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Memorandum to Clients

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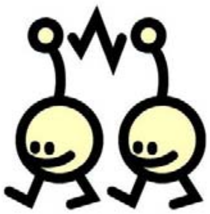

That's one small step for . . .

TV Channel-Sharing Ground Rules Start to Emerge

By Christine E. Goepp
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And so it begins.

The Commission has adopted the first minimal rules paving the way for the repacking of the TV broadcast spectrum. The new rules are, at most, preliminary guide markers. In that respect they're much like the seemingly inconsequential surveyor's stakes that quietly appear as an early harbinger of the heavy-duty construction teams that will eventually re-shape the idyllic pastureland into a ten-lane highway. Like those surveyor's stakes, they mark the beginning of a process that will likely lead to dramatic changes in the landscape.

As everyone by now knows, the Commission (with Congress's clear support) is intent upon repurposing a substantial chunk of the spectrum currently used for over-the-air television broadcasting. The goal is to free up UHF spectrum for broadband use. The full technical details of how the FCC might hope to accomplish that have not been revealed (and may not even have been fully formulated as yet). But you've got to start somewhere, so the Commission has now taken its first step.

In its recent Report and Order (Channel Sharing Order), the Commission has opened the door – at least for the purposes of the incentive auctions that Congress has authorized – to permit channel-sharing by full-power and Class A TV licensees. (The Commission will consider channel sharing in non-auction contexts in a later rulemaking.) The channel-sharing concept, under which multiple TV licensees would share a single six MHz channel, arose a couple of years ago. It was also an integral component of the spectrum portion of the "Middle Class Tax Relief and Job Creation Act" (which the FCC self-centeredly refers to as the "Spectrum Act") the Congress enacted last February.

According to the new rules, when channel-sharing eventually becomes a reality, it will be subject to the following general considerations:

Eligibility – Channel-sharing will be available only to full-power and Class A TV licensees (commercial and noncommercial) who participate in the incentive auction process by which the Commission hopes to coax TV stations off their current channels. Of course, what these TV licensees are eligible *for* isn't entirely clear – since, as noted below, multiple key details of the channel sharing procedure are left to be determined in future proceedings. (Note: Since the purpose of the auction is to facilitate the repacking of the TV band, and since LPTV stations, being "secondary" licensees, need not be protected in the repacking process, LPTV licensees will not be eligible to participate in the incentive auction and thus are not eligible for channel-sharing under the new rules.)

Voluntariness – Sharing will be entirely voluntary. The Channel Sharing Order seems to go to great lengths to assure broadcasters that whether to share, and with whom to share, will be questions left to each licensee. No arranged marriages here – the FCC says the new rules will *not* "authorize the Commission to choose channel sharing partners". But hold on there. Elsewhere in the order the Commission says that "the sharing parties *must have a say* in selecting their sharing partners" (those are our emphases, not the Commission's). Isn't there a difference between (a) having total control over who your partner is going to be and (b) "having a say" in that decision? Does the Commission's choice of words mean that the agency could veto a sharing arrangement because the FCC doesn't think the pairing is suitable for some reason? It's hard to say, but the use of the expression "must have a say" does not discourage such thinking.

Minimum capacity – The manner in which a given six MHz

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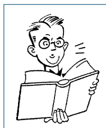

Inside this issue . . .

Wireless Bureau Sheds Light on Upcoming Tower Registration Regimen

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If, in the foreseeable future, you're planning on (a) building a new tower or (b) significantly modifying an existing tower, listen up. The Commission's Wireless Telecommunications Bureau has issued a public notice laying out the new registration procedures that have been adopted (but not yet implemented) to provide pre-registration notice-and-comment opportunities relative to environmental considerations. We reported on the new procedures in the February, 2012 *Memo to Clients*; the public notice puts a little more meat on the procedural bones we described back then.

Who needs to worry about this? You do, if you're:

- planning to build *any* new tower that would have to registered through the FCC's Antenna Structure Registration (ASR) system. The only exceptions are for (a) towers to be built on sites for which some other federal agency has responsibility for environmental review or (b) cases in which an emergency waiver has been granted.
- modifying an existing registered tower by (a) increasing its overall height by more than 10% or 20 feet, or (b) adding lighting to a previously unlit structure, or (c) modifying existing lighting from a more preferred configuration to a less preferred configuration. (Helpful tip: the "most preferred" configuration is no lights at all; the least preferred is red steady lights. Anything else falls in the middle.)
- amending a pending application involving either of the foregoing situations and the amendment would (a) change the type of structure, or (b) change the structure's coordinates, or (c) increase the overall height of the structure or (d) change from a more preferred to a less preferred lighting configuration or (e) an Environmental Assessment is required.

If you're in one of those categories, here's what the Bureau will expect you to do once the new process takes effect.

First, you'll file a partially-completed Form 854 in the FCC's ASR system. This will consist of information previously required on Form 854, plus tower lighting information ***and*** specification of the date on which the applicant wants the FCC to post the application on the Commission's website for comments.

Once Form 854 has been filed, you'll have to publish a notice ("in a local newspaper or by other means"). The Bureau isn't specific about the precise content of the required public notice or what "other means" – besides a local paper – might be. But the purpose of the local notice appears to be to let folks know about the registration application and the opportunity to submit comments to the FCC about it. The local notice has got to be made on or before the date the applicant has designated in its application for posting of the application on the FCC's website.

The comment period will be open for 30 days, during which time members of the public can ask the Commission for further environmental review.

If the FCC staff concludes that no additional environmental review is required, the applicant will then move on to Step Two of the process. In that step, the applicant will have to amend its application to reflect (a) the FAA's study number and issue date (if those haven't already been provided in the initial application), (b) the date of the local public notice, and (c) a certification that the proposed construction will have no significant environmental impact. According to the FCC's public notice, that could happen "after approximately 40 days" – but the notice doesn't say whether that means 40 days after the opening of the comment period or the close of the comment period or some other date.

But if, after considering the initial, partial Form 854 and any public comments that roll in the door, the FCC decides that more review is required, it will require the submission of an Environmental Assessment (assuming, of course, that the applicant hasn't already filed such an Assessment on its own). It's safe to say that that would extend the processing time considerably. If an Environmental Assessment is required, the FCC will have to issue a

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Tempting though it may be

Don't Touch That REC button . . .

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The telephone rule strikes again! We thought we made it pretty darn clear in the February, 2011 *Memo to Clients* that, with very few exceptions, you're not supposed to record ***any*** part of a telephone conversation for future broadcast unless you have first obtained consent from the other party to the conversation. You can look it up – it's Section 73.1206. And yet, barely three months later, another licensee did just what it wasn't supposed to do. If only it had paid attention to the *Memo to Clients* (or www.CommLawBlog.com, where we also reported on the story), it could have avoided a $2,000 fine. Oh well, maybe next time.

