureau has also announced that it will not accept FM commercial and noncommercial educational minor change applications during the Auction 93 Form 175 application filing window – a window which will open on ***January 3, 2012***, and close on ***January 12, 2012***.

(Continued from page 4)

ney from the Commission's Office of General Counsel is present.

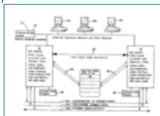
To prevent a Chairman from unilaterally, and indefinitely, withholding proposals from a vote, the bills would require new FCC procedures allowing a "bipartisan majority" of Commissioners to direct the staff to prepare draft orders for Commission vote, and then to put such drafts on the agenda for decision.

The Commission would have to develop deadlines for resolving any and all types of requests for FCC action. While the bills provide no guidance as to any particular time periods the sponsors might have in mind, the fact is that any deadlines would likely be preferable to the current situation, where virtually *no* internal processing deadlines exist at all.

The Commission's ability to impose conditions on transactions (*e.g.*, assignments of license or transfers of control) would be narrowed substantially. Such conditions would have to be "narrowly tailored to remedy a harm that arises as a direct result of the specific transfer or specific transaction". Perhaps more importantly, the Commission could impose a condition only if it could impose such a requirement "under the authority of a specific provision of law". This is presumably directed to the FCC's recent inclination to achieve indirectly, through "conditions", goals that it could not achieve directly through regulation. This limitation would apply as well to supposedly "voluntary" commitments made by parties seeking FCC approval. This practice was evident in the approval of the NBC/Comcast merger, where NBC/Comcast agreed to a number of "voluntary" commitments that the Commission itself did not have the authority to impose.

The bills would also require the Commission to prepare a number of reports on various aspects of its operations, including the status of pretty much anything pending before the Commission at any time. A new report, to be submitted to Congress every other year, would broadly assess the state of competition in the "communications marketplace", a marketplace encompassing any and all communications technologies.

These are broad proposals that would substantially alter, if not the way the current FCC conducts much of its business, then the way future Commissions are *required* to do business. The prospects for passage are far from clear, but the fact that that process has been formally initiated should send a clear message to the FCC that change may be on the way.



(Continued from page 5)

realistic possibility here), the broadcast defendants will have painted themselves into a corner.

Any such reversal by the PTO is still conservatively months away, though, and would be subject to further appeals that could tie it up for years. In the meantime, the initial PTO rejection of MAD's patent claims looms like a big dark cloud over any claim that MAD could advance – in the Delaware litigation or in efforts to cajole broadcasters into signing license agreements now (in order, theoretically, to avoid getting sued by MAD). MAD itself argued in opposing the stay request that its patents "have essentially been stripped of their licensing value" by the PTO action.

The fact that time is working against MAD brings us to the second point: licensing. We reiterate our earlier observation that any outreach from MAD should be viewed seriously but with considerable skepticism and caution. As noted above, MAD itself has implied that there's no reason for a broadcaster to sign a licensing agreement at this point.

9/16 of a second, seven years later

Indecency 2011: Third Circuit Sides With CBS, Again

By Harry F. Cole
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In a long-awaited if anticlimactic decision, a divided panel of the U.S. Court of Appeals for the Third Circuit has again sided with CBS in its seven-years-and-counting fight with the Commission over the 2004 Super Bowl® half-time show. For those of you with short memories, that was the show that featured Janet Jackson, Justin Timberlake and (for a spectacularly noteworthy appearance lasting 9/16 of a second), Ms. Jackson's right breast, seen from a considerable distance.

While this most recent decision in CBS's favor may be cheered by many (if not most) broadcasters, it is limited in scope. As a result, the impending Supreme Court show-down in the *Fox* case (*see* related item in our Updates column on Page 18) remains the primary focus of attention among First Amendment *aficionados*.

But even so, the Janet Jackson case cannot be ignored. This was, after all, the situation that re-kindled the FCC's interest in strict regulation of "indecency" on the airwaves.

