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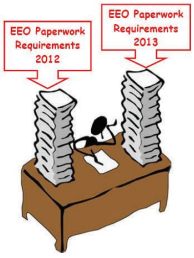
Memorandum to Clients

March 2013 | News and Analysis of Recent Developments in Communications Law | No. 13-03



FCC eases burdens, but for whom?

EEO Audits Announced

Some filing requirements reduced, but underlying recordkeeping remains unchanged.

By Kathleen Victory
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It's that time again. The FCC has announced its first round of random 2013 EEO audits to radio and television stations. And this year the Commission tells us that it's trying to make life easier for the licensees who made the list. You might want to take that claim with a grain of salt, though.

Each year, the FCC audits approximately five percent of all radio and television stations, with the lucky stations selected randomly. (Here's a list of this year's selectees.) The goal of this spot-check ritual is presumably to keep everybody on their toes and ever-mindful of their ongoing EEO obligations. Those obligations require broadcast employment units with five or more full-time employees to recruit broadly for minority and female applicants for ***all*** job openings. "Recruiting broadly" entails (among other things) distributing notices of openings to multiple potential sources of referrals. The FCC also expects licensees to maintain detailed records of those recruitment efforts.

Historically, audited stations have been required to respond to the audit letter by submitting a lot of paperwork. What's a lot? Think dated copies of ***every*** notice (including advertisements, bulletins, letters, faxes, emails . . . you get the drift) sent to ***every*** one of the station's employment sources for ***every*** job opening that occurred during the period covered by the last two annual EEO public file reports. And for on-air ads, don't forget dated log sheets for each time the ad ran. (Stations with fewer than five full-time employees in the relevant employment unit were spared the burden of sending all this paperwork in.)

But things are different this year.

The FCC – purportedly looking to reduce the burden imposed on audited stations – has made three changes to the documentation that stations are required to submit.

The new audit letter instructs respondents to submit to the FCC only ***one*** copy of an employment notice sent to multiple sources along with a list of each of the sources to which it was sent. And for on-air ads, only one log sheet showing when an ad aired and a list of each of the other times the ad aired. The fact that you don't have to *submit* all that paper doesn't mean that you don't have to *have* all that paper and make it available to the FCC should they decide, based on what you do submit, that they want to see more.

Note that, as a trade-off for paring back the number of documents that have to be submitted with an audit response, the Commission is now also insisting that responding stations include a statement advising "whether [the station] retain[s] copies of all notices sent to all sources used" and "all the log sheets for each time" the ad aired. (Hint: Since the Commission's rules require that licensees retain such materials, it's probably best if your statement confirms that, yup, the station does, in fact, retain those materials.)

Another supposed labor-saving change this year: if your employment unit participated in more than four recruitment initiatives during the period covered by the two EEO annual public file reports submitted with the response, that's swell, BUT the FCC wants documentation about only four of them. You can and should summarize any other initiatives in your response, but the Commission doesn't want the underlying paper. Again, though, it will be prudent to keep the documentation on any additional initiatives because the FCC could come back and ask for it.

Finally, the FCC has expressly instructed that stations *not*

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Inside this issue . . .

First, make sure to get it built on time

Audio Division to Permittees: Get License Applications Filed Within 30 Days of Permit Expiration . . . Or Else!

By Harry F. Cole
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Attention, everybody who is currently sitting on, or may someday be sitting on, a construction permit for a new radio station. The FCC's Audio Division has announced, in no uncertain terms, that when the rules say that a covering license application must be filed before the expiration of the underlying construction permit, they really mean it . . . sort of.

The problem here arises from Section 73.3598(e) of the Commission's rules, a section admirable for its concision and directness:

> Any construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.

Your ordinary person reading that would likely understand it to say that any permittee who doesn't get the covering license application on file by the permit's expiration date is out of luck. Period. End of story. That is, after all, precisely what the rule says.

But thanks to the Audio Division's latest reading of the rule, permittees will have an extra 30 days within which to file their license applications, provided, of course, that they did in fact complete construction before the permit's expiration.