Truth be told, this violation was not as bad as some others we've seen – including, particularly, the one we wrote about last year. In this case, a station's morning team called some guy at about 6:00 a.m., possibly to discuss some dispute the guy was involved in. With the recorder running (but *not* on the air), the announcers ID'd themselves. The guy immediately asked whether he was on the air. No, responded the jocks, but they acknowledged that "[t]echnically you're being recorded right now." [Note: Why they qualified that admission with "technically" is not clear, since they were, in fact, recording him. But it was 6:00 in the morning, after all.] The guy astutely advised them in no uncertain terms that he did not consent to the broadcast of his voice.

To which the announcers replied: "Oh bummer".

The announcers then terminated the recording and, to their credit, did not broadcast the snippet of conversation they had taped. But the caller was obviously cheesed off, and he complained to the Commission.

The Enforcement Bureau wasted no time in bringing the hammer down. As it pointed out in the Notice of Apparent Liability, the rule leaves no room for doubt:

> *before* broadcasting *or recording* a telephone conversation for later broadcast, a licensee must inform any party to the call of its intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast.

(Those are the Bureau's italics, not ours.) In responding to the Commission's initial inquiry, the licensee admitted that the announcers made the recording with the intent of broadcasting the conversation. Bingo – violation.

There are a couple of take-home messages here. First, Section 73.1206 does mean exactly what it says, and the Commission is going to enforce it. So even if the recording is not broadcast, the rule can still be broken. Second, the First Rule of Holes applies: when you find yourself in one, stop digging. In this case, the licensee saved itself at least $2,000 by *not* broadcasting the recording. That exercise of judicious self-control was, in the Bureau's view, a *sua sponte* "corrective measure" taken before the Commission got involved at all. As a result, the standard penalty for a Section 73.1206 violation – *i.e.*, $4,000 – was halved.

Still, even at half the standard penalty, two grand is a hefty price to pay for such an easily avoidable violation. And that's not counting the legal fees rung up for helping to prepare the response to the FCC's inquiry, or the internal hassle that invariably accompanies the response process. So can't we all agree that, as tempting as ambush phone calls may be (particularly at 0 dark 30), it's best to just say no to that temptation?

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Finding of No Significant Impact before the applicant can proceed to Step Two with the necessary amendment of its application.

Interestingly, it appears from the FCC's public notice that the Commission doesn't plan to directly notify applicants when their applications are ready for Step Two. According to the notice, "[a]pplicants will be able to determine which of their pending applications are ready for completion of Part 2 by logging into the ASR system, where these applications will be listed as Ready for Certification."

The FCC's public notice also lists some additional obligations relating to service-specific applications, and provides information about the opportunity for members of the public to file "Environmental Requests". Such "Requests" will seek further FCC environmental review.

Obviously, the Wireless Bureau has been hard at work gearing up for the eventual implementation of the new environmental processes. The public notice lists a range of updates that have been made to Commission systems and forms as part of the process.

The new registration process is not yet effective, but that could change any day now. The Office of Management and Budget has apparently signed off on the new regimen, so it's presumably just a matter of time before the Commission makes it official. Check with www.CommLawBlog.com for updates.

Top tips from the tip top

Top Ten Tips for Telecom Transactions

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[*Editor's Note: In January, Fletcher, Heald & Hildreth welcomed* ***Robert Butler*** *into the fold. Bob has decades of experience in telecom contracting, the fine art of identifying a client's telecom needs and negotiating to secure the capacity and services to meet those needs without (a) over-buying (i.e., ending up with more services or capacity than you want), (b) under-buying (i.e., getting less than what you really need), (c) over-paying, or (d) exposing yourself to unnecessary potential liabilities. The following is a set of tips that any party looking to deal with a telecom provider should keep in mind. An earlier version of this appeared in our sister publication, FHH Telecom Law. It's also available on our blog, www.CommLawBlog.com.*]

Buying telecommunications and related services presents a different kind of contracting challenge. Such services are, of course, absolutely essential in the modern marketplace. But successfully arranging for just the right services is a far cry from buying paper clips at Office Depot.

Start with the expanding universe of constantly developing high tech products available, all swimming in a dense alphabet soup of acronyms – VANs/WANs, VPNs, VOIP, ISDN, DSL, ATM, MPLS, DS1s, 2s, and 3s, OC-1/10s, etc. Recognize that those products include a mix of regulated and unregulated offerings. Throw in the reality that many routine transactional documents often still include (at least in the initial go-round) contractual artifacts from a long gone monopoly era. Appreciate the fact that one's particular situation often demands unique contractual provisions addressing specialized needs or concerns. And don't forget the importance of minimizing exposure to liability that could arise from myriad potential worst case scenarios.

A steady and experienced hand is indispensable to securing a customer-friendly deal.

The bottom line is that a steady and experienced hand is indispensable to securing a customer-friendly deal. The following are prime examples of areas in which an experienced hand can and should assist anyone looking to arrange for telecom services.

Tip No. 1 - Plan Early

Try to stay at least a year ahead of the game. Whether you're planning to renew an existing arrangement or strike an entirely new deal, ***a year or more in advance is NOT too early*** to begin planning to meet your future telecommunications requirements.

Before jumping into any deal, you're going to need to:

identify your *current* service demands (by, *e.g.*, obtaining detailed information from your existing provider);
identify *projected* service demands; and
evaluate new and upcoming technologies in this fast moving field.

Above all, don't wait until your current agreement is about to expire. The closer you are to losing your existing telecom services, the less leverage you have to negotiate. Sharply increased rates and/or other less than desirable terms can be avoided if you start the process early and don't end up trying (usually unsuccessfully) to negotiate with your back against the wall.

Once you have a well-founded idea of what you currently need and what you're likely to need down the line, use that knowledge to prepare a request for proposal (RFP) to solicit competitive bids from potential telecom vendors. The RFP should require potential vendors to provide detailed and specific responses to ***all*** items, including not only service and pricing proposals, but also key contract terms. If you have particular contract language covering important terms in mind, that language should be set out in the RFP so that there's no question about what you want. And you should insist that, if a responding vendor has any problems with your proposed language, the vendor propose alternative language that would be acceptable to the vendor. This will save substantial time in the inevitable follow up negotiations.

Tip No. 2 - Understand the Structure of the Deal Documents

The typical telecommunications agreement consists of a range of separate and distinct components, each of which serves one or more functions once the arrangement is signed and put into operation. You start with a general "terms and conditions" document (often dubbed a master agreement or MSA), to which service-specific attachments (possibly titled "supplements" or "addenda") are appended. The MSA usually also provides for service orders to be placed at times during the life of the agreement. It may also include reference to separate tariff schedules, service guides, price guides and other such items.

This structure presents significant risks for the uninitiated. Understanding how these documents fit together is crucial to ensuring that you ultimately get out of the deal exactly what you think you have bargained for.

For example, the various additional documents – attachments, guides, addenda, etc. – may include hundreds of provisions totaling a thousand pages or more, all slanted in favor of the carrier/provider. These are often simply posted on a website and subject to unilateral changes by the carrier. Tar-

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iffs are similarly changeable and, what's worse, they control by operation of law even if your vendor's rep has explicitly told you otherwise.