To review the recent history of the case, we go back to 2008, when the Third Circuit first reversed the FCC's decision to whack CBS with a $550,000 fine. Its decision was based on administrative, rather than constitutional, grounds. That is, the court concluded that the FCC's imposition of a fine for a "fleeting" exposure of a breast was inconsistent with previously-established Commission policies. While the FCC can, of course, change its policies if it wishes, in doing so it must provide notice and an explanation of the change. According to the court, the Commission came up short on the whole notice/explanation thing. Because it found that the case could be resolved on non-constitutional grounds, the court did not take on CBS's First Amendment arguments.

The FCC asked the Supreme Court to review the Third Circuit's decision. But in the meantime the Supremes considered a similar decision from the Second Circuit in the *Fox* case. In that case, the Supreme Court held that the FCC *had* adequately explained the apparent abandonment of its "fleeting expletive" policy. As a result, in May, 2009, the Supremes shipped the *Fox* case back to the Second Circuit for further consideration, and at the same time it shipped the *CBS* case back to the Third Circuit.

A year later (in July, 2010), the Second Circuit cranked out its decision on remand. There the Second Circuit held that the Commission's indecency policy violates the First Amendment because it is unconstitutionally vague. The FCC promptly asked the Supremes to look at *that* decision, and the Supremes agreed. As noted above, we're expecting that that case will be argued in early 2012, and a decision should be out by July, 2012.

Meanwhile, the Third Circuit took its own sweet time . . . some 16 months longer than the Second Circuit. And the result of its deliberations, issued November 2, 2011, is nowhere near as dramatic as the constitutional gauntlet thrown down by the Second Circuit.

Instead, the Third Circuit has again concluded that the FCC's decision in *CBS* reflected a change in policy that was not adequately announced or explained. Even though the Supreme Court's 2009 opinion in *Fox* accorded the Commission considerably greater leeway to change policies than the Commission had previously been thought to enjoy, the Third Circuit remains convinced that the FCC's *CBS* decision cannot survive even the more relaxed standard set out in *Fox*.

The Third Circuit remains convinced that the FCC's Janet Jackson decision cannot survive.

And even the dissenting judge on the Third Circuit panel would reverse the *CBS* decision and remand it to the FCC. In his view, the FCC did not apply the proper standard of *mens rea* (a legal concept relating to the accused party's level of culpable intent or "guilty mind"), so he would send the case back to the Commission for further consideration.

Where the case goes from here isn't clear. The Commission could ask the Third Circuit to reconsider its position. (That's the approach the Commission tried, without success, in the Second Circuit.) The Commission could try to haul CBS back up to the Supremes. Or the Commission could throw in the towel.

Since the Commission hasn't said die on this yet, it's probably a pretty good bet that they will continue to fight the fight, at least in the short term. The goal would be to try to keep the case alive in some venue at least until the Supreme Court acts in the *Fox* case next year. If the Supremes decide that the FCC's overall indecency policy runs afoul of the First Amendment, then presumably the FCC will drop any further appeal in the *CBS* case, as there will no longer be any indecency policy to enforce. But if the indecency policy somehow survives *Fox*'s constitutional challenge, the FCC might want to continue to slug it out with CBS on the non-constitutional issues.

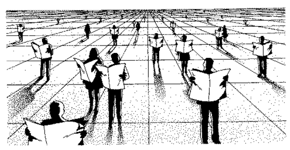
So here we are, nearly eight years after Ms. Jackson's 9/16 second exposure, with at least several months – and maybe a year or more – of additional litigation ahead. But for the foreseeable future, the broadcast interests (represented by Fox and CBS) appear to be in the driver's seat. Let's hope they stay there.

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

Updates On The News

White space database update – We reported back in September about a test of the first database for “white space” devices meant to provide Wi-Fi-like service on unused TV channels. The database – developed by Spectrum Bridge Inc. – is intended to help prevent interference from those devices into TV receivers, wireless microphones, and other authorized users of the bands. The FCC invited public participation in a 45-day online test.