The underlying story starts back in 2004, when an FM station in West Virginia obtained a CP to construct new facilities after its then-authorized tower had been destroyed. The permit specified the conventional three-year construction period, with an expiration date in 2007.

Wouldn't you know it, 2007 came and went, but no license application got filed.

The replacement facilities specified in the 2004 permit had in fact been built within the construction period (this according to the station's licensee, and we have no reason to doubt it), but the license application was inadvertently overlooked. Four years later, in 2011, the licensee tried to file the covering license application, but the Audio Division refused to accept it because the underlying permit had died in 2007. Instead, the Division made the licensee file for a new CP, which was promptly granted. (The licensee followed up with a *very* prompt license application.)

In addition to sending the licensee back to Square One, application-wise, the Division also proposed to fine the station for failing to timely file its license application for the 2004 permit, and also for operating without authorization during the time between (a) the expiration of the 2004 permit in 2007 and (b) grant of special temporary authority in 2011.

Hold on there, said the licensee. Despite the seeming clarity of Section 73.3598(e), the Division had historically been willing to waive the automatic expiration provision. According to the licensee, the Division should have done the same here.

The licensee was correct on its facts: in at least a couple of instances the staff had indeed waived the rule without fanfare. The licensee argued that it would therefore be inappropriate (if not unlawful) for the Division to impose a forfeiture on conduct that the licensee had every reason to believe was lawful.

(Disclosure: In one of the earlier cases cited by the licensee, the waiver had an adverse impact on one of our clients. We took the FCC to court, complaining that the waiver should not have been granted. After an oral argument in which the FCC seemed – to us,

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The Swami takes the stand.

Kevin's In the House . . . or, Rather, the Senate!

FHH attorney Kevin M. Goldberg – you may know him as the Swami – doffed his seer gear recently and testified before the Senate Judiciary Committee. That's the United States Senate, thank you very much. The occasion was a hearing entitled "We the People: Fulfilling the Promise of Open Government Five Years After The OPEN Government Act". The general topic: implementation of the Freedom of Information Act (FOIA) five years after the OPEN Government Act was signed into law. (The OPEN Government Act was the product of efforts by Senate Judiciary Chair Patrick Leahy and fellow Committee Member John Cornyn.)

Kevin testified on behalf of the American Society of News Editors and the Sunshine in Government Initiative. In his testimony he reviewed provisions of the OPEN Government Act that have worked and those that have not; he also addressed the Obama Administration's faithful implementation of that law and the requirements of the FOIA generally.

He made five specific recommendations for further amendments to the FOIA:

Strengthen the Office of Government Information Services, also known as "OGIS" but informally referred to by many as the "FOIA Ombudsman", by increasing its funding and its independent authority to hold other agencies accountable;

Hold OGIS itself accountable, requiring it to exercise its advisory opinion power to create a record that FOIA requesters themselves can use to hold agencies accountable;

Hold all governmental officials individually accountable by making information disclosure a part of every federal government employee's overall performance review;

Codify the disclosure-friendly standard previously described by Attorney General Eric Holder in a March, 2009 memorandum. Under that standard, information should only be withheld from disclosure if foreseeable harm would result from the information's disclosure;

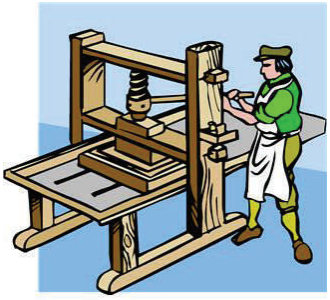
Save taxpayers some money by encouraging agencies to adopt a new processing system (currently being tested) known as "FOIA Online" as their existing software contracts expire.

Kevin stirringly professes his love for his wife **and** *gets a laugh out of Senator Al Franken.*

You can snag a copy of Kevin's written testimony at this link, but if you want the full Kevin Goldberg Experience, check out the video of the hearing at this link. Total wonks will likely be transfixed through the whole two-hour extravaganza, but members of the Kevin4Ever Fan Club will probably want to cut to the chase by scooting ahead to the 1:44:00 mark (or thereabouts) and watching through 1:48:44. That's where he delivers his testimony. Then you can flash forward to about 1:55:00, which is the start of some back-and-forth that culminates in three minutes' worth of follow-up observations by Witness Goldberg, beginning at 2:00:39 and running through 2:03:16.