In other words, even if you think that you've nailed all the important details down in the MSA, other elements of the deal incorporated by reference in the MSA (*e.g.*, tariffs) can still be changed by the vendor without notice to you.

To avoid major disappointment, it is therefore of paramount importance that all critical business terms be expressly set out in the core contract documents. Also, you should preserve, at a minimum, the right to terminate the agreement in the event any provision is altered in a manner unfavorable to your interests. This can often be accomplished through inclusion of a material adverse change (MAC) clause.

Another source of potential surprise: service attachments and orders generally control over conflicting terms in an MSA. This means that a lowly clerk submitting an order for something as simple as a new phone line could make a material change in an agreement that was painstakingly negotiated by your executives and lawyers. It follows that establishment and diligent implementation of a reliable contract administration process are necessary to protect your deal.

Tip No. 3 – Understand and Accommodate the Impact of Regulation

Telecommunications services are still regulated in various ways at the federal, state and local level in the U.S., and to even greater extents in many foreign jurisdictions. The good news is that such regulation will rarely give a vendor an excuse not to meet your reasonable requests for service or specific contract terms. The bad news? Governmental regulation may still in some respects limit your vendor's flexibility in providing the service; it can also increase costs (for both the vendor and, more importantly, *you*) through taxes and specialized levies such as universal service fund payments.

What makes matters more difficult is the fact that the regulatory landscape is shifting in various, not necessarily predictable, ways. Contrary to what we've generally seen in the past two decades, the recent trend is to increase regulation for some previously regulated service, and to start to regulate previously unregulated offerings such as Internet and other IP services. These changes, which are occurring both in the U.S. and in other countries, can undermine the enforceability of previously negotiated terms, and they can complicate negotiations that are still underway.

To avoid the potential pitfalls created by the uncertainties of regulation, it's important to conduct due diligence so that you understand the effect that both existing *and* potential regulation could have on your deal. And an essential added safeguard is an effective material adverse change (MAC) clause to permit you to make appropriate adjustments should regulatory changes, whether or not anticipated, adversely affect your interests after you've signed the deal.

Tip No. 4 – Be Sure to Get Specific and Enforceable Service Commitments

Earlier I pointed out that a telecom transaction consists of a number of separate and distinct agreements. One of those is usually a "Service Level Agreement" (SLA) that sets out the performance characteristics of the services you're purchasing. More often than not, the telecom vendor will propose (not surprisingly) vendor-friendly SLA language that speaks in terms of aspirational objectives, *not* contractually enforceable commitments. This language needs to be changed to establish performance guarantees on which the customer can rely; and, of course, failure to meet those guarantees should expose a carrier to substantial liabilities. Such potential liability serves as an inducement to the vendor to make good on its promised level of service.

Unfortunately, carriers routinely offer only very modest credits as a customer's exclusive remedy for SLA failures. That means that the customer should, as part of the negotiation process, shoot for a considerable increase in the credits which the vendor will have to provide for service shortfalls. It's also useful to include as part of the deal a termination right for chronic failures: if the vendor proves unable to provide the customer the promised level of service, the customer would then have the contractual right to walk away from the deal without penalty.

> *It's very important to understand how the various components of a telecom deal relate to one another.*

One more consideration about SLAs: As I mentioned above, it's very important to understand how the various components of a telecom deal relate to one another. For example, the master service agreement (MSA) may include a general disclaimer of warranties provision. That's routine and not objectionable. But since SLAs could arguably be viewed as warranties, such a general disclaimer could (also arguably) be seen as effectively nullifying the SLAs. One way to avoid that is to expressly except the SLAs from your contract's general disclaimer of warranties language. However it's done, the goal is to make sure that specific terms (such as particular levels of service to be delivered) which you successfully negotiate don't get overridden by operation of some general provision in some other component of the overall deal.

Tip No. 5 – Watch for Term and Commitment Traps

Most telecom contracts specify a minimum financial commitment – the dollar spend for services you agree to buy, whether annually or over the life of the contract – and a minimum time commitment, or contract term, which typically runs three-five years. To maximize your flexibility and leverage, you should: (a) opt for shorter terms (no more than three years except in specialized cases, such as fiber build-outs); (b) commit to no more than 60-70% of your expected actual spend; (c) make the commitment only over the full term of the agreement rather than annually or with respect to particular services; and (d) secure a termi-

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nation right that will kick in whenever you reach the committed spend, even if early in the term. The idea is to make it as easy as possible for you to satisfy your commitment, with the additional benefit (and inducement) of being able to terminate the deal once you have met that commitment.

Of course, even the best laid plans often go awry, so it's also a good idea to consider, and protect against, unfavorable scenarios. For example, despite your best efforts, you may not satisfy your commitment. Recognizing that up front, you should not agree to 100% shortfall liability in the event of such a failure. In my experience, 25-50% is more typical, and it's often possible to further cushion the blow by negotiating rollover or work-off options as well. You should also ensure that you are not obligated to pay ***both*** shortfall ***and*** termination liability changes if you exit the contract early without cause or the carrier terminates you for breach. You certainly don't want to pay what would amount to a double penalty for early termination.

Finally, beware of perpetual agreements that lock you in for so long as any minimum service order term (typically a year or longer) remains unexpired. As I've already cautioned above, telecom deals are complex arrangements with multiple separate but interrelated components. Be on the lookout for any provisions that could keep you on the hook longer than you are prepared to be kept there.

It's a good idea to consider, and protect against, unfavorable scenarios.

Tip No. 6 – Cloud or Data Center?

If information processing is an integral part of your telecom needs, you will have to decide whether to go with cloud computing or set up your own equipment in a data center/colocation facility. As with most such options, there are upsides and downsides to both sides.

With cloud computing, you are acquiring a service application hosted and managed by a remote vendor over a shared platform. This reduces required up-front investment, since you'll be relying on the service host's facilities instead of buying or renting your own. Additionally, the cloud provides increased scalability: expanding available resources is just a matter of signing up for greater capacity – no need to buy any more gear or arrange for integrating that gear into your operation.

The downsides to the cloud? You'll have less flexibility in the choice of services and vendors, and you'll face heightened security and privacy risks. When you're relying on a remote vendor to host your information, you'll be counting on that host to assure adequate protection for that information. You will also be at the host's mercy when it comes to technical changes that could require expensive upgrades to (or replacement of) your interconnected systems, software and equipment.

In contrast, opting for having your own servers hosted at a data center with multiple carrier connections gives you exclusive control over the storage and processing of your content while offering variety and diversity in your transport options. But those options entail additional immediate and ongoing costs. And you'll be responsible for security and privacy protection.

The nature of your business, the sensitivity of your data, and the types of services you wish to acquire should guide you in deciding whether to go to the cloud or stick with a data center.

Tip No. 7 – Beware the AUP

Historically, Internet service providers have established draconian acceptable use policies (AUPs) designed to hold their customers liable for virtually any bad act perpetrated by anyone over the purchased services. In most instances such AUPs will expose you to substantial potential liability and the threat of service cut-off without notice or recourse. What's worse, vendors are increasingly seeking to apply AUPs to non-Internet services as well. While in theory there's nothing wrong with the concept of an "acceptable use" policy, it's important that such policies reasonably reflect appropriate assignment of responsibility for problems that may be encountered. It's equally important that you be given some adequate opportunity to correct problems that are within your control *before* the vendor pulls the plug on you.