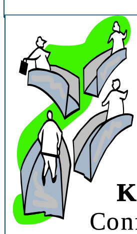
Spectrum Bridge has completed its trials and submitted a “summary report” about it to the Commission. The FCC, in turn, is now requesting public input on the test result and the summary report. We have provided on our blog (www.CommLawBlog.com) links to the various Spectrum Bridge materials on which comment is sought. Those materials include: the Spectrum Bridge summary report; Attachment 1 – “Dashboard” (statistics concerning traffic to the Spectrum Bridge test site); Attachment 2 – Registration Records; and Attachment 3 – Comments.



Attachment 3, in particular, makes for interesting reading. It reflects a number of comments, criticisms and inquiries submitted to Spectrum Bridge during the test, and Spectrum Bridge’s responses. Some of the problems identified in the test are troubling. For instance, Spectrum Bridge’s database ignored, at least initially, some facilities whose licenses (a) appeared to have expired but (b) were actually still in effect because of pending litigation relative to renewal of the licenses. But it does appear that Spectrum Bridge was responsive to the problems. We shall see.

Comments on the Spectrum Bridge report were due on November 28, 2011, which has already past, but reply comments can still be filed until ***December 5***, if you’re so inclined.

Fox to the Supremes – Mark your calendars, all you First Amendment buffs. The Supreme Court has scheduled the oral argument in *FCC v. Fox Television Stations* for ***Tuesday, January 10, 2012***. (Do we need to remind any of our readers that the question before the Court in *Fox* is nothing less than the constitutionality of the FCC’s indecency policy?) The Court’s calendar notation doesn’t specify a time, but the odds are the argument will crank up about 11:00 a.m. – although if you don’t get your place in line by 7:00 a.m. or so, there’s a good chance you won’t get in. Supreme Court arguments are open to the public, free of charge, but seating is limited and tends to fill up fast. For more information about attending the argument, check out the Court’s helpful and informative webpage. As we did the last time the Supremes, the FCC and Fox got together for a free and frank exchange of views on the topic of broadcast indecency (in 2009), we plan to have a team of observers at the argument – our goal being to post summaries of the argument from each team member’s perspective as quickly as possible. Check our blog (www.CommLawBlog.com) after the argument for reports from the front.



FHH - On the Job, On the Go

Frank Montero and **Kathleen Victory** will be attending the Radio Ink Forecast Conference at the Harvard Club in New York on December 6. Check it out – **Frank** will be introducing Larry Kudlow, the keynote speaker at the luncheon.

Kevin Goldberg will be speaking at the American Society of Access Professionals’ Annual Symposium and Training Conference on December 7 on a panel entitled: “The New News Media and Fees – Should the Fee Provisions of the FOIA be Overhauled”.

And after the first of the year, **Scott Johnson** will be participating in the South Carolina Broadcast Association’s Annual Winter Conference from January 19-20 in Columbia, SC. **Scott** will present a wide-ranging program addressing current issues of concern at the FCC and in Congress.

By the way, we are pleased to report that **Fletcher Heald** has been included in a list of Top Ranked Law Firms compiled by LexisNexis/Martindale-Hubbell in cooperation with Fortune Magazine. To make it on the list, a firm has to have at least 21 attorneys, and at least one-third of them have to have attained the coveted AV Preeminent peer review rating. Martindale-Hubbell has long been the go-to guide for attorneys nation-wide. It conducts an extensive assessment of individual lawyers based on the confidential opinions of other attorneys and members of the judiciary who are familiar with the lawyers being rated. The “AV” rating is the top of the heap — in the words of Martindale-Hubbell, it is “a testament to the fact that a lawyer's peers rank him or her at the highest level of professional excellence.” (FYI — Peer Review rated lawyers are ***not*** required to have a paid listing on Lawyers.com or martindale.com.) One of the perks of being on the list is being able to trot out the spiffy logo they sent us and splash it around. We don’t plan to do that *all* the time . . . just every now and then, like now:

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