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Memorandum to Clients

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Radio, MVPD's likely to follow to the cloud

TV Public Files Moving Online

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Coming soon to an Internet near you (well, maybe not *that* soon)!!! The public files of every U.S. TV station, commercial and noncommercial, all hosted on a cloud-based system that the Commission promises to develop and manage. And radio and MVPD operators can probably expect that they, too, will eventually be required to make their public files available on the same system. In the possible culmination of a proceeding that has already lasted more than a decade, the FCC, turning a deaf ear to most of the objections of the broadcast industry, has directed television licensees to upload big chunks of their public files to a yet-to-be revealed web portal the FCC will host.

"Possible" culmination? Well, yes. Those familiar with the recent history of the public file requirement will recall that, in 2007, the Commission mandated that TV public files be made available online. But the Commission never jumped through the hoops that would have been necessary to translate that mandate into regulatory reality. Will this latest effort produce different results? It's hard to say. The Commission sure seems serious about it, but there are a number of practical problems that could gum up the works, at least in the short term.

For background on the move to make public files Internet-accessible, check out the page one article in the October, 2011 *Memo to Clients*. The rules which the Commission has now adopted vary somewhat from the proposal described there, but the core requirements are pretty much the same. In short, TV public files are moving to the Internet (although some vestiges of the old-fashioned paper filing will remain.)

The vast majority of existing public files for TV stations will have to be uploaded to an FCC-managed website. Each licensee will be responsible for posting: political advertising materials (more on that below); quarterly issues/programs lists; annual EEO Public File Reports; time brokerage agreements; joint sales agreements; must-carry or retransmission consent elections; children's televisions commercial limits records; citizen agreements; donor lists for noncommercial educational stations; local notice announcements; documentation of continuing eligibility for Class A stations; and materials related to FCC investigations.

Significantly, the requirement to upload these documents, *other than the political file materials*, is *not* just on a "going forward" basis. Stations will be required, for instance, to upload *all* quarterly issues/programs lists going back to their last renewal. Basically, if it's in your public file as of the effective date of the new rules (and it's not political or a communication from a member of the public), it will need to be included in the online version.

There is some limited good news on the material-to-be-uploaded front.

First, licensees will *not* be required to upload documents already available on the FCC website – *e.g.*, licenses and construction permits, applications, contour maps, ownership reports, EEO Program Reports and Mid-Term Reports, children's television reports, FCC letters of inquiry (as well as other "investigative information requests" from the Commission), and "The Public and Broadcasting" manual. As currently envisioned, the Commission's system will automatically link such items to the appropriate public file.

Second, letters and emails from the public will *not* need to be uploaded to the online public file. Instead, stations will continue to keep them in a publicly available correspon-

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Inside this issue . . .

Tales from the crypt!!!

Dead Men File No KidVid Reports

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In recent months we have written about the Commission's apparent quest to move as many Class A television stations back into the LPTV category as possible. Presumably this quest is motivated by the Commission's seemingly all-consuming urge to free up as much TV spectrum as possible for "repurposing".

That urge has now driven the Commission's Video Division to reach into the grave to take a couple of Class A authorizations back from a dead guy. (We've included links to the two orders at www.CommLawBlog.com.)

The case involves two Class A – er, one-time Class A, at least as of April 26 – stations in Texas licensed to a gentleman named Humberto Lopez. Back in March, 2011, when the stations were both still card-carrying members of the Class A Universe, the Video Division asked how come Mr. Lopez apparently hadn't filed children's TV reports (FCC Form 398) for 2006, 2007, 2008, 2009 and 2010. Commission records revealed no such reports, so the reasonable assumption was that no such reports had been filed – but the March, 2011 inquiries were designed to give Mr. Lopez the chance to set things straight.

Wouldn't you know it, Mr. Lopez died in May, 2011, within a month or two of the FCC's inquiries. It's hard to respond to FCC questions where you're, um, dead.

The Commission followed up its March, 2011 inquiries with more inquiries in August, 2011. By then, of course, Mr. Lopez was long gone, although, in fairness, the Commission may not have been aware of the licensee's unfortunate demise at that point.

But the Commission was for sure aware of his demise by November, 2011, when the executor of gone-but-not-forgotten Mr. Lopez's estate filed an application (FCC Form 316) for consent to the assignment of the license to the executor. Such applications are standard operating procedure; they are routinely granted in a matter of days. Not so in this case. According to CDBS, that 316 is still pending, more than five months after it was filed.

Of course, until that application is granted, Mr. Lopez technically remains the licensee, and his executor (who is not the licensee) is technically not in a position to respond to inquiries directed to the licensee.

So what does the Video Division do? Knowing that the licensee is dead, and knowing also that the licensee's executor is not in a position to formally respond to Commission inquiries addressed to the licensee, the Video Division issued show cause orders to Mr. Lopez in February, 2012. Those orders proposed to reclassify the two Class A stations to LPTV status.

To no one's great surprise, Mr. Lopez, being dead and all, did not respond to those orders.

And now the Division has held that, because of his lack of response, the Division will "deem him to have accepted the modification of [his licenses] to low power television status".

We understand that the Commission is on what it perceives to be a desperate quest for TV spectrum. And we get that Class A stations that no longer qualify for Class A status may look like low-hanging fruit in that quest. But really, is the Commission so desperate that it has to engage in grave-robbing? Since Mr. Lopez had been dead for nearly a year by the time the Division issued its show cause orders, isn't it more than a little inappropriate for the FCC to draw any conclusions from his failure to respond to those orders?

It may be true that the late Mr. Lopez failed to file KidVid reports. But that doesn't necessarily mean that he didn't air the programming or place appropriate reports in his public files. Wouldn't it be at least fair (not to mention decent) to grant the Form 316 application and then accord the new licensee a reasonable time to investigate the situation and respond accordingly?

In the alternative, shouldn't the Commission try to check – maybe with a Ouija board – exactly what the licensee meant by not responding?

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FM Boosters: The Next Source of Originated Programming?

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Now that the DTV transition has been in effect for almost three years, multi-channel TV broadcasting is fairly commonplace. But what about FM radio? Thanks to digital FM technology designed by iBiquity and authorized by the FCC, FM stations have for years been able to provide up to two additional programming streams beyond their main channel. And yet, development of an economically sound model for multi-channel audio services has been much slower than on the TV side.

Enter Geo Broadcasting Solutions, LLC (Geo). The folks at Geo have come up with an alternative approach to multi-channel FM service. They are proposing that on-channel analog FM boosters be permitted to originate programming separately from the parent station. The concept is that each booster could transmit hyper-local material to the audience in its immediate vicinity – mostly commercial spots, but also other material if a licensee so desired.

There is a more fundamental business question: does targeting for one or more micro-audiences make sense?

Boosters are like translators – low-power transmitters that permit licensees of full-power stations to improve the coverage of their full-power stations within their already protected contours. The difference between boosters and translators is that a booster operates on the same frequency as the full-power station whose signal it is "boosting". Translators, of course, operate on different frequencies from their primary stations. (Boosters are authorized only to the licensee of the primary station and may not expand the primary station's service area. Commercial translators funded by the primary station also may not expand the primary station's service area – a restriction that does not apply to non-commercial translators or independently-funded commercial translators.)

Since boosters are on the same channel as the primary station, booster operation generally poses considerable potential for interference. That's one reason why boosters have not been widely used over the years, even though the FCC's rules have provided for them for more than four decades. In recent years, however, modern computer control techniques allowing precise synchronization of the parent and booster signals have improved performance. A quick glance at the FCC's database indicates that a few hundred FM boosters are currently authorized.

Geo claims to hold patents on techniques that shape signal coverage to avoid interference both (a) between a booster and its parent station and (b) between multiple boosters each rebroadcasting the same parent. According to Geo, its technology will allow the insertion of separate material into the programming on each booster. In other words, a licensee with multiple boosters could include different programming on each separate booster – allowing the licensee to direct different content to specific areas within its main station's primary contour.

Geo says in its petition for rulemaking that it has conducted successful tests of the technology in Utah and Florida (thanks to experimental authority granted by the Commission). Armed with that experience, Geo is now formally proposing that the FCC amend its rules to authorize booster origination on a regular basis. The Commission has, in turn, invited preliminary comments on Geo's petition. Any comments – whether supporting or opposing the proposal – are due by ***May 23, 2012***. (Note: This is a ***very*** preliminary stage. The Commission has ***not*** yet issued a formal proposal – *i.e.*, a "notice of proposed rulemaking" – with respect to Geo's petition, and it may never issue such a proposal. The present commenting opportunity just gives interested parties the chance to chime in with their initial views on whether to kill Geo's concept before it multiplies or take it to the formal rulemaking stage.)