Possible approaches include, as a minimum: negotiating limits to your third party liability exposure; shifting the responsibility for network security breaches back to the vendor; and securing meaningful advance notice and cure rights before your service can be suspended or terminated.

Tip No. 8 – Key Carrier Boilerplate May Not Be Effective

Many telecom agreement templates contain clauses that at first glance appear to offer significant benefits to customers such as competitive rate reviews, business downturn relief and new technology migration. These are often little more than sizzle: if you read those clauses carefully, you find that they rarely promise more than an essentially worthless willingness to talk about possible contract changes should any of those unpleasant eventualities come to pass. Especially in the case of longer term deals – those of three years or more – it's important to make sure that's there's meat in these provisions, and not just sizzle. If the vendor chooses to dangle possible future opportunities in front of you as a possible inducement to do the deal, you can and should ensure that the vendor will in fact afford you real opportunities. You can do this by negotiating a variety of provisions, including, *e.g.*, a reduction in committed spend, additional termination rights, or the availability of an arbitrated dispute resolution if you're not satisfied with your vendor's response to your invocation of rights under such clauses.

Tip No. 9 – Limit Your Liability Exposure

The standard carrier agreement almost invariably contains very one-sided risk allocations. Clauses limiting liability

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Mark your calendars

Online TV Public File Update: Recon, Appeal Deadlines Set

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If you're thinking about asking the FCC to reconsider its recent decision to move TV public files to an FCC-maintained cloud-based online system – or maybe if you're more inclined to ask the courts to take a look at that decision – your deadlines for doing so have now been set. The Commission's Second Report and Order, which we reported on last month, has now been published in the Federal Register. That means that (as dictated by Section 1.429 of the rules) petitions for reconsideration are due to be filed with the Commission no later than ***June 11, 2012***.

On the other hand, thanks to 28 U.S.C. §2344, petitions for judicial review may be filed by ***July 10***. Those can technically be filed with *any* of the federal courts of appeals, but heads up. If you were hoping to have a particular circuit review the FCC's order, you needed to be mindful of the judicial lottery process and Section 1.13 of the rules. As implemented by the Commission, that process requires that, to be part of the judicial lottery, a petitioner has to file with the FCC's General Counsel *within 10 days* of the Federal Register publication (in the case of the Second Report and Order in the public file proceeding, that deadline was ***May 21***) a copy of its petition for review with the court of appeals of its choosing. We understand that the NAB – presumably preferring to have the D.C. Circuit hear the case – did file its petition for review there on May 21. No reports of any other early filers have since surfaced, so it looks like the case will be heard in D.C.

This flurry of procedural dates does ***not***, however, mean that the new public file rules are going to become effective in the immediate future. Before that can happen, the FCC has to run the new rules through the Paperwork Reduction Act (PRA) process, a process which the Commission has also just cranked up with a Federal Register notice. If you have any PRA-related thoughts to offer, you've got until ***June 11, 2012*** to lob them in to the Commission. After that, the Commission will bundle up all the comments it receives and ship them over to the Office of Management and Budget, along with a supporting statement explaining why it think the new rules are consistent with the PRA. (The rules will then go into effect 30 days after the FCC announces in the Federal Register that OMB has approved the rules. Check back with www.CommLawBlog.com for updates on that score.)

By the way, according to the notice, PRA-related comments are supposed to address:

- ✔ whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility;
- ✔ the accuracy of the Commission's burden estimate;
- ✔ ways to enhance the quality, utility, and clarity of the information collected;
- ✔ ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and
- ✔ ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

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under the contract and requiring indemnification for third party actions are frequently drafted solely in favor of the carrier. You need as a minimum to make these provisions mutual and ensure that liability caps (a) are not so low as to be meaningless, and (b) do not apply to indemnification obligations. In particular, in this era of increasing litigation by patent trolls, a comprehensive indemnification from your vendor for all costs, not just finally awarded damages, for infringement of a third party's intellectual property is a must.

Tip No. 10 – Secure Your Migration and Exit Strategies

The flip side of early planning (*see* the first installment of this series) is ensuring that you have a sound migration and exit strategy. This means that your contract should permit you to: (a) terminate without liability for material vendor breach and extended force majeure events (watch out for obligations to pay vendor's third party costs); and (b) continue to receive service on the same terms and conditions for at least six months after expiration or termination of the agreement for any reason in order to permit you to transition in an orderly fashion to a new provider. (Important: The vendor should be obligated to cooperate in this transition.) You also need to be aware of your vendor's plans for service obsolescence and the concomitant risk that you will be forced to migrate to a new service or technology. Carriers uniformly insist upon the right to discontinue aging services they no longer wish to support, often with only 12 months or less notice.

* * *

The issues I've addressed here are not meant to be exhaustive or definitive. Individual situations may entail additional factors or may warrant a reordering of priorities. Issues of confidentiality, network security, service provisioning, software and equipment use, account support and staffing, and other important topics may assume a greater importance to you. But it will still be advisable to pay heed to the top ten issues I have identified in order to secure the benefit of your bargain and avoid exposure to unacceptable liabilities in contracting for telecommunications and related services.

Plus ça change . . .

2012 Reg Fees Proposed [Spoiler Alert: They're Going Up]

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The FCC has performed that annual rite of spring – its announcement of proposed regulatory fees for 2012. These are the reg fees that, for the vast majority of Commission regulatees, will be due and payable by a to-be-announced date (probably sometime in August or September). As with most ritual activities, there are no real surprises here: the rates are, with very few exceptions, proposed to go up.

In general, the Commission figures that broadcast-related reg fees should get bumped up between 4-7% or thereabouts, depending on the type of facility in question and the market in which it's located. There are some exceptions, though. For example, commercial VHF TV stations in Markets 51-100 would enjoy a nearly 9% reduction (amounting to $2,205) compared to last year's fee, if the FCC's proposal holds. And fees for UHF stations in Markets 11-25 would drop $1,000 (about 3%) from last year's levels.

The Commission figures that broadcast-related reg fees should get bumped up between 4-7% or thereabouts.

We're attaching a grid providing the proposed 2012 fees along with some comparative information showing the changes from the fees actually imposed last year. (Red entries reflect 2012 fees that would go up over last year's fees; the small handful of green entries reflect fees that would go down this year.)

As always, the Commission is giving everybody a chance to comment on the proposed fees. If you've got something to say about the proposals, you had until May 31, 2012 to file comments with the Commission. No problem, though — you can still file reply comments until ***June 7***.

Over and above the fees themselves, this year's Notice of Proposed Rulemaking (*NPRM*) contains a couple of elements of interest.

First, as the Commission hinted last year, this year's fee calculations are based on 2010 U.S. Census data. That's particularly important for AM and FM stations, since their fees vary based on the population each station serves. The 2010 Census data hadn't been fully firmed up and finalized as of last year, so the Commission opted to use 2000 data to calculate the populations served for the 2011 fees. But now the 2010 data are set, so they're the ones the Commission has used for this year's fees. Anybody who disagrees with this should feel free to file comments letting the FCC know.