Kevin aficionados will doubtless swoon when the Man Himself gets a laugh out of Senator Al Franken, no stranger to humor (that's at 2:00:39), or when he stirringly professes his love for his wife Brenda (at 2:01:50, but be sure you have some Kleenex handy before you hit the "play" button), or when Franken observes – accurately – that Kevin, in his testimony, managed to work in cites to Jerry Garcia, Bruce Springsteen and his wife (check it out at 2:01:58).

And for more Kevin G, take a gander at his op-ed piece published recently by no less a Main Stream Media Member than *USA Today*.



Editor's Note

With this issue of the *Memo to Clients* we are trying an experiment: the inclusion of active links in several of the articles. The use of links is common on our blog (www.CommLawBlog.com). We have not previously used them in the *MTC*, however, mainly because we never got into the habit of doing so back when the *MTC* was prepared the old-fashioned way, on paper (*see* illustration on left), where links would have been useless. But now that we are distributing the *MTC* electronically, it makes sense to provide links to our readers. (Yes, we know that our electronic distribution has been going on for several years already – it takes some of us a while to catch up.) We hope that the links will prove to be a useful resource to readers interested in delving into some of the materials underlying our articles. We welcome your comments on this and any other aspect of the *Memo to Clients*.

FCC proposes to tweak racial identification

Revised Form 323 Out for Comment at OMB

By Harry F. Cole
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The Federal Register on March 1 informed us that the FCC's Broadcast Ownership Report (FCC Form 323) is back at the Office of Management and Budget (OMB) for review. According to the notice, the Commission is proposing a change in the question seeking the racial identification of attributable interest holders. You can get to the OMB's files on the matter at this link.

The form currently in effect lists five racial categories and then a catch-all "Two or more races"; respondents are required to select only one of those six options. Apparently, though, OMB changed its policies governing collection of data relative to race and ethnicity last September. (According to the FCC, that change is reflected in an OMB action dated September 13, 2012, cited by the FCC as "Notice of Office of Management and Budget Action (NOA), dated 09/13/2012". We were unable to track down a copy of that action, but we're willing to take the Commission's word that it exists somewhere. If any reader can point us to a site where we might find the OMB action in question, we'd be much obliged.) As a result, the Commission is proposing to eliminate the "Two or more races" option and to allow respondents to select as many of the other racial options as may apply to the individual who is the subject of the response.

While the elimination of the generally uninformative "Two or more races" might be thought to provide a greater degree of useful data concerning the racial composition of commercial broadcast ownership, we're not confident of that.

After all, the draft revision of Form 323 doesn't provide any guidance for determining precisely when an individual may properly deem him/herself to be qualified to check any particular racial category. Presumably having a parent belonging to one category or another will clearly suffice. But what about more distant levels of racial ancestry?

The proposed version of the form would allow an individual to identify him/herself as belonging to as many as five different racial groups, simultaneously. (The proposed form provides five separate racial categories, and instructs the respondent to "[c]heck all racial categories that apply." Note that the form also asks for ethnicity information separate and apart from racial information, injecting a further element of heredity into the mix.) That clearly indicates that the Commission contemplates that claims of racial affiliation can be based on genetic contributions dating back at least three generations (*i.e.*, to the great-grandparent level), which suggests that as little as 1/8 – and maybe less – of one's genetic inheritance may affect one's response.

The draft version of the Ownership Report submitted to OMB is silent on just how far down the family tree one may permissibly – or is required to – climb in order to determine the correct answer. The form seems to leave it up to the respondent to make the call. But if that's the case, how reliable will the resulting statistics be? The flap in the Massachusetts senatorial election last fall relative to then-candidate-now-Senator Elizabeth Warren's ancestry illustrates some of the difficulties attendant to self-identification of racial heritage.