Geo's technology would not eliminate some of the practical concerns in booster operation. For example, it would still be necessary to choose booster sites carefully. At least in today's analog FM radio world, boosters should generally be shielded by terrain from the parent station, so that any individual listener will not receive a strong signal from more than one source at the same time. Many areas do have terrain obstacles, though; the Geo concept might prove useful in such situations.

Beyond the technological questions, there is a more fundamental business question: does targeting for one or more micro-audiences make sense? Newspapers have tried hyper-local inserts with only mixed success. But newspapers have to bear the ongoing costs of printing and distributing separate editions to provide micro-area advertising services. For radio stations, the process would be entirely electronic. Beyond the one-time cost of obtaining hardware and software (and obtaining the necessary FCC authorizations), broadcasters' expenses would be largely limited to ongoing personnel costs to sell and produce extra spots for target areas.

Before we wade into that level of cost-benefit analysis, though, we should wait to see what the engineering community thinks. If the Geo proposal gets through the technical gate, then station owners will have to ponder the economics.

The next step in the LPFM (r)evolution

FCC Dissects, Perfects Lo-Po Tech Specs

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In last month's *Memo to Clients* we reported on the complicated method devised by the Commission to resolve the longstanding impasse between the interests of would-be FM translator licensees and Low Power FM (LPFM) applicants. That was just part of a comprehensive effort by the Commission to deal with LPFM-related issues arising in large measure from the enactment of the Local Community Radio Act (LCRA) last year. In addition to trying to sort out the translator/LPFM problem, the Commission adopted a number of technical rules and proposed a number of others, all relating to LPFM.

Here's an overview.

Third-adjacent LPFM spacings eliminated (almost)

For those of you keeping score, the third-adjacent channel separation requirements for low power FM (LPFM) stations are about to be history – like they were back in 2000, before they were reinstated in 2001, at Congress's express direction. But last year Congress had second thoughts, and so it's "see ya" once again to the third-adjacent protections . . . except that some will still be with us.

Third-adjacent minimum distance separation requirements for LPFM stations have been tossed, except . . .

In a decision formally titled (deep breath first) the "Fifth Report and Order, Fourth Further Notice of Proposed Rulemaking and Fourth Order on Reconsideration" (*5th R&O*), the Commission has complied with the LCRA's "unambiguous" direction and has tossed the on-again-off-again third-adjacent channel separation requirements applicable to LPFM stations.

The resulting rule changes, which are set to take effect on June 4, 2012, are relatively narrow.

In the LCRA, Congress told the Commission to get rid of the third-adjacent minimum spacing requirements between LPFM stations and other FM band occupants (*i.e.*, full-service FM, FM translators and FM boosters). How hard can that be? Just hit the Delete button every time "third adjacent" shows up in the LPFM rules, right?

Not so fast.

While Congress "unambiguously" wanted the Commission to deep-six third-adjacent protections, Congress also wanted to protect radio reading services (RRS) that operate on subcarrier channels which are particularly susceptible to (wait for it) third adjacent interference. So if you eliminate all third-adjacent separation requirements, which Congress wants, you threaten RRS operations, which Congress ***doesn't*** want. Oops.
No worries. As it turns out, the Commission's rules *already* included extra protections for stations carrying RRS on their subcarriers. Those rules, initially adopted back when the FCC first abandoned third-adjacent protection requirements for LPFMs in 2000, had become "redundant" when the requirements were reinstated the next year (at Congress's insistence). Despite their redundancy, the Commission never got around to deleting the RRS protection rules. Good thing, since they will come in handy now that Congress has ordered those protections un-reinstated. As a result, Sections 73.807 (a)(2) and (b)(2) of the LPFM rules will continue to contain some third-adjacent limitations on LPFM stations.

Oh, one more thing. Third-adjacent channel protection requirements applicable to LPFM stations in border areas will also remain in place. Treaties with Canada and Mexico impose such requirements, and nothing in the LCRA suggests that Congress intended to unilaterally revise those treaties.

While prospective LPFM applicants can presumably figure out fairly easily whether they're close enough to the border to have to worry about the residual third-adjacent limits, the RRS question is another problem entirely. The FCC generally doesn't regulate, much less keep track of, subcarrier use. As a result, figuring out what stations are actually carrying RRS on their SCAs may be a tad problematic. It's even more problematic since the actual language of the rule (which was adopted more than a decade ago) technically limits the universe of protected stations to those that were providing RRS as of September 20, 2000. Look for that (presumably) unintended limitation to be corrected eventually although, since the Commission has no record of what stations are currently providing RRS on the subcarriers, it's not at all clear how the RRS protection provision will be enforced.

Bottom line: Consistent with the will of Congress, third-adjacent minimum distance separation requirements for LPFM stations have been tossed . . . except (a) in border areas or (b) when the third-adjacent full service station happens to be providing RRS. As noted, the elimination (or, more accurately, semi-elimination) of these requirements is set to take effect on ***June 4, 2012***.

Proposed post-LCRA Lo-Po rules

The Notice of Proposed Rulemaking (NPRM) portion of the *5th R&O* encompasses a wide range of LPFM-related topics, many involving considerable complexity.

The following discussion addresses the high points, but anyone with a serious interest in the FCC's LPFM proposals – or

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in LPFM generally – should be sure to read the full NPRM. Be forewarned, though: the NPRM is not light reading. Keep your NoDoz® handy.

The proposals entail two broad categories of regulations: first, issues arising from the interrelationships between LPFM stations and other stations operating in the FM band; second, issues relating to the process of initially licensing LPFM stations.

LPFMs vs. Other FM Band Users

Second-Adjacent Channel Separation Waivers. First out of the box is a proposed approach to requests by LPFM stations for waiver of otherwise applicable minimum second-adjacent channel separations. In the LCRA Congress expressly authorized the FCC to waive those spacing requirements in some circumstances. What circumstances? Congress thought second-adjacent waivers should be permitted as long as the LPFM applicant establishes that its proposal "will not result in interference to any authorized radio service". That showing can be made "using methods of predicting interference taking into account all relevant factors, including terrain-sensitive propagation models".

Of course, the Commission has had its own second adjacent waiver policy in place since 2007. But that policy (which involves a "balanc[ing]" of various interests) is a bit more loosey-goosey than what Congress seems to have had in mind. Congress's approach requires first and foremost that the LPFM "will not result" in interference, regardless of whether the extent of possible interference might be said to be offset by any possible gains in service. So the Commission tentatively figures that its 2007 approach is history (although it still invites comments on that tentative conclusion).

Though technically deleted from the rules, the third-adjacent separation limits will still be retained in the rules.

How would an LPFM applicant demonstrate that its proposal would not "result in interference"? The Commission suggests that the undesired/desired signal strength ratio approach (used, for example, in assessing some translator applications) might be the way to go. It also suggests that LPFMs might be permitted to use directional antennas to protect second-adjacent stations.

The Commission also offers some other factors it might be inclined to consider in connection with second-adjacent waiver requests. For example, should LPFM applicants be required to show that no fully-spaced channels are available? Is it relevant that the LPFM proposal would eliminate or reduce interference received by the LPFM? How about looking at whether the proposal would result in "superior spacing" to other FM operations (full-service, translator, booster) on co-channel and first-adjacent channels? The FCC appears to be wide-open for further suggestions here.

With respect to handling complaints about interference caused by an LPFM station with a second-adjacent spacing waiver, the LCRA lays out a clear process to be followed. In the NPRM the FCC acknowledges that Congressionally-mandated process and proposes to incorporate it into the rules. But in doing so, the Commission solicits comments on some practical questions the LCRA doesn't address – like how to define a "bona fide complaint", and how the LPFM station accused of interference might demonstrate that it's not the source of the complained-of interference.

Third-Adjacent Channel Interference. As discussed above, the Commission has – at Congress's behest – deleted most (but not all) of the minimum separation requirements for third-adjacent channel LPFM operations. But that doesn't mean that LPFM interference to third-adjacent stations is a thing of the past. To the contrary, it merely means that a threshold protective measure designed to prevent such interference has been removed. In ordering the deletion of the separations, Congress provided that LPFM stations would still be subject to interference limits. But in so doing, Congress managed to introduce an astonishing level of complexity which the Commission is now attempting to sort out.