And as was the case last year, with respect to Class A, LPTV and TV Translator stations, a fee will be assessed for each facility operating either in an analog or digital mode. In instances in which a licensee is simulcasting in both analog and digital modes, a single regulatory fee will be assessed for the analog facility and its corresponding digital component.

This approach is likely to change as "greater number of facilities convert to digital mode". Still, for the time being – and, apparently, at least for this year – it looks like the policy of exacting only one reg fee per Class A, LPTV and TV Translator license will stay in place.

The Commission has proposed an interesting new procedural wrinkle. It's planning on requiring that any request for a refund, waiver, fee reduction or deferment of any reg fee (or apparently, any application fee) be submitted electronically, rather than the old-fashion hard copy way. This change is part of an agency effort to improve the way it provides public information about the filing and disposition of waiver requests. The *NPRM* doesn't go into any detail about the mechanics of any particular electronic filing system the Commission may have in mind. Rather, the *NPRM* just asks for comments on the general concept of mandatory electronic filing of waiver requests and the like.

Again, the *NPRM* – and the fees described in it – are still only proposals. We won't know the final fees until sometime this summer, although experience suggests that the final fees aren't likely to stray too far from the initial proposals.

Check back at www.CommLawBlog.com for updates.

Fee Category	Final 2011 Fees (USD)	Proposed 2012 Fees (USD)	Difference (USD)	Percent Change
TV VHF Commercial Stations				
Markets 1-10	84,625	87,425	2,800	3.3%
Markets 11-25	68,175	72,925	4,750	6.9%
Markets 26-50	40,475	41,675	1,200	2.9%
Markets 51-100	22,750	20,725	2,025	8.9%
Remaining Markets	6,100	5,800	300	4.9%
Construction Permits	6,100	5,800	300	4.9%
TV UHF Commercial Stations				
Markets 1-10	34,650	34,650	NC	NC
Markets 11-25	32,950	31,950	1,000	3.0%
Markets 26-50	20,950	21,875	925	4.4%
Markets 51-100	12,325	12,625	300	2.4%
Remaining Markets	3,275	3,425	150	4.5%
Construction Permits	3,275	3,425	150	4.5
Low Power TV, TV/FM Translators/ Boosters	395	385	10	2.5%
Other				
Broadcast Auxiliary	10	10	NC	NC
Earth Stations	245	275	30	12.2%

Satellite Television Stations				
All Markets	1,250	1,350	100	8%
Construction Permits	675	890	215	31.8%

Commercial Radio Stations Proposed 2012 Regulatory Fees

Population Served	AM Class A	AM Class B	AM Class C	AM Class D	FM Classes A, B1 & C3	FM Classes B, C, C0, C1 & C2
<=25,000	725 (3.5%)	600 (4.3%)	550 (4.7%)	625 (4.1%)	700 (3.7%)	875 (2.9%)
25,001 -75,000	1,475 (5.3%)	1,225 (6.5%)	850 (6.2%)	950 (5.5%)	1,425 (5.5%)	1,550 (3.3%)
75,001 -150,000	2,200 (4.7%)	1,525 (5.1%)	1,125 (7.1%)	1,600 (6.6%)	1,950 (5.4%)	2,875 (4.5%)
150,001- 500,000	3,300 (4.7%)	2,600 (6.1%)	1,675 (6.3%)	1,900 (5.5%)	3,025 (5.2%)	3,750 (4.1%)
500,001 -1,200,000	4,775 (4.9%)	3,975 (6%)	2,800 (6.6%)	3,175 (5.8%)	4,800 (5.4%)	5,525 (4.2%)
1,200,001- 3,000,000	7,350 (5%)	6,100 (6%)	4,200 (6.3%)	5,075 (5.7%)	7,800 (5%)	8,850 (4.1%)
>3,000,000	8,825 (5%)	7,325 (6.1%)	5,325 (6.5%)	6,350 (5.8%)	9,950 (5.2%)	11,500 (4%)
AM Radio Construction Permits	550 (12.2%)					
FM Radio Construction Permits	700 (3.7%)					

It's important to cover your, er, assets

Are You Using 20th Century Contracts for 21st Century Transactions?

By Steve Lovelady
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[*Editor's Note: Recently, the Memo to Clients Contracts Guy, Steve Lovelady, conferred with* ***Kathy Kleiman****, Fletcher Heald's Internet Maven, in the preparation of transaction documents involving the sale of a broadcast station, a sale which involved a number of important Internet-related assets. The two concluded that 20th Century asset sale/purchase agreements – even agreements that contracting parties still use, often out of force of habit – don't include adequate provisions for 21st Century intellectual property issues. They prepared the following article based on that experience. The Contracts Guy is especially grateful for the Internet Maven's extensive familiarity with the Internet, which came in handy in identifying and capturing the substance, and value, of a station's online intellectual property assets.*]

Contracts for the purchase/sale of broadcast stations are a bit like recipes. Particular broadcasters and their lawyers tend to have their favorite versions which include provisions that they happen to like. Maybe they drafted those provisions themselves. Maybe the other party to some deal they did a long time ago drafted them and our particular broadcasters (and their lawyers) liked the way the provisions worked. Who knows?

Contracts handed down from year-to-year and deal-to-deal may need to be freshened up.

Whatever may be the case, when a new deal pops up, those broadcasters (and their lawyers) normally don't waste time creating a brand new asset purchase agreement from scratch. No. More often than not they rummage through their file of previous deals. When they find a contract that comes close to the outlines of the new deal, they tweak the old contract as necessary to make it work for the new deal – just as a chef, in assembling a new meal, starts off with tried-and-true recipes that can be tweaked here and there to accommodate the guest's tastes and the ingredients available.

That approach tends to work well. It's efficient and economical. And it affords contracting parties the psychological comfort of using documents they're familiar with.

But reliance on the old can cause problems. Contracts handed down from year-to-year and deal-to-deal may need to be freshened up, just like old recipes. And that's particularly true with respect to broadcast deals in the 21st Century.

Nowadays, radio and television stations are making substantial investments in a wide range of intangible assets that can provide better communication with younger audiences – websites, domain names, Twitter feeds, Facebook pages are obvious examples. If you're buying a station, you're probably expecting to acquire all those intangible assets, which can reflect a station's image almost as much as its actual on-air content. But historically, the notion of "intellectual property" assets in a broadcast deal tended to be limited to call signs and jingle packages, with maybe some software manuals thrown in for good measure. Suffice it to say that intellectual property provisions derived from agreements struck decades ago don't begin to address the range of important considerations relating to 21st Century intellectual property interests.

What happens to these valuable intellectual property assets when a station is sold? Based on our recent experience sorting through these issues in a couple of deals, we have assembled the following tips.