As long as the Commission is trying to clean up its form in the hope of producing useful statistics relative to the racial composition of broadcast ownership, it might want to take this opportunity to do just that. Greater specificity in the instructions to Form 323 would be a start.

> *The FCC in any event faces the problem of verifying responses concerning racial identity.*

Of course, even if the Commission were to refine its form to clearly specify the necessary quantum or degree of racial identity, it would face the problem of verifying the responses. Would it undertake spot checks? Would it investigate allegations of racial misidentification? What type of proof would be necessary, or sufficient, to satisfy the Commission? If no verification processes are contemplated, then how can the Commission be confident of the accuracy of the data it's proposing to amass? That's especially true in view of the seemingly infinite latitude which the revised Form 323 currently accords to respondents relative to racial/ethnic identification claims.

Some – including this author in particular – have taken the position that the race and ethnicity of broadcast owners are (in the words of the brief for *Brown* in *Brown v. Board of Education*) a constitutional irrelevance. More than 20 years ago, while working for another law firm, I argued to the Supreme Court that the FCC could not constitutionally discriminate in its broadcast licensing policies based on race or ethnicity. The Court ruled the other way in that particular case (*Metro Broadcasting, Inc. v. FCC*), but within five years the Court had overruled *Metro* in a case called *Adarand Constructors v. Pena*. As a result, the Commission was left constitutionally unable to engage in race- or ethnicity-based decisionmaking unless it could satisfy the "strict scrutiny" standard of review. That standard of review is particularly demanding and ordinarily requires a conclusive demonstration of past discrimination which the challenged race-based scheme would be intended to correct.

In the nearly two decades since *Metro* was overruled, the FCC has not compiled such a conclusive demonstration. A number of observers suspect that the Commission's push in

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End of the road for an upstart Internet-based MVPD wannabe?

Will ivi Wither on the Vine?

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It looks like the Supreme Court may have dumped a final, fatal treatment of Roundup on ivi, Inc. In a standard nine-word order ("The petition for a writ of certiorari is denied."), the Supremes unceremoniously rejected ivi's last-gasp effort to get out from under the preliminary injunction imposed by the federal District Court in NYC two years ago. As a result, ivi is still barred from operating in the Second Circuit, and its future prospects are decidedly dim.

We've reported on several occasions on ivi. It's one of a handful of companies seeking to revolutionize television viewing by making broadcast signals available to viewers via the Internet. ivi's approach involves a liberal interpretation of the Copyright Act that would allow it to stream television programming directly to your computer, tablet or smartphone.

ivi claims that its Internet-based streaming operation is the equivalent of a cable system as defined in Section 111 of the Copyright Act. Under that theory, it has argued that it's entitled to retransmit broadcast programming without the prior consent of the broadcasters as long as it pays applicable copyright royalties. The broadcast industry has disagreed, naturally; in 2010, even before ivi started operation, broadcasters peppered ivi with cease and desist letters. Undaunted, ivi went on the offensive, filing a lawsuit in the U.S. District Court for the Western District of Washington seeking a declaratory judgment that ivi is a cable system under the Copyright Act. The broadcasters promptly countered with their own suit (alleging copyright infringement) in New York.

ivi's Washington case was tossed by the judge there in January, 2011. The following month, the broadcasters convinced the judge in the New York case to preliminarily enjoin ivi from operating pending the outcome of the case. ivi appealed that ruling to the Second Circuit, to no avail. In its trip to the Supreme Court it was trying to get the Supremes to lift the injunction.

Now that the U.S. Supreme Court has denied ivi's bid for "certiorari" (the high-falutin' legalese term for an appeal to the High Court), it's looking more like ivi may be exiting the marketplace. Granted, the Courts to this point have ruled only on the issue of the preliminary injunction, so the case is technically not done – thus far ivi has been told only that it can't operate pending the outcome of the full lawsuit on the merits. But things aren't looking good and that's usually the death knell for many start-up companies.