Because of the language of the LCRA, the Commission finds itself required to establish two separate and distinct "LPFM interference protection and remediation regimes". The first applies to LPFM stations that would have been short-spaced if the Commission had retained the minimum separation limits for third-adjacent operations; the second applies to LPFM stations that would not have been so short-spaced.

(Irony alert: Yes, it turns out that, even though the third-adjacent separation limits have been technically deleted from the rules, they will still be retained in the rules – but "solely for purposes of reference" to permit the Commission to determine which protection/remediation "regime" is to be implemented when third-adjacent interference rears its ugly head.)

Remediation Process for Section 7(1) Stations – For LPFM stations that would be short-spaced to third adjacent operations under the old spacings – what the Commission refers to as "Section 7(1) Stations" – the drill would track the process used for translators. ***Any*** actual interference from a Section 7(1) Station to the "direct reception by the public of the off-the-air signals of any authorized broadcast station" would be prohibited, regardless of where or when the interference occurs. If such interference were to crop up, it would have to be eliminated or the LPFM would have to cease operation.

While the translator rules don't say so in so many words, in order to warrant the Commission's attention an interference complaint must be "bona fide". In the FCC's view, that means that the complainant must be "disinterested", *i.e.*, not having any "legal stake" in the matter.

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Since the LCRA specifically instructs the Commission to use the translator interference remediation process (currently codified in Section 74.1203), it's doubtful that the FCC has much room to change that process at all relative to LPFMs. Still, the Commission asks whether any changes might be possible and, if so, what they might be.

Remediation Process for non-Section 7(1) Stations – All LPFM stations that don't qualify as "Section 7(1) Stations" would be treated as "Section 7(3) Stations", which would enjoy a considerably more lenient process for dealing with interference. Where Section 7(1) Stations would have to either eliminate interference or turn themselves off regardless of where that interference might occur, Section 7(3) Stations would merely have to "address interference complaints within the protected contour" of the interfered-with third-adjacent station. (The LCRA also calls for the FCC to "encourage" Section 7(3) Stations to "address" any other complaints regardless of the locus of the interference.)

What exactly must an LPFM station do to "address" an interference complaint?

Of course, the statutory term "address" is not particularly specific. While it seems clear that "addressing interference complaints" does not require "eliminating" interference, "addressing" has still got to involve some action on the part of the LPFM station. But what exactly must an LPFM station do to "address" an interference complaint? The Commission's not sure, so it has invited comment on that fundamental question, as well as other more practical issues (*e.g.*, should complaints have to be filed with the Audio Division? should the complainant be required to provide contact information?).

The LCRA does specify that newly-constructed Section 7(3) Stations must be required to broadcast, periodically during the first year following construction, announcements alerting listeners to the potential for interference. The announcements must instruct listeners to contact the LPFM station to report interference. (According to the LCRA, the LPFM station must in turn notify the FCC and any affected stations about any complaints within 48 hours of the time they roll in.) The Commission is dutifully proposing to follow through with that, but it has a number of questions about the details – should the text of the announcements be specified by the Commission, when and how often should they be aired, etc. Oh, and the Commission is also thinking that it might impose the announcement requirement on newly-built Section 7(1) Stations, even though the LCRA does not expressly authorize such a requirement.

Translator Input Complaint Procedure The LCRA requires the Commission to modify its rules to "address the potential for predicted interference to FM translator input signals on third-adjacent channels". This is a significant change, since the Commission's current policy is to require remediation of *actual* interference. That is, under the FCC's existing policy, questions of third-adjacent interference from an LPFM station to a translator's input signal would be dealt with only if such interference actually arises; no consideration to the potential for such problems is given at the initial licensing stage.

Obviously, Congress's approach – requiring the FCC to "address the potential" for such interference – means a change in the FCC's SOP on this front. Rather than wait for an already authorized station to cause interference, the Commission will have to consider the possibility of interference *before* authorizing construction in the first place.

Accordingly, the Commission is proposing that any application for a new or modified LPFM station will be barred from using a transmitter site within a "potential interference area" of any FM translator station that receives the off-air signal of a third-adjacent channel FM station. Applications proposing such a site would be dismissed.

The term "potential interference area" would, for purposes of this policy, be defined as

any area within 2 km of the translator site or any area within 10 km of the translator site within the azimuths from -30 degrees to +30 degrees of the azimuth from the translator site to the site of the station being rebroadcast by the translator.

Applications specifying transmitter sites within "potential interference areas" could still be filed, *as long as* they include an exhibit demonstrating that no interference to off-air reception will be caused. Applicants could make that demonstration by showing that the ratio of the proposed LPFM signal to the FM signal would be below 34 dB at all locations. Alternately, they could use an equation set out in Section 2.7 of "Experimental Measurements of the Third-Adjacent Channel Impacts of Low Power FM Stations, Volume One—Final Report (May 2003)", which is a go-to resource when it comes to the technical aspects of LPFM.

I.F. Separation Requirements The Commission is proposing to remove the requirement that LPFM stations operating with less than 100 watts protect full-service station on their intermediate (I.F.) frequencies. This change would bring LPFM into regulatory parity with FM translator stations and Class D FM stations, which are already exempt from I.F. when operating with less the 100 watts ERP.

LPFM Licensing Processes

Anyone who may be thinking about filing an application in the next LPFM window should pay particular attention to Paragraphs 47-66 of the *5th R&O*. There the Commission proposes a considerable number of changes to the some important aspects of the application and selection process. The proposals include:

Elimination of the LP10 class of service (*i.e.*, LPFM stations with maximum power of 10 watts ERP at 30 meters HAAT), but creation of a new higher power

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Look out below!!

Closing Gavel Comes Down On Auction 93

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Kiss good-bye to Auction 93 and color it gone. After eight days of auction action, on April 5 the ***FCC*** gaveled its 2012 auction of FM construction permits to a close. And while the results may not reflect any permanent trends in market values, one thing is clear: this year's crop of FM CPs brought in less than half the total of auction proceeds generated in the 2011 Auction.

This year's auction featured 119 permits, but only 93 of them got sold, with total winning bids amounting to a shade under $4.5 million. (Bean counters beware: the total the FCC will actually receive will come in under $4 million, thanks to bidding credits, a/k/a discounts, given by the Commission to more than half of the successful bidders.) By contrast, the 2011 auction, with a total of only 108 permits ultimately sold, netted $8.5 million (on total winning bids of more than $10.5 million). That slump is consistent with an eight-year trend.

The 2007 FM auction raked in an impressive $21 million for 111 permits. But that was less than half the $54 million haul (for 163 permits) in 2006. And let's not talk about the 2004 auction, in which the Commission struck gold, selling 258 FM permits for a whopping $148 million. This year's bottom line is even worse than the 2009 auction conducted in the throes of the Great Recession. There the Commission still netted more than $5 million, 25% more than this year.

The considerable downturn in proceeds may be attributable to any number of factors, including the rough economic times and the fact that a number of the permits this year were re-treads that had already gone unsold (or, in some cases, sold but unbuilt) in previous auctions. Whatever the reason, the high rollers (and their bankrolls) stayed away in droves this year.

Only seven of the winning bids broke $100,000. The highest winning bid, by far, was $309,000 for a Class C3 in scenic Tishomingo, Oklahoma (about midway between Dallas and Oklahoma City). A Class A in Cloverdale, California (80 miles or so up the 101 from San Francisco), was the second highest at $261,000. Coming in third was a Class A in Culver, Indiana (halfway between Ft. Wayne and Gary) – winning bid, $200,000. By contrast, even last year's auction saw six permits go for more than $500K each.

On the other end of the spectrum, nearly a third of this year's permits were sold for the lowest possible bid, each attracting only one bidder. And we can look for more re-tread opportunities in future auctions, since more than two dozen permits had no bidders at all.

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class to operate with up to 250 watts ERP at 30 meters HAAT in certain smaller communities, rural areas, or "non-core" locations (*i.e.*, outside population centers) in larger markets;

Clarifying that American Indian Tribes and Alaskan Native Villages (Native Nations) are both (a) eligible to apply for LPFM stations and (b) entitled to a point in the point system selection process. The NPRM also seeks comment on whether Native Nations should be granted exemptions from the multiple ownership and cross-ownership rules so that they might in some circumstances own more than one LPFM station *and* full-service stations at the same time;

Permitting cross-ownership of LPFM stations and one or more FM translator stations;

Jiggering with the process for selecting from among mutually exclusive applicants in various ways designed to further emphasize and enhance the "local" nature of LPFM licensees and the service they're likely to provide;

Alternative ways of dealing with tie-breaker and time-share situations.