First and foremost, both buyers and sellers should know what online intellectual property the station owns, has licensed and has permissions to use. Too many to fully enumerate here, they include:

- Websites and domain names
- Twitter and Facebook accounts
- Trademarks for call signs, slogans and domain names
- Copyrights for website materials (such as photographs and videos).

Once these assets have been identified, it's a good idea to include a separate schedule listing them all in detail. But that's not the end of the job – it's just the beginning.

Each of the various items will often bring with it a number of subsidiary questions that should be resolved as part of the negotiation process. For example:

Websites and domain names. Who owns the website content – the station, some website designer, a third party? What's the best way to transition the website to a new owner? Who owns the domain names and what needs to be done to get them transferred to the purchaser?

Twitter and Facebook accounts. Does the station have these accounts? Are they part of the assets to be acquired? If so, the asset purchase agreement should clearly provide that the seller will provide the buyer the most up-to-date version of any and all necessary user ids and passwords – social media sites don't do much good if you can't access them and control their content.

(Continued on page 11)

EAS Update

On Second Thought, Text-to-Speech Conversion IS Permitted

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Back in January the Commission released its Fifth Report and Order (*5th R&O*) in its long-running effort to modernize the Emergency Alert System. Under the new rules (many of which became effective on April 23, 2012), EAS participants are required to be able to convert CAP-formatted EAS messages into messages that comply with the EAS Protocol requirements, following the procedures for such conversion as set forth in the EAS-CAP Industry Group (ECIG) Implementation Guide.

One notable exception, though, involved the Guide's provisions concerning text-to-speech (TTS) conversion. The Commission was not confident in the accuracy and reliability of current TTS technology. Additionally, the FCC figured that it might be preferable to require TTS conversion software to be utilized by the originators of EAS messages, rather than by EAS participants – the goal being to minimize the risk of "differing, and thus confusing" audio messages that might otherwise result.

The Commission is still not prepared to embrace some of the ECIG Guide.

Bottom line in January: the FCC mandated that TTS conversion would ***not*** be permitted, notwithstanding the ECIG Implementation Guide.

That decision was apparently news – and disappointing news, at that – to the FCC's EAS regulatory partner, the Federal Emergency Management Agency (FEMA). FEMA fired off a petition for reconsideration, pointing out that, by prohibiting TTS conversion by EAS participants, the FCC was discouraging development of TTS technology. What's worse, the lack of TTS conversion capability could "possibly disrupt dissemination of National Weather Service alerts, delay retrieval of referenced audio files in alerts, and impact the ability of jurisdictions with limited resources, or those with certain, already implemented CAP alerting capabilities, to issue CAP-formatted alerts."

FEMA's position was seconded by a number of state and local emergency management agencies, as well as the Commission's own Communications Security, Reliability and Interoperability Council.

That was enough for the Commission. It has revised its rules to permit, but not require, EAS participants to follow the ECIG Implementation Guide with respect to TTS. In so doing, the FCC made clear that it was still not prepared to embrace the ECIG's adoption of TTS software configured in EAS equipment to generate the audio portion of an EAS message; rather, consideration of that particular item has been deferred.

With the publication of the rule change in the Federal Register, that change took effect ***May 7, 2012***.

(Continued from page 10)

Trademarks. Trademarks play an increasingly important role in the registration and protection of online intellectual property. A growing number of stations are seeking to register their call signs, slogans, on-air characters, domain names and more as trademarks. For a purchaser, key questions include: what trademarks exist, who owns them, and will they transfer with the station?

Copyright. Copyright protection online is an issue that makes headlines regularly. If an active website is part of the station transfer, the purchaser should request adequate documentation of all copyrighted material posted on the website, including purchases, licenses and permissions for celebrity photographs and videos. (After the transfer of the website content, it will not be a sufficient legal defense that the prior owner was the one originally responsible for posting copyrighted material on the website.)

It's also not a bad idea to get a handle on any website and Internet policies that the seller has imposed with respect to station-related online activities. For example, are the station's Facebook pages run by its on-air talent personally, or through the station? Do station employees have their own Twitter feeds that are tied into the station? Are there limits to what can be posted or tweeted? Whatever happens, you don't want a disgruntled ex-employee sending out unauthorized tweets or posting unauthorized material on the newly-acquired station's Facebook page.

It is critically important that transitions of Internet intellectual property be handled easily, smoothly, and quickly. This can best be accomplished if appropriate provisions are written clearly into our 21st century agreements. We are obviously looking at a newly developing area of transactional law practice. Of course, no single stock answer fits each situation – each transaction is different and needs to be assessed and handled differently. But recognition of the need to focus on these questions is an essential first step.

(Continued from page 1)

channel would be divided by sharing licensees will be left to the licensees, *provided that* each sharing station retains enough capacity to operate at least one standard definition programming stream at all times.

Single facility/separate licensing – While stations sharing a single channel will utilize a single common transmission facility, each will continue to be licensed separately. Each sharing licensee will keep its original call sign, retain all rights of an FCC licensee, and remain subject to the full panoply of FCC rules, policies, and obligations. For example, each station will still have to comply with the full range of rules governing children's programming, political broadcasting, minimum operating hours, main studio, and EAS. Sharing licensees will not be responsible for each others' programming content or rule violations, although exactly how blame will be determined when technical violations occur has been left to (you guessed it) a future proceeding.

Must carry – The Commission asserts that the new sharing rules will have no effect on broadcaster's current cable and satellite carriage rights. Sort of. Specifically, each separately licensed station will be entitled to the same carriage rights at the shared location as it would have *at that same location* if it were not sharing, and only so long as it meets all of the usual technical requirements for carriage *from that location*. The same would be true for the "local-into-local" "carry one, carry all" requirement for satellite broadcast signal carriage.

But even if a sharing station is entitled to the carriage rights which it would get as a standalone station at the shared location, the fact is that as many as half of all sharing stations will likely be relocating their facilities as part of the sharing arrangement. Such a relocation could, for example, alter the moving station's service area and, thus, the station's ability to deliver the requisite "good quality signal" to all cable and satellite providers that it reached from its original site. And, in the case of a relocating Class A station, the move could take it more than 35 miles away from cable headends (*i.e.*, outside the limit within which Class A stations are entitled to carriage). And don't go crying to the Commission if your voluntary channel sharing arrangement results in the loss of must-carry rights: "[W]e expect that stations will take into account technical obligations that could affect their continuing carriage rights when designing their channel sharing arrangements."

NCE-Commercial sharing – Commercial and NCE stations are permitted to share, so long as NCE licensees structure their arrangement to ensure continued compliance with NCE rules to maintain their NCE status. Should an NCE licensee operating on a reserved channel opt to move to a non-reserved channel as part of a channel sharing arrangement, the NCE station must continue to operate on an NCE basis. That, of course, gives rise to a follow-up question: what happens if a commercial station elects to share a channel that has been reserved for NCE use? Answer: The Commission will address that conundrum in a future proceeding.

Also relegated to a later rulemaking is the significant matter of how Class A and full power station sharing will work out in practice. For example, the "single transmission facility" requirement may mean that a sharing Class A station could benefit considerably by operating at greater power (with a considerably expanded service area) than currently allowed under the Class A service rules. But would the converse be true? That is, would a full power station sharing the facility of a Class A station have to operate at a reduced power and service area? That would appear to create a serious disincentive to such arrangements.