Let's be clear that I am *not* reveling in any of ivi's misfortune. I distinctly appreciate and support innovation and have argued that Congress and the Copyright Office should consider changing the relevant laws to create a place at the video distribution table for ivi and its brethren. But let's face facts. ivi hasn't operated in about two years, and it's hard to see how ivi could have raised revenue to keep the fight going; one also has to wonder whether it's been able to attract funders to its cause in the face of repeated judicial defeats.

Lacking the nutrients necessary for any business to survive, and facing the toxicity of multiple losses on the judicial front, ivi may simply wither away like so many innovators before it. But even if ivi does wither, other contestants remain in the video-delivery-by-Internet race. ivi's legal theory was, for instance, distinct from the theory underlying approach taken by Aereo and its quasi-twin, AereoKiller, which has received mixed reactions in court.

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recent years to amass (through its revised ownership reporting requirements) extensive information about the racial/ethnic/gender composition of the broadcast industry is an effort to generate data that might support such a so-called "*Adarand* showing". If that's the case, then it would appear even more important for the Commission to take careful steps to assure that any data that it seeks to compile are maximally accurate and reliable. The constitution disfavors race- and ethnicity-based governmental decisionmaking, which explains the high hurdles the Supreme Court has imposed on that practice. If the Commission is planning to try to cross that constitutional minefield, it will have to be prepared to make an overwhelmingly persuasive case.

In its proposed form, it's far from clear that the revised Ownership Report form currently awaiting OMB review will do the trick.

(For those readers interested in the fate of the Special Use FRN (SUFRN), the proposed form sitting over at OMB just now does not appear to alter the availability of the SUFRN. The FCC's Supporting Statement makes no reference to any change in that regard, and the sample form also is silent on the question. Note, however, that the Commission has submitted only an MS-Word version of the form to OMB. Astute readers will recognize that the SUFRN option shows up as a drop-down option relatively deep in the inner recesses of the online version of Form 323. The SUFRN option does not appear in the MS-Word version. Indeed, the last time the Commission revised the SUFRN option, it had to write the changes into the form by hand, as demonstrated in our blog post at the time.)

Leading off – Virginia's FOIA

Supreme Court 2013 Season: The Swami Takes His First Shot

By Kevin M. Goldberg
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[*Editor's note: The Supreme Court recently heard arguments in McBurney v. Young, a case involving a "citizens-only" limitation on state FOIA rights in Virginia. This was smack in the wheelhouse of Kevin Goldberg, a/k/a the Swami, who has long specialized in matters affecting access to information and the rights of the media. He attended the argument and provided this report.*]

If you want to hear (and see!) what I had to say right after the *McBurney* argument, click here – that's where you'll find a video interview with me conducted by our friends at LexBlog only hours after the argument wrapped up. In the interview I hit the high points of the case, but for you, my faithful readers, I'll flesh out a few more facts and the reasoning behind my prediction.

The case started when two individuals – neither of them a Virginia citizen – filed requests for information under the Virginia Freedom of Information Act. Mark McBurney requested records relating to child support owed to him by his ex-wife; Roger Hurlbert sought property assessment records for business purposes. Each request was denied because the Virginia FOIA is (with some limited exceptions) available ***only to Virginia citizens*** and neither McBurney nor Hurlbert is a Virginia citizen.

Those denials were upheld by the U.S. District Court for the Eastern District of Virginia, which held that Virginia's law does not unreasonably discriminate against non-residents. The case was appealed to the U.S. Court of Appeals for the Fourth Circuit.

I got involved in the case at that point.

One of the limited exceptions to the "citizens-only" limit makes the Virginia FOIA available to print and broadcast journalists, ***but only*** if their newspapers, magazines or stations reach into Virginia. My client, the American Society of News Editors (ASNE) joined amicus briefs in the Fourth Circuit, and then in the Supremes (a brief supporting the grant of cert and a separate brief on the merits) in support of the McBurney/Hurlbert challenge.