Again, the *5th R&O* is dense with material and should be studied carefully by anyone concerned about LPFM service – or about FM service generally. That includes any potential applicant for an LPFM station as well as any existing full-service licensee who might suffer interference from new or modified LPFM operations nearby. While the Commission obviously has a lot of ideas of its own here, the agency appears to be wide open to any alternative suggestions that interested parties might want to lob in.

The LCRA clearly establishes that LPFM as a service enjoys substantial Congressional support – which means that it will have to be reckoned with. The *5th R&O*'s NPRM reflects an important opportunity to define how the LPFM service is to be integrated into the panoply of other FM services going forward. For that reason it warrants the serious attention of anyone using, or thinking of using, the FM band.

If you want to file comments on any of the FCC's proposals, you have until ***May 7, 2012***. Reply comments are due by ***May 21***. Since the proposals include some "information collection" requirements, you can also tell the FCC what you think about those, thanks to the Paperwork Reduction Act – comments in that vein are due by ***June 5***.

The Quinquennial Question: To Quash or Not to Quash?

Commission Contemplates Lifting Ban on Exclusive Program Access Deals

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Hard to believe, but it's that time again – time for the Commission to take a look at competition in the multichannel video programming distribution (MVPD) industry to determine whether the 20-year-old ban on certain exclusive program access deals is still necessary. With the release of a Notice of Proposed Rulemaking (*NPRM*), the Commission has started that ball rolling again. Interested parties have until June 22 to let the FCC know their thoughts on the issue.

The last two times the Commission considered this question, it concluded that the ban should remain in place. Thanks to at least one intervening court decision, though, this time could be different.

Back in 1992, Congress was concerned about the chokehold that the largely monopolistic cable industry then had on video delivery in many markets. Congress understood from the FCC that that chokehold was at least partly the result of the fact that competitors couldn't secure programming owned by "vertically integrated cable companies". (In this context, "vertically integrated cable companies" are cable operators that own attributable interests in companies that provide cable programming.) So Congress just said "no".

The Commission will be looking for specific data and empirical analyses.

It ordered the Commission (among other things) to prohibit certain exclusivity agreements between a cable operator and a cable program provider in which the operator has an attributable interest. The idea was to assure that all competing cable operators would have access to the primo types of programs most attractive to subscribers.

Congress was aware that the video delivery industry was developing rapidly and that the need for the ban might decline over time. So Congress included a sunset provision: while the 1992 Cable Act required the imposition of the ban, it also required that the FCC revisit the ban in 2002 after the enactment of the Cable Act. Unless the FCC were then to determine that the ban continued to be necessary to protect competition and diversity, the ban would automatically expire. And even if the ban survived the 2002 review, it would be subject to similar reviews every five years thereafter.

The ban did indeed survive the 2002 review, and the 2007 review as well. But the latter decision was appealed to the U.S. Court of Appeals for the D.C. Circuit in 2010. While the court affirmed the FCC's decision to leave the ban in place for another five years, the court expressed concern because (a) Congress had clearly intended that the ban go away at some point and (b) the video delivery market has "changed drastically" since 1992. One of the three judges issued a dissenting opinion buying into the appellants' argument that the ban raised serious First Amendment concerns.

Against that backdrop comes the *NPRM*.

This time around the Commission appears to be taking to heart the messages from the Court of Appeals. In contemplation of a possible sunsetting, the Commission is seeking suggestions for how best it could preserve competition and diversity if the ban were finally to be tossed.

And to those who would urge that the ban be kept in place – at least for another five years – the Commission cautions that it will be looking for ***specific data*** and ***empirical analyses*** showing that lifting the ban would harm competition. In the past, the ban's supporters have tended to rely on generalized claims that certain programming controlled by cable-affiliated entities is "must-have" and should not be subject to access exclusivity deals. It appears from the *NPRM* that that won't cut it anymore.

As a preliminary observation, the Commission notes that, since 2007, there have been at least three developments that might affect the questions at issue:

The separation of Time Warner Cable Inc. (TWC), a cable operator, from Time Warner Inc. (Time Warner), an owner of satellite-delivered, national programming networks. As a result of the separation, Time Warner's programming networks are no longer affiliated with TWC, thus reducing the number of satellite-delivered, national programming networks that are cable-affiliated. This is significant because the FCC has historically compared the total number of satellite-delivered channels with the number of those channels affiliated with a cable operator. The actual significance of that comparative approach is not entirely clear.

The joint venture between Comcast (a vertically integrated cable operator) and NBC Universal, Inc. (NBCU), an owner of broadcast stations and satellite-delivered, national programming networks). While this transaction led to an *increase* in satellite-delivered, national programming networks that are cable-affiliated, the *NPRM* suggests that the program access conditions of the merger agreement mitigate any adverse effects this deal might have on the video distribution market. (Of course, those merger conditions are in any event set to go away at the end of 2018, and they might be removed or revised earlier than that – so their permanent protective effect are neither as extensive nor as solid as a more general rule or policy applicable to all parties.)

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The rapid growth of distributing and viewing of video programming over the Internet (OVD, or online video distribution). In assessing the Comcast/NBCU merger, the Commission acknowledged the potential effect of OVDs on programming choices, viewer flexibility, technological innovation and lower prices. In the Comcast/NBCU Merger Order, the Commission recognized that OVDs "can provide and promote more programming choices, viewing flexibility, technological innovation and lower prices." According to the Commission, OVDs are a "potential competitive threat" that "must have a similar array of programming" if they are to "fully compete". The *NPRM* solicits information regarding the effect – historical or anticipated – of OVDs on nationwide and regional multichannel video distribution subscription rates. It also asks whether (and if so, how) the emergence of OVDs that could benefit from the exclusive contract prohibition should affect the Commission's analysis. (It's interesting that the FCC may be looking at OVDs as a potential beneficiary of, rather than a reason for sunsetting, the exclusive contract prohibition.)

In view of all these factors, the *NPRM* asks whether it should: (a) sunset the ban on exclusive contracts involving satellite-delivered, cable-affiliated programming; (b) retain that ban as is, or (c) retain it with some relaxation. It also solicits comments on revisions to the program access rules that might allow it to address alleged violations (*e.g.*, discriminatory volume discounts and uniform prices increases) more effectively.

Anyone looking for continuation of the prohibition – a universe likely to include non-vertically integrated MVPDs – will be expected to demonstrate, with hard data, either that (a) little has changed in the competitive dynamics of the video market since 2007, or (b) as a result of (or in spite of) changes, relaxing or sunsetting the prohibition would harm competition. Among the issues the FCC has teed up are the following:

What is the impact of the allegedly growing number of satellite-delivered national programming networks? According to the *NPRM*, the percentage of such networks that are cable-affiliated has significantly declined. One difficult issue here is how to count programming. For example, should a network that provides its programming in standard definition, high definition, 3-D and video-on-demand formats be treated as four networks or one? (While non-integrated MVPDs might be inclined to argue in this context that a multi-format network like this should really count as only one network, they argued otherwise in 2010 to get the Commission to force regional sports networks (RSNs) to provide access to HD feeds as well as SD feeds.)

Do integrated MVPD/programmers still have the ability to withhold programming from competitors in a manner that harms competition? The NPRM appears to recognize the continued existence of some popular channels for which there are no current substitutes. The ability to withhold such "must have" channels has generally been viewed as anti-competitive. But the Commission is now looking for "reliable, empirical data" to establish conclusively the existence of such channels. While the notion of "must have" channels may seem obvious – even the Commission seems to acknowledge that RSNs are critical to a competitive MVPD service – proving their existence with facts and figures could be a difficult and expensive proposition.

Do integrated MVPD/programmers still have the incentive to withhold programming from competitors in a manner that harms competition? The historical theory has been that integrated companies are willing to forgo revenue from licensing programming to competitors because such integrated companies can profit more from increased revenues derived from subscribers who flock to the integrated MVPD to get the programming that's unavailable from its competitors. The *NPRM* suggests that the decline in national penetration rate for cable operators (67% to 58.5%) may undermine that theory. Of course, presumably the integrated cable operators have lost subscribers to the very competitors to whom they already must make their programming available – so it's not clear why a declining penetration rate might justify elimination of the ban on exclusivity deals, but that's a point that will presumably be made by commenters.

It's not clear why a declining penetration rate might justify elimination of the ban on exclusivity deals.