> *The prospect of multiple "future proceedings" looms large throughout the Channel Sharing Order.*

The prospect of multiple "future proceedings" looms large in other areas throughout the Channel Sharing Order. In addition to the "future proceedings" mentioned above, the Commission alludes to additional "future proceedings" that would address: issues involving technical requirements (including RF compliance) for sharing stations; procedures "through which stations may undertake their voluntary proposed channel sharing arrangements"; channel-sharing in non-auction contexts; the timing of the auction process; and whether to allow channel sharing to result in service losses (and whether such potential losses should be taken into account by the Commission "when considering the proposed sharing arrangement"). Whether the Commission intends to address all of these loose ends in a single wide-ranging proceeding or a series of more narrowly-targeted proceedings is not clear.

According to the FCC, its goal in adopting these initial channel-sharing rules is to "provide greater certainty to stations that may wish to consider channel sharing". At least some licensees, however, will need answers on the issues left outstanding before they will know whether channel sharing is a choice they want to make.

One final observation. The concept of channel-sharing necessarily means that each sharing licensee will have less than six MHz of spectrum in which to operate. But the use of a full six MHz channel is

> necessary to provide viewers and consumers the full benefits of digital television made possible by the DTV Standard, including high definition television ("HDTV"), standard definition television, and other digital services. The DTV Standard was premised on the use of 6 MHz channels. To specify a different channel size . . . would not promote [the FCC's] goals in adopting the DTV Standard.

(Continued on page 13)

2010 decision affirmed

Audio Division: Longley-Rice-Based Studio Site Moves Must Be Approved in Advance

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When it comes to main studio site compliance and Longley-Rice, the Media Bureau's Audio Division is sticking to its guns. As we reported in the October, 2010 *Memo to Clients*, the Division had then issued a $7,000 Notice of Apparent Liability (*NAL*) to an FM licensee for a main studio siting related violation, even though its main studio was within the station's city-grade contour, as required by the rules. Now the Division has followed up with a Forfeiture Order re-affirming that *NAL*. If you've got a main studio whose legality hinges on Longley-Rice signal coverage calculations and if you weren't paying attention when the *NAL* came out in 2010, now would be a good time to focus on this.

What's the problem with relying on Longley-Rice, you ask? Nothing, as long as you jump through the right hoops in the right order, according to the Division. It seems that this particular licensee's studio location was ***not*** within the city-grade contour according to the FCC's ***predicted*** method, even though it ***was*** within that contour as determined by a Longley-Rice analysis. According to the licensee, it performed the Longley-Rice analysis to confirm that the site in question was within the contour as required by the main studio rule; comfortable with that knowledge, the licensee went ahead with the move, simultaneously notifying the Commission of the move. In the notification the licensee asserted that the new location complied with the rules. (It later moved a block or two down the street, to a site that also complied with the rules, according to Longley-Rice.)

> *The Forfeiture Order does nothing to spackle over the gaping holes in the Division's earlier "analysis".*

More than a year after the first move, the Commission started an investigation when somebody (we're guessing it was a competitor, but you never know) complained. The licensee explained what it had done. In response, the Division whacked the licensee with a $7,000 fine, even though everybody agreed that, per Longley-Rice, the studio was street legal.

According to the Division, before a station can move to a studio site whose compliance is based on Longley-Rice, the licensee must first get Commission approval for the move. The Forfeiture Order re-affirms that position, although it reduces the fine to $5,600 because the licensee has managed to keep its nose clean (in FCC-speak, it has a "record of compliance").

The Forfeiture Order does nothing to spackle over the gaping holes in the Division's earlier "analysis". (Check out our October, 2010 article – which is also available at www.CommLawBlog.com – for a brief discussion of some of those holes.) While the Division continues to claim that the rules require prior FCC consent when compliance depends on Longley-Rice, the language of the rules continues not to support that claim. Undaunted by that technicality, the Division continues to rely on language in a footnote to a 1997 Commission decision which still does not appear to support the Division's position quite as firmly as the Division seems to think. According to the Division, to perceive the footnote's supposedly "clear" mandate, you have to "pars[e]" the language of the footnote "in context". We would have thought that "clear" language would not require "parsing", but what do we know?

In any event, there appears to be reasonable basis to conclude that the Division's take on the rule could be overturned on appeal. But don't expect the licensee in question to take this to the courts. An appeal would likely cost tens of thousands of dollars in unrecoverable attorney fees – and the best possible result would be the elimination of a $5,600 fine. Do the math and you'll probably come to the same conclusion we have – an appeal sure looks unlikely.

Which leaves everyone in the same position they were in back in 2010, when the *NAL* was issued. As we observed then, if you moved your studio to a site based on a Longley-

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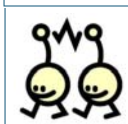

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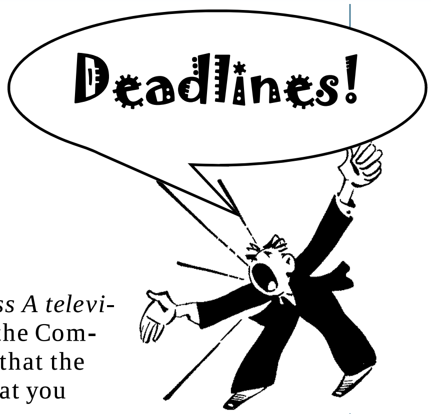
That's not us talking; that's what the Commission said back in 1997, when it rejected arguments for digital TV channels of less than six MHz. In doing so, the Commission expressed particular concern about "the longstanding expectations of the parties, on which they have based the technology and established their plans". In its efforts to promote channel-sharing, the Commission seems to be singularly unconcerned with how that might affect the promotion of free over-the-air HDTV.

The Channel Sharing Order was published in the *Federal Register* on May 23, meaning that the new rules technically go into effect June 22. But because of their obviously preliminary nature, the effectiveness of the rules is not likely to have much, if any, immediate impact.



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 - 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 certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to substantiate compliance with those limits, must be placed in the public inspection file.

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

Issues/Programs Lists - For all *radio*, *television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues during the past quarter must be placed in the station's local public inspection file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

August 1, 2012

Radio License Renewal Applications - *Radio* stations located in **Illinois** and **Wisconsin** 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 **North Carolina** and **South Carolina** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

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

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

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

Television License Renewal Pre-filing Announcements - *Television* stations located in **Florida**, **Puerto Rico**, and the **Virgin Islands** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on 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 **California, Illinois**, **North Carolina**, **South Carolina**, and **Wisconsin** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the

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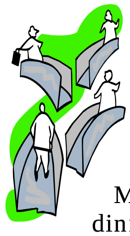


FHH - On the Job, On the Go

On Friday, June 8, **Frank Jazzo** will join the NAB's Chris Ornelas in "Coffee, Tea or FCC", a discussion of national broadcasting issues at the annual convention of the New Mexico Broadcasters Association in Albuquerque.