ASNE's interest in the case is understandable. Virginia is one of only three states that have citizens-only FOI laws; a decision upholding Virginia's law could lead the other 47 states to jump on the citizens-only bandwagon. And that in turn could result in unnecessary burden and expense for journalists, who would be forced to pursue state-based FOI requests by proxy, *i.e.*, hiring others to make the requests on their behalf.

The issues before the Court were whether the "citizens only" provision violates one or another of two constitutional provisions, either (a) the Privileges and Immunities Clause (Article IV, Section 2, Clause 1) or (b) the "Dormant Commerce Clause". The latter is a doctrine, derived from the Commerce Clause (Article I, Section 8, Clause 3), which provides that a state shall not unreasonably discriminate in favor of its own citizens and against non-citizens in matters of interstate commerce.

To win, McBurney/Hurlbert will have to show: first, that access to records under a state FOI law is either: (1) a fundamental right (triggering the Privileges and Immunities Clause) or (2) an activity constituting or affecting interstate commerce (thus triggering the Dormant Commerce Clause); and second, that the law unreasonably discriminates against non-citizens.

As I joined fellow amateur-court watchers – and some professional reporters – outside the courtroom post-argument, at least a few thought the Court would rule in favor of the state. I initially thought so as well. After all, the first 20-30 minutes didn't go so well for the challengers. But by the end of the arguments, the tide had swung quickly and swung hard, so hard that I swore I saw Earle Duncan Getchell, Jr., Virginia's Solicitor General, noticeably fidgeting. So trying to pick up reliable signals from the back-and-forth between Justices and counsel wasn't easy – it seldom is.

But I'm the Swami, and reading those tea leaves is what I do. So here goes.

I think the Court will, by a 6-3 vote, find the Virginia statute violates the Dormant Commerce Clause. Chief Justice Roberts will be joined in the majority by Justices Kennedy, Breyer, Ginsburg, Sotomayor and Kagan. Justices Scalia, Thomas and Alito will be in the minority.

Let's start with my predicted minority.

As usual, Justice Thomas didn't ask a single question; Justice Alito didn't either. But, given their historical positions, I think it's safe to say they'll side with Virginia on this one. Justice Scalia, who did ask a number of questions (no surprise there), also seemed skeptical of the notion that Virginia should be required to open up its records to anybody. At one point he mused that Virginia "do[es]n't want outlanders mucking around in – in Virginia government. It's perfectly okay for good old Virginians to do that, but they don't want outlanders to do it. Why – why is that unreasonable?"

On the other end of the spectrum, Justices Ginsburg, Sotomayor and Kagan seemed clearly to favor Messrs. McBur-

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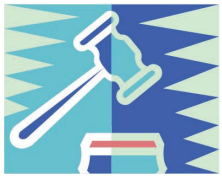
Takin' care of bid-ness

Auction 94 - The Applications Are In



By R. J. Quianzon
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Auction 94, featuring 112 FM construction permits, is on track. The FCC has issued a notice announcing that 109 potential bidders submitted applications to participate in the upcoming auction of 112 FM construction permits. The auction is still scheduled to begin on ***April 23, 2013***.

A total of 109 prospective bidders tossed in applications. Of those, 88 made the initial cut: the Commission has concluded that their applications were complete and acceptable, so they are assured of a bidding paddle and a seat in the bidders' section (assuming, of course, that they get the necessary upfront payment filed in time). The other 21 applicants? Their submissions were lacking in one or another respect, so for the time being they're on the outside looking in. But we don't need to exile them to Loserville yet. All 21 of the not-yet-in-the-door applicants were supposed to receiving an overnight letter from the Commission laying out "the information that is required to make its application complete." They then had until ***March 18, 2013*** to resubmit corrected applications.

Any bidder – whether one of the 88 or one of the 21 – who wanted to participate in the bidding was required to wire the upfront payment to the FCC by ***6:00 p.m. Eastern time on Monday, March 18, 2013***. (While it's now too late for would-be participants in Auction 94, we'll remind everyone else who might be planning to participate in later auctions: send your money to the FCC well before the deadline to avoid any unexpected delays. The FCC is not sympathetic to bidders that wait until the last day; historically, the FCC has disqualified some late-paying bidders who claimed that their lateness was the fault of their banks.)