If, after reviewing all the comments and other record information, the Commission concludes that the prohibition on exclusive programming contracts should be tossed, the Commission will have to decide how, in the absence of the prohibition, it can and should protect and preserve competition. The FCC invites comments on a range of possible approaches, including:

Complete elimination of the prohibition, replaced by reliance other existing protections. The Commission has complaint processes in place with respect to a variety of programming-related issues on the MVPD front. So even if the absolute ban on exclusive access deals were to be eliminated, aggrieved parties could theoretically still plead their case to the Commission through complaints. But the complainant would have the burden of proof. That would require the complainant to demonstrate the integrated MVPD had engaged in some "unfair act" the "purpose or effect" of which was to "significantly hinder or prevent" the complainant from providing programming to its subscribers. That's a tough burden to meet, although the *NPRM* invites suggestions for easing that burden with respect to RSN, and possibly other, programming (through, perhaps, the establishment of rebuttable presumptions regarding the intent and effect of denying such programming to competitors).

Gradual elimination of the prohibition market-by-market. Under this approach, the prohibition would be left in place, but cable operators or satellite-delivered, cable

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Ban on regular ads remains

9th Circuit Opens Noncoms to Political Spots

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Just as the political advertising season is about to shift into overdrive, the U.S. Court of Appeals for the Ninth Circuit has opened the competition for candidates' cash to a universe of broadcasters previously excluded from that potential revenue stream. According to the court, the long-standing prohibition against the sale of paid political advertising by noncommercial educational broadcast stations – a/k/a "NCE" or "public" broadcasters – is unconstitutional.

Since the earliest days of broadcasting, the Communications Act has prohibited noncommercial stations from broadcasting "advertising". The Act currently defines "advertising" in this context to include any broadcast content, aired in exchange for consideration of any kind, that either:

promotes some for-profit activity; or

expresses the views of any person with respect to any matter of public importance or interest; or

supports or opposes any political candidate.

(Yes, yes, we know that most, if not all, NCE stations do broadcast items that look a lot like standard ads. Those are technically referred to as "enhanced underwriting announcements". They are theoretically subject to considerably greater constraints than normal "ads" – and the FCC does occasionally fine stations for exceeding the permissible limits.)

The theory underlying the ban on ads is clear : if public stations were allowed to accept advertising, so the thinking goes, they'd be inclined to replace niche educational programming with programming designed to attract a much broader audience, or maybe they'd feel pressure to alter the content of their programming to please their advertisers – the goal, in either event, being to attract more advertising dollars. (Note: whether or not that theory is valid is far from clear, but it's the theory that Congress relied on.)

So how did much of the ban just get tossed?

The story starts a decade ago. In 2002, the FCC fined a San Francisco public station, KMTP-TV, $10,000 for broadcasting numerous prohibited advertisements. KMTP-TV paid the fine, but then sued in federal District Court in California for reimbursement. Its claim: all of the advertising prohibitions are unconstitutional restrictions on the station's speech. The District Court upheld the prohibitions on advertising across the board, and KMTP-TV appealed to the Ninth Circuit, which released its decision earlier this month.

The Circuit agreed with the FCC that Congress does have a substantial interest in supporting the types of "high quality educational" programming found on NCE stations. (The Court did not address the obvious question of how the term "high quality" programming is defined or who is defining it.) And the Court was also on board with the government's claim that Congress had enough evidence supporting its general theory that the goals of noncommercial broadcasting would be undermined if advertising were permitted. (That's the theory that NCE stations would (a) abandon niche educational programming in favor of more mass-market programming and (b) alter the content of their programming to attract advertisers.) To be sure, the evidence wasn't particularly empirical and much of it dated back to 1981 and earlier – but the Court reasoned that Congress's judgment is entitled to substantial deference.

The ban on regular advertising was upheld. Political and issue advertising, however, were another story.

Accordingly, the Court upheld the ban on regular advertising. Political and issue advertising, however, were another story.

In the Court's words,

> neither logic nor evidence supports the notion that public issue and political advertisers are likely to encourage public broadcast stations to dilute the kind of noncommercial programming whose maintenance is the substantial interest that would support the advertising bans.

To illustrate this, the Court focused on two types of programming – public affairs and children's/family programming – touted by the government as the types of NCE programming that Congress intended to protect.

As to children's programming, the Court concluded that allowing political/issue advertising would have minimal adverse effect. That's because most viewers of such programming (*i.e.*, children) can't vote, so (according to the Circuit) NCE stations would have no incentive to alter that programming to suit the preferences of a political candidate or "issue group" and thereby attract their advertising dollars.

As to public affairs programming, the Court acknowledged that stations might change the content of such programming to attract political and issue advertising on various sides of important issues. But the Court could find no evidence – either before Congress when it enacted the ban or before the District Court that initially upheld it – that suggested that Congress was, or should have been, worried about that speculative notion. To the contrary, Congress appeared to be concerned exclusively with "commercialism". Campaign ads and issue ads don't promote "commercialism" because, in the Court's view, they "do not encourage viewers to buy commercial goods and services".

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Additionally, the Court was struck by the fact that the discriminatory effect of the advertising ban. The ban permits announcements that promote the goods and services of non-profit companies, but forbids political/issue announcements. Such governmental line-drawing based on the content of the communications at issue raises serious constitutional questions. The FCC was unable to justify to the Court's satisfaction the content-based distinction drawn by the statutory prohibition.

So what does this all mean? For openers, it means that NCE stations – at least those in the states within the Ninth Circuit – can now sell advertising time to political candidates and groups seeking to address important public issues. That could alter some candidates' strategies – since NCE stations may provide more direct access to certain audience demographics. It will certainly alter the operations of many NCE stations, which will now be able to market themselves to at least certain limited classes of advertisers.

NCE stations won't have to worry about the "reasonable access" provision of the Act.

By the way, (1) what states are in the Ninth Circuit, and (2) why does that matter?

Answer to Question 1: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

Answer to Question 2: Because the Ninth Circuit has jurisdiction over only those cases arising in those states, and its decisions thus affect only those states. It is therefore at least conceivable – but not, in our view, likely – that the Commission could take the position that stations located outside of the Ninth Circuit are still subject to the advertising prohibitions. (We think it unlikely that the Commission will go that route because to do so would create, in effect, two separate sets of rules based purely on the accident of geography. We like to think that the FCC would not be eager to head down that road.)

Those public stations that elect to jump into the political advertising game will have to familiarize themselves with the complex of political ad rules that routinely beleaguer their commercial counterparts. Equal opportunities, lowest unit rates, political file obligations, etc., will presumably all have to be implemented in some fashion, even though the Court's decision did not address any of those niceties.

One thing that NCE stations ***won't*** have to worry about: the "reasonable access" provision of the Communications Act. That provision mandates that candidates for ***federal*** office are entitled to "reasonable access" to advertising time. The precise extent of "access" that might be deemed "reasonable" has bedeviled the Commission and the courts for years. But the Act expressly exempts NCE stations from that obligation, and the Ninth Circuit's decision does not alter that exemption.

Where do we go from here? The Commission could fold up its litigation tent and accept the Circuit's decision, leaving it to Congress to amend the Communications Act to address the decision if Congress sees fit.

Alternatively, the Commission could ask the Ninth Circuit to reconsider its decision. The three-judge panel did include one dissenter, which might give the Commission some hope. Or the FCC could ask the full Circuit to rehear it *en banc*. Or it could go for broke and ask the Supremes to take a look. In the meantime, unless the FCC requests and is granted a stay of the effectiveness of the Circuit's decision, the ban on political/issue ads on NCE stations (at least in the Ninth Circuit) is gone until further notice.

Check back on www.CommLawBlog.com for updates on how the Commission chooses to proceed.

In closing, we note that KTMP is probably frustrated. In all likelihood, KTMP launched its appeal *not* with the goal of trashing the ban on political/issue ads, but rather to get rid of the more general ban on commercial advertising which had gotten it into hot water at the FCC. While it obviously came up short on that score, KTMP's efforts have nonetheless established an important precedent for all NCE stations.

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-affiliated programmers would be permitted to file a Petition for Sunset seeking to remove the prohibition on a market-by-market basis based on the extent of competition in the market.

Retention of a more limited prohibition. If any problem arising from the kind of program exclusivity deals barred by the current prohibition is really limited to certain types of programming, the Commission is open to considering narrowing the scope of the prohibition to reach only RSNs and certain other so-called "must-have" programming. Again, however, hard data is sought as to the alleged "must-have" nature of protected programming.