Meanwhile, **Frank Montero** will be attending the NAB Educational Foundation's Service to America Awards dinner in Washington, D.C. on June 11. He'll also be attending, and presenting, at the Puerto Rico Broadcasters convention in San Juan on June 21-23. And in between the two, he'll be attending the US Chamber of Commerce's Telecommunications & E-Commerce Committee Spring Meeting in Washington, D.C. on June 15.

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

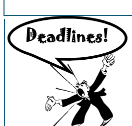
Kevin Goldberg, in a painfully obvious effort to appeal his narrow loss to **Peter Tannenwald** in last month's *Media Darling* sweepstakes, graciously forwarded to us a bunch of links to on-line coverage of his mission to the Gambia. Among the highlights: The *Point*, a daily independent paper ("Gambia News for Freedom and Democracy") described **Kevin** as a "visiting US legal expert on media and law issues" who is associated with "a leading US law firm based in Arlington, Virginia". It even said that **Kevin** gave an hour-and-a-half lecture! All very impressive, especially the part about the "leading US law firm" (but c'mon, Kev, would it have killed you to mention us by name?). So things were looking up for Brother Goldberg, until we got wind of the fact that newcomer **Kathy Kleiman**'s name was popping up – most prominently in a Bloomberg BNA piece describing the final report of ICANN's Whois Review Team. Among her many prominent Internet-related activities, **Kathy** vice-chaired that team before joining us, and was an obvious go-to choice for comment on the report. Lots of quotes from **Kathy**. Hmmm. Tough call. By why make any call at all? If you're a Media Darling, you're a Media Darling – and it's safe to say that this time around both **Kevin** and **Kathy** fill the bill. So they're our *co-Media Darlings of the Month*!!

(Continued from page 13)

Rice analysis, and you did so without any prior FCC approval, it looks like you're going to be on the hook for a $7,000 fine if and when the FCC finds out.

In 2010, we suggested that the Division might want to declare an amnesty of sorts, sticking to its insistence on prior approval but allowing that there may have been some reasonable doubt as to that requirement prior to 2010. The Division has, regrettably but clearly, declined that suggestion. Here's another suggestion: perhaps the NAB or one or more state broadcast associations could take up the fight. If enough of their members are facing possible $7,000 fines, it might make sense for such organizations to challenge the Division on this. While the economics of the situation (as noted above) make it unlikely that any single licensee will appeal, the calculation changes if the would-be appellant is an association representing a critical mass of potentially affected licensees.

It's hard, if not impossible, to determine precisely how many folks out there are currently operating from a heretofore unapproved studio site the legality of which depends on Longley-Rice. If there are a significant number of such folks, it might make economic sense to band together in some fashion to advance their common cause – the alternative being to sit tight and wait for the Commission to spank you for $7K. So if you're a licensee who could be looking down the wrong end of one of these studio site fines, you might want to check with one or another broadcaster association to see if they might be interested in helping out.



(Continued from page 14)

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 **California**, **North Carolina**, and **South Carolina** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

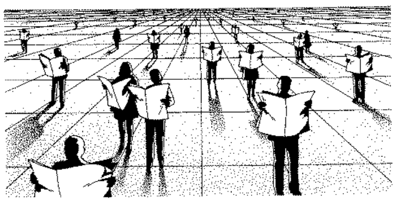
Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Illinois** and **Wisconsin** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

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

Updates On The News

White space rules take effect – Last month we reported on an FCC action that may mark the end of the decade-long "white space" proceeding authorizing the operation of some unlicensed devices in the broadcast television bands. The Commission's *Third Memorandum Opinion and Order (3rd MO&O)*, released in early April, disposed of a handful of petitions for reconsideration of the agency's 2010 decision which had in turn tweaked technical "white space" specs adopted back in 2008. The *3rd MO&O* has now been published in the Federal Register, which means that, barring any extraordinary intervening event (like the issuance of a stay – the approximate likelihood of which is pretty much zero), the rules as modified last month will take effect on ***June 18, 2012***. No big deal, though – as we have previously reported, the Commission has thus far authorized white space database operation in only two relatively small areas (Wilmington, North Carolina and Nottoway County, Virginia).

FM Translator Dismissals/ Amendments still on the way – The Great FM Translator Application Purge has moved one step closer: the FCC has formally initiated the Paperwork Reduction Act (PRA) process which must be completed before the "information collection" aspects of the herd thinning measures can be implemented. With respect to the several thousand new FM translator applications still pending since 2003, the new rules adopted last March in the Fourth Report and Order (*4th R&O*) impose application caps of (a) 50 nationwide and (b) one in each of the 156 markets identified in Appendix A of the *4th R&O*. Any applicant with more than 50 apps nationwide and/or more than one app in any of the listed markets must dismiss enough applications to bring themselves under the limits. The letters necessary to seek those dismissals constitute "information collections" subject to the PRA.



Additionally, the *4th R&O* affords pending FM translator applicants some limited opportunities to amend their applications. Those amendments, too, are "information collections".

With its notice in the Federal Register, the Commission has invited the usual PRA comments on both aspects. Anyone so inclined has until ***June 29, 2011*** to submit comments to the Commission. After that, the Commission will bundle up all comments received and ship them over to the Office of Management and Budget, which will open its own 30-day comment period. After that, look for a notice that OMB has approved the process, which will clear the way for the Commission to open its doors for dismissals/ amendments. If things move smoothly, it looks like those doors might swing open toward the end of the summer.

Regulation, the old-fashioned way – Never let it be said that the guv'ment has turned its back on the Old Schoolers among us. Sticking with a tradition that goes back decades, the Commission has announced the availability of actual hard copies of all of its rules – like a real, um, rule book. Truth be told, the Commission is selling not one, but five separate rule books, each covering different parts of Title 47 of the Code of Federal Regulations. (The CFR is the place where all federal rules from all agencies reside; Title 47 is the portion containing the FCC's rules.)

The hard copies, available from the U.S. Government Printing Office, aren't cheap. A complete set of all five volumes will set you back nearly $300 — and that's if you live in the U.S. of A. Foreign purchasers get nicked for an extra 40% premium across the board. (This presumably is intended as a disincentive designed to discourage those darned foreigners from stealing the FCC's regulatory magic.) But they're sure to be collectors' items, so think of it as an investment.

Orders for any or all of the volumes may be placed with the GPO at:

> U.S. Government Printing Office
> P.O. Box 979050
> St. Louis, Missouri 63197

Of course, it is a good idea to have ready access to a set of the rules (if for no other reason than to conclusively settle bar bets). But the GPO's printed rules, albeit official, are nevertheless not ideal. That's because they reflect the rules as they were as of October, 2011. But they didn't go on sale until April, 2012 — meaning that they were already six months out of date when they hit the stands. If you'd prefer to have a more current handle on the rules, add this bookmark to your Internet browser:

> http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=6718cde20def94049f0b5cc5441b48b9&c=ecfr&tpl=/ecfrbrowse/Title47/47tab_02.tpl

That'll take you to an online GPO version of the FCC's rules that is updated daily.