Finally, the Commission notes that elimination of the prohibition could cause substantial disruptions to cable subscribers. For example, some programming agreements entered into while the prohibition has been in effect might provide that, should the prohibition be eliminated, the cable-affiliated programmer could immediately terminate the agreement and instead enter into an exclusive arrangement with its cable affiliate. If such a provision were invoked, subscribers to non-affiliated MVPDs might suddenly lose access to desirable programming. What steps, if any, should the Commission take to minimize viewer disruptions if the prohibition is eliminated?

The *NPRM* is a wide-ranging invitation for comments on a host of issues, both general and detailed. It is dense with assertions and questions that demand considerable review and deliberation. Since the bottom line here is the possible elimination of a rule that has been in place for 20 years already, everyone affected by that rule should consider how they may be able to influence the final outcome here.

Comments in response to the *NPRM* are due by ***June 22, 2012***; replies are due by ***July 23***.

A paler shade of white?

FCC Adjusts "White Space" Rules

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The FCC has released yet another decision in its long-running effort to implement rules allowing unlicensed "white space" devices in the television bands. The latest revision does not represent any wholesale changes, but will make it easier for some devices to operate.

White space devices (TV Band Devices or TVBDs, in the FCC's nomenclature) rely on the fact that every location has some TV spectrum not being used. Those vacant frequencies typically show up as white spaces on a map of spectrum occupancy – hence the name. Technical studies show that properly controlled unlicensed devices can use these channels without causing interference to TV operation and other authorized users, including wireless microphones.

Following a Notice of Inquiry late in 2002, and a 2004 Notice of Proposed Rulemaking, the FCC first adopted rules allowing white space devices in 2006, but left the technical specifics for a later date. Those came in 2008, and then in 2010 the FCC responded to petitions for reconsideration with a number of revisions. Now the FCC has addressed petitions for reconsideration of the 2010 order.

The rules categorize each white space device as either fixed or mobile.

The rules categorize each white space device as either fixed or mobile. A fixed device must have its location either professionally programmed in or determined by an on-board GPS device, and is subject to limits on operating power, antenna height, and antenna gain limits. Before operating, it must query a database of available spectrum for its location. A mobile device may similarly use GPS to determine its location and then query a database (Mode II devices); alternatively, it can contact another white space device that will in turn query the database (Mode I devices). The FCC has so far approved ten private companies to administer the databases, of which two have completed testing to the FCC's satisfaction.

In its recent order disposing of the petitions for reconsiderations, the Commission provided the following changes and clarifications:

Antenna Height. The 2010 rules limited fixed device antenna heights to a maximum of 30 meters above ground, and the height above the average terrain (HAAT) to no more than 76 meters. Several parties requested reconsideration of this restriction, particularly the HAAT portion. (According to one, the majority of the state of West Virginia would have been off-limits.) The FCC now allows fixed white space devices to have antennas up to 250 meters above average terrain, although still no more than 30 meters above ground level. At the same time, the FCC revised the separation distances between fixed white space devices and television contours to allow for the greater HAAT, but left unchanged the separations for wireless microphones and the exclusion zones around MVPD, LPTV, and BAS receive sites. A device that provides database information to Mode I portable devices must comply with the previous HAAT limitations, so as to keep the Mode I device from straying too far from a known location.

Out-of-Band Emissions. The 2010 rules limited out-of-band emissions to 72.8 dB below the device's highest in-band emissions. Now the out-of-band emissions are relaxed to 72.8 dB below the maximum power allowed within the 6 MHz bandwidth. The new order also cuts back the required occupied bandwidth from 6 MHz to 5.5 MHz, so as to ease the roll-off at the channel edges, and slightly increases the allowable power spectral density so as to leave total power unchanged.

Channel 52 Protection. As part of the DTV transition, the FCC auctioned former TV channels 52 and above for wireless use. The wireless companies have long sought restrictions on channel 51 TV operation to protect their frequencies just above, and similarly requested limits on white space devices on channel 51. The FCC refused, partly on procedural grounds, and partly on the principle that white space devices, being unlicensed, are already required to protect licensed wireless operations.

Classes of Devices. The FCC rejected a new class of white space device, similar to "Mode II" but for indoor use only, without GPS capabilities. The FCC feared these could be easily moved without updating their locations, thus creating interference. It also found the new class to be largely unnecessary, as Mode I portable devices may operate without geolocation (although they must query a Mode II or fixed device periodically).

Confidentiality of Database Information. The FCC makes publicly available all information required to be included in the databases that white spaces devices must search before operating. A cable association asked the FCC to withhold certain data, including coordinates of cable headends and towers, claiming this type of equipment was "critical infrastructure" that could be subject to terrorist attack. The FCC disagreed with the premise and refused the rule change.

Finally, the FCC clarified two points. It emphasized that LPTV, television translator, and Class A television stations will have their receive sites protected based on the coordinates available in the existing CDBS database. The FCC will create a new web interface so that broadcasters can update the information. Second, the recent order corrects the coor-

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Looking to the future

CRB Announces Proposed NCE Copyright Rates for 2013-2017

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If you're a noncommercial educational (NCE, a/k/a "public") broadcaster, heads up. The Copyright Royalty Board (CRB) has issued proposed rates and terms for the use of various copyrighted works by public broadcasters from January 1, 2013 through December 31, 2017. You've got 30 days – to ***May 25, 2012*** – to sift through the complex series of rate schedules the CRB has put on the table.

So just what's on the table? The rates that NCE broadcasters will have to pay to copyright holders (through those holders' agents, including ASCAP, BMI and SESAC) for the right to broadcast, during 2013-2017, the underlying music and lyrics in all those copyright holders' songs. (Technically, the CRB proposal also covers the use of pictorial, graphic and sculptural works, but those tend to have less impact on broadcasters.) For the CRB's purposes, the universe of NCE broadcasters encompasses all entities treated as NCE licensees by the FCC, including educational institutions and large scale public radio and TV licensees.

The proposed rates are the product of an arcane ratemaking process that began on January 5, 2011. First, the CRB invited potentially interested parties to, in effect, sign up to participate. Who showed up? The usual suspects. For the copyright holders, there were: ASCAP; BMI; SESAC; the National Music Publishers Association and the Harry Fox Agency; and the Church Music Publishers' Association. Broadcasters on board included: the Educational Media Foundation; NPR/PBS/CPB; the National Religious Broadcasters Noncommercial Music License Committee; the Catholic Radio Association; and the American Council on Education.

General NCE broadcasters will pay slightly more for performance of musical works.

The CRB then turned all the players loose for a three-month negotiation period. The goal was to see if the parties could come to agreement on the rates to be applied to the various subsets of noncommercial broadcasting. Some specific agreements were reached between specific public broadcasting entities and specific copyright owners (or their representatives). Those were not, and will not be published, in the Federal Register, as their reach is limited to the particular parties to the various agreements.

The more generally applicable agreements are submitted to the CRB for its approval. There were seven such agreements. In its latest notice, the CRB sets forth those proposals in a collection of proposed rules (actually, proposed changes to the rules found in 37 C.F.R. Part 381). They include eight separate grids of rates covering licensees of various types and sizes, in various markets, providing various types of programming. To say that there's a lot of information to consider and digest here is a gross understatement.

Since the CRB's notice (with all of its proposed rules, tables, rates and terms) has just been released, we can't pretend that we've studied it carefully. But we will. In the meantime, here's a very early, very quick and dirty review of what we see as the high points:

It's unclear what is happening with regard to NPR and PBS stations. The rule that previously applied to this subset of noncommercial broadcasters has been removed and the space held open for future use. No explicit reason was given. It could be that NPR and PBS reached specific licensing agreement; could also be that these stations are just going to be treated as equals to their fellow non-college and university noncomms.

Those general noncommercial broadcasters will pay slightly more for performance of musical works (as would be expected) during the upcoming five-year period, but the change is not drastic. Also as expected, they will pay the same amount to ASCAP that they pay to BMI, with each of those entities receiving more per station than SESAC. While smaller stations (according to their predicted 60 dBu contours) will pay about the same whether they are playing large amounts of music or not, there are distinct differences among larger stations, depending on whether those stations are music- rather than talk-focused.

There is also a slight increase for noncommercial stations affiliated with a college or university. However, the bigger change on this end is the elimination of a one-size fits all flat fee in favor of a tiered system that takes into account the size of the student body when determining payments to ASCAP and BMI (no such tiering exists for SESAC). However, even within this tiered system, smaller stations (those with an ERP of 100 watts or less) get a break.

Anyone who might be affected by copyright rates to be charged NCE broadcasters until the end of 2017 would also be well advised to dig into the CRB's notice. With a paltry 30-day comment period, the sooner you get started on figuring out how the proposals could affect you, the better off you'll be.

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dinates of certain radio astronomy sites, which must be included in white spaces databases and protected by white spaces devices.

Most of the rule changes will take effect 30 days after publication in the Federal Register. Revisions to the filing of receive site information and entry of other information into the white spaces databases require OMB sign-off, and will probably take a few months longer. Check back with www.CommLawBlog.com for updates on this and related matters.

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dence file at the main studio. That includes complaints from the public, regardless of their apparent lack of merit. (And even more good news on this front: the Commission also affirmed that comments left by the public on social media websites, such as Facebook, do *not* need to be maintained in any file, online or at the station.)

Third, shared services agreements will *not* have to be made available in any public file. Ditto for written sponsorship identification disclosures. The Commission's 2011 proposal envisioned broadening the contents of the public file to include such materials, but the Commission has apparently thought better of those ideas.

So much for the broad strokes. Let's take a look at some of the details.

Political advertising materials – Under the original 2007 proposal, stations would not have been required to make their political files available online. Bad news there: the Commission (Commissioner McDowell dissenting on this point) has decided stations indeed *will* need to upload political file materials to their online public files.

Licensees will have to maintain their own local back-up copies of their political files (but not of the remainder of their online public files).

To cushion this particular blow, though, stations will have to do so only on a "going forward" basis. There will be no need to upload the reams of pages generated prior to the date when the new rules kick in, although stations will still be required to hold onto those old paper files and make them available for inspection at the station.

The majority of stations won't have to start posting their political file documents until July 1, 2014. But the Big Guys – *i.e.*, any station in a top-50 market affiliated with one of the four biggest commercial networks (ABC, NBC, CBS and Fox) – must comply as soon as the rules go into effect.

Stations will have to immediately post any initial requests or final orders from candidates for specific schedules, including the amounts and classes of time bought and the rates charged. Station will *not* be required to post general requests by candidates regarding availabilities and/or rates for a general array of time, or a record of the back-and-forth discussions with the candidates after a time request is made. In addition to posting the details of any final, mutually agreed upon time order, stations must provide follow-up reconciliation information about the order, such as the times the spots actually aired, information regarding "make goods" for preempted time and rebates or credits issued.

The FCC acknowledges that reconciliation information typically doesn't get placed in the public file until after the final billing has been sent out, depending on the licensee's business practices. Instead, stations make personnel available to answer questions about that data. Written documentation of the final reconciliation is posted at a later date consistent with the station's business practices. That approach is expressly permitted in the online public file era.

Of course, a lot of stuff regarding a lot of candidates goes into a political file each election cycle. To assist in keeping the file orderly, the FCC is planning to include in its online system organizational features, like subfolders for candidates and issue ads (and the ability for stations to create their own additional subfolders and subcategories).

Acknowledging the fallibility of its own still-to-be-designed-and-tested-and-implemented online system, the Commission also imposes an additional political file duty on licensees. Licensees will have to maintain their own local back-up copies of their political files (but *not* of the remainder of their online public files). The goal is to ensure that, in the event the FCC's system goes down, stations will still be able to make information available to candidates as soon as possible. On this point the Commission reassuringly coos that it does "not expect the requirement to provide back-up access to the political file during any times of outages to be overly burdensome."

Of course, the Commission may be correct that the actual provision of back-up access may not be a problem. But maintaining a set of electronic back-up files that will enable you to provide that access? That's another story. The FCC suggests that stations might want to make "mirror copies" of what the station has uploaded to the FCC's site. Sounds simple. According to the Commission, here's what would be involved:

> [S]tations will need to ensure that they retain any political file records that have not been uploaded or were uploaded after their last download of a mirror copy of their online public file. This means that if a station decides to download a mirror copy of their online public file on a weekly basis, it will need to maintain at the station, in paper or electronic form, any documents that have not been uploaded or that it uploaded to the online political file after its last weekly download. If a station chooses to download a mirror copy of their online public file on a monthly basis, it will need to maintain at the station any documents that have not been uploaded or that it uploaded to the online political file after its last monthly download.

Got that? And if you don't download *any* mirror copies, well, then you'll have to maintain at the station copies of *all* documents required to be in your online political file.

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While the FCC emphasizes that such station-maintained back-up copies will have to be made available only in the event that the Commission's system itself crashes, the Commission seems to ignore that making those copies available is only part of the burden. Having those back-up copies on hand and ready at all times (since it's impossible to reliably predict exactly when the FCC's system will crash) – well, there's the rub.

Materials about investigation or complaints – Stations currently are required to retain in the public file "material having a substantial bearing on a matter which is the subject of an FCC investigation or complaint to the FCC" of which the subject station is aware. That obligation will continue in the online era. While the FCC will automatically post in each station's public file any document (*e.g.*, letter of inquiry, order terminating an investigation, notice of apparent liability) from the FCC regarding investigation, the station will be obligated to upload its responses to Commission inquiries (unless the FCC directs to the contrary in any particular case). Stations will still be able to request confidential treatment of particular information; materials subject to a confidentiality request may be placed online with the confidential material redacted.

Complaints a station receives that are not the subject of an FCC letter of inquiry or other investigative request are not required to be posted in the online public file – but heads up! Such complaints *are* required to be included in the station's hard-copy, locally-available correspondence file (unless the FCC specifies otherwise).

New obligations – As a general matter, the FCC's new rules don't require any new categories of information to be kept in the public file. *BUT* the rules *do* require that the online public file include the station's main studio address and telephone number and the email address of a person designated to handle questions about the public file. Also, stations that have websites will be required to: (a) place a link to the online public file on their home page; and (b) include on their home page contact information for a station representative who can "assist any person with disabilities with issues related to the content of the public files."

Document formats – When the time comes to upload materials, what exactly will you be uploading? The Commission expects stations to provide documents in their "native formats", to the extent "technically feasible". That means that the FCC would prefer to have the "original" electronic versions of documents, rather than PDF versions produced by scanning paper copies (although the Commission acknowledges that scanning may be required for older documents). What if you've got electronic copies in both PDF and, say, Microsoft Word (*i.e.*, ".doc")? It appears that either will do, as long as the uploaded version is text-searchable. Note, though, that stations will not be required either "to create or preserve" metadata. That means that you can, and probably should, "scrub" any documents to be uploaded to the online public file.

Timing – So when does all this falderal begin? Stations will be required to begin using the online filing system as of the effective date of the new rules. That date will be 30 days after the FCC announces, in the Federal Register, that the Office of Management and Budget has approved the new data collection requirements (as required by the Paperwork Reduction Act). Check back with www.CommLawBlog.com for updates on that score.

Once the effective date arrives, all full-power and Class A TV licensees will have to upload to the online file all newly-created documents required to be placed in the public file except for letters/emails from the public and, in some cases, political file materials. Those licensees will have six months in which to upload all pre-existing public file documents to the online system (again, with the exception of communications from the public and, in all cases, political materials).

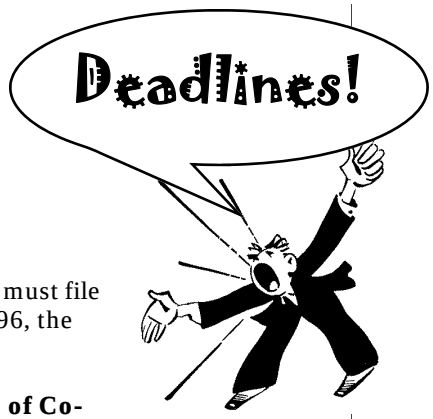
*Nobody has to upload **existing** political file materials – they've been exempted from the online file requirement.*

Who has to upload political materials and when? Nobody has to upload existing political file materials – they've been exempted from the online file requirement. The first folks to feel the brunt of the online rule as far as political materials go are the Big Guys we mentioned above (stations (a) affiliated with one of the top four commercial networks and (b) located in a Top 50 market). If you're one of them, you have to start uploading your newly-created political documents as of the effective date of the rules. Everybody else can relax until July 1, 2014 on this score.

Once the system is up and running, broadcasters will be expected to actively manage their online public files. The Commission is not specifically requiring stations to take down each item at the end of its retention period, but notes that stations should not allow the public files to become so overgrown with out-of-date documents that it is difficult to access relevant materials.

Development schedule for the online system – The FCC says it anticipates "being able to design an online public file that is highly available, scalable, cloud-based and eliminates any user wait times associated with processing documents after upload." Readers will forgive our skepticism, but we struggled through the implementation of the new Ownership Report (Form 323). Form 323 was filed through CDBS, an established, tried-and-sometimes-true system with which the FCC had years of experience. As even the Commission admits in a masterpiece of under-

(Continued on page 17)



May 14, 2012

Interpretation of Terms Multichannel Video Programming Distributor and Channel - Comments are due regarding the interpretation of the foregoing terms in the pending program access complaint proceeding.

June 1, 2012

Radio License Renewal Applications - *Radio* stations located in **Michigan** and **Ohio** 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.

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

Radio Post-Filing Announcements - *Radio* stations located in **Michigan** and **Ohio** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on June 16, July 1, July 16, August 1, and August 16.

Television Post-Filing Announcements - *Television* stations located in the **District of Columbia**, **Maryland**, **Virginia**, and **West Virginia** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on June 16, July 1, July 16, August 1, and August 16.

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

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

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in the **Arizona**, **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Nevada**, **New Mexico**, **Ohio**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

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

June 13, 2012

Interpretation of Terms Multichannel Video Programming Distributor and Channel - Reply comments are due regarding the interpretation of the foregoing terms in the pending program access complaint proceeding.

July 10, 2012

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the second quarter reports on FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file. Please note that the FCC 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 certifica-

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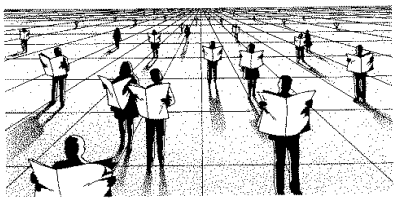
Stuff you may have read about before is back again . . .

Updates On The News

Nottoway County, Virginia: Tomorrowland of the Mid-Atlantic? – In more news from the White Space front (*see* the related article on page 12), the FCC has authorized TV white space database coordinator Telcordia to offer service within Nottoway County, Virginia, a mostly rural area toward the southern part of the state. Initial operations will include 20 sites serving rural schools and households. The action comes less than a month after the FCC approved Telcordia's database for operation in Wilmington, NC, and four months after the first white space operations by coordinator Spectrum Bridge, Inc. were approved, also for Wilmington, NC. Included in the Nottoway County order are special procedures for registering wireless microphones entitled to protection from white space devices.



It's unclear what mystical power the city of Wilmington has over the FCC, but there is undeniable evidence that something's going on there. Back in 2008, the FCC chose Wilmington to be a testing place for the DTV transition, and now it's the go-to place for white space database operators. But the designation of Nottaway County may signal that that chokehold has been broken. Stay tuned for further developments.

We assume the pace of approvals of the remaining eight proposed database systems will pick up. At the current rate, we calculate it will take until the year 2797 before white space systems are fully deployed. By then, we expect to be communicating telepathically via devices wired into our nervous systems. Assuming, of course, the FCC can free up enough spectrum.

(Continued from page 15)

statement, the revised Form 323 implemented in 2010 caused "problems". (We in the Real World can attest to the truth of that admission.)

But if the Commission couldn't get the Form 323 filing to work in a familiar infrastructure environment, is it realistic to think that the Commission will fare better in the *terra incognita* of the cloud, with a system the Commission seems to be making up as it goes along? The Commission claims the public file system will work smoothly. We'll see.

Will all of this lead to a new era of transparency, efficiency and regulatory bliss? Maybe, maybe not. Members of the general public (*i.e.*, almost everybody except wayward students working on research and political campaign time buyers) have historically ignored the long-time availability of in-station public files. It's hard to imagine that those same members will suddenly flock in droves to online public files.

Of course, in adopting the new rules, the Commission has made clear that the public file – online or in-station – is not really just for the public. Rather, it's also a "tool for the larger media policy community." The "larger media policy community"? Who might that be? "Public advocacy groups, journalists, and researchers", that's who. According to the Commission, these members of the "larger media policy community" act "as surrogates for the viewing public in evaluating and reporting on broadcast stations' performance".

Why the viewing public might need "surrogates" is not clear. Certainly many members of the "viewing public" would likely be surprised to hear that the FCC thinks that the public needs any help in "evaluating" broadcasters' performance. Presumably, though, the FCC figures that it knows what's best for the viewing public.

(Continued from page 16)

tion 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.

Wilkommen, Bienvenue, Welcome!!!

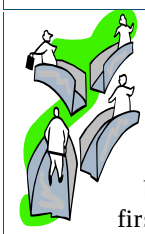
FHH Welcomes Back Kathy Kleiman

Fletcher Heald & Hildreth, P.L.C. is pleased to welcome Kathy Kleiman back into the FHH fold. Kathy was an associate with the firm in the 1990s. She left to explore the then-just-developing world of Internet Law (but not before she had co-founded the firm's Internet Law Group, one of the first of its kind). She now returns as FHH's Internet Counsel to co-lead its Internet Law and Policy Group.

To say Kathy is well-suited for the job is an understatement. She helped found the Internet Corporation for Assigned Names and Numbers (ICANN), the organization that coordinates the domain name system without which the Internet wouldn't be the Internet. Kathy was a key drafter of the domain name dispute policy everyone uses today, and an editor of many sections of the rules governing applications for new top-level domains. She has traveled to ICANN meetings in more than a dozen countries on six continents and spoken on Internet Free Speech, fair use, privacy and due process around the world.

Kathy is Beantown-educated – Harvard undergrad, BU law (both with honors, thank you very much). She currently lives in Falls Church, Virginia, where she dabbles in community leadership and politics when she's not tending to her two kids. In what passes for free time *chez* Kleiman, she is also producing a documentary about the six women who programmed ENIAC, the world's first modern computer, and thus founded the field of modern programming.

Kathy will be working with clients on a wide range of projects relating to: domain name conflicts; challenges and opportunities likely to be encountered in connection with new top level domains; website protections; and intellectual property issues in the Internet age. She can be reached at 703-812-0476, by email at Kleiman@fhhlaw.com, or at Skype ID Kathy.kleiman.



FHH - On the Job, On the Go

On May 3, **Kevin Goldberg** is set to be the featured speaker at a forum marking World Press Freedom Day (the anniversary of the Declaration of Windhoek, a date designated by the UN to raise awareness of the importance of freedom of speech). And get this – **Kevin** will be doing his speaking in The Gambia, where he'll be running a media law training and reform program for the International Center for Journalists during the first week of May.

Globetrotting **Kevin** will be returning state-side, though, since he's scheduled to speak at the Media Financial Managers conference in Las Vegas on May 21 on the topic of: "Legal Implications of Social Media".

On May 3, the very day that **Kevin** will be expounding on free press issues, **Frank Jazzo** will be leading the Government Affairs panel at the Annual Meeting of the Maryland/DC/Delaware Broadcasters Association in exotic Ellicott City, Maryland. Joining **Frank** will be the NAB's **Jane Mago** and **Kelly Cole**.

Frank will also be a panelist in the Legal & Regulatory Session (along with the NAB's **Ann Bobeck** and LAB Counsel **Charles Spencer**) at the Joint Annual Convention of the Louisiana Association of Broadcasters (LAB) and the Mississippi Association of Broadcasters (MAB), on May 31 in arguably more exotic New Orleans.

From May 18-20, look for **Peter Tannenwald** at the National Translator Association's annual meeting in Albuquerque. He'll be a featured speaker there.

And in June, **Howard Weiss** is slated to attend the Virginia Association of Broadcasters Convention (from June 21-23).

Media Darling of the Month News. Oddsmakers are doubtless putting their money on **Kevin G** to walk away as this month's *Media Darling*, what with his sojurn in The Gambia, his featured speech on World Press Freedom Day, and his follow-up star turn in Vegas. But let's see – Africa and North America – that's just two continents. How about **Peter T**, who was a featured panelist on an April 4 discussion program, waxing eloquent on "The Spectrum Provisions of the Tax Relief Act – Implications for Broadcasters, Wireless Carriers and Tech Interests". The program was presented on BroadbandUS.TV, an Internet TV channel on the TV *Worldwide* network. Worldwide? That would include *seven* continents, right? BroadbandUS.TV's programs present "high-profile speakers" in "lively, spirited and balanced debate". "High-profile"? "Lively"? "Spirited"? We looked each of those terms up, and not only was the dictionary entry for each accompanied by a picture of **Peter**, but each entry also assured us that the terms are all synonymous with "Media Darling". So by definition, **Peter** – you're our *Media Darling of the Month!*