As is commonplace with auction notices, the FCC dedicated three pages of its nine-page release to warnings about the anti-collusion rules. Cautionary anti-collusion note: Even if they opt not to participate further from this point on in the auction process, ***all 109 prospective bidders are prohibited from discussing the auction, the markets, the bids or the bidding strategies with other bidders in the same market until several weeks after the auction closes.*** The anti-collusion rules are very strict and the FCC enforces them rigorously. Cautionary example: Several years ago the FCC and the U.S. Department of Justice dragged a bidder through federal court in order to enforce penalties related to anti-collusion violations.

Of the 109 applicants, more than half are claiming new entrant bidding credits that would allow them to pay less than their bid amounts should they win. A new entrant with no interest in any other mass communication outlet is entitled to a 35% credit, which means they would pay only 65% of their winning bid. Bidders who own three or fewer mass communication interests are entitled to a 25% discount as long as there is no overlap between (a) any of their current interests and (b) a market on which they are bidding. As is typical in these types of auctions, more than a quarter of the bidders advised the FCC that they wanted to bid on all 112 markets. Selecting all markets does not necessarily indicate that the bidder will be active everywhere; rather, it may just reflect a preference to keep the maximum number of options open . . . or it may indicate that the bidder simply pressed the "Select All" button by mistake when filling out the form.

After the FCC receives funds from potential bidders, it will release another list of those bidders who are going forward in the auction. The next list is expected at the beginning of April. Check back with www.CommLawBlog.com for updates.

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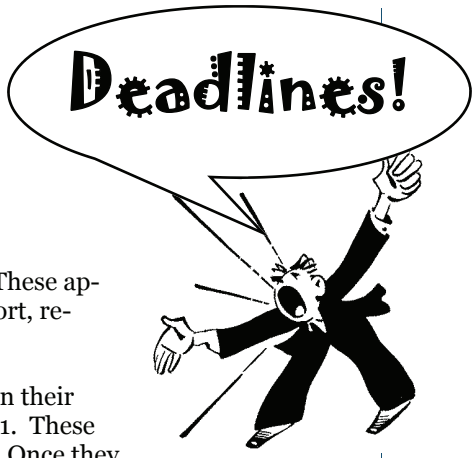
ney and Hurlbert. While – sadly – none seemed convinced that access to governmental-maintained information is itself a fundamental right, each did seem to believe that this information (and access to it) is an essential element of national commerce and that the state had no valid reason for hindering non-Virginians' access to it. (Sotomayor, in particular, launched into her questioning of Virginia's Getchell before he even got a word in edgewise.) Each of these Justices appeared to have trouble understanding how the state could claim to be burdened by providing information to non-citizens, given that it really doesn't cost the state any more to do so.

Chief Justice Roberts and Justices Kennedy and Breyer seemed a little more on the fence. But, in the end, I think they share Justice Sotomayor's concerns. Both Roberts and Breyer, at different points, appeared frustrated by Getchell's attempts to portray the Virginia FOI law as simply "political in nature" (which, according to Getchell, would mean the law couldn't violate the Dormant Commerce Clause – an argument that Scalia seemed to buy completely).

Roberts even dropped his usual poker face, wincing as Getchell tried to explain that the Virginia FOI law is not intended to, and does not, affect "commerce". Breyer seemed to literally swat that argument away with the back of his hand. Kennedy pressed hard on the issue of whether the Court had the power to determine that the law does in fact affect commerce, contrary to Getchell's insistence that there was no evidence to support such a conclusion.

So there you have it, kids. To repeat my bottom line – 6-3 in favor of McBurney/Hurlbert, in what would be a welcome affirmation of the importance of access to information. (The framers would have wanted it that way.)



April 1, 2013

Radio License Renewal Applications **-** *Radio* stations located in **Texas** 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 **Indiana**, **Kentucky**, and **Tennessee** 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 **Texas** must begin their post-filing announcements with regard to their license renewal applications on April 1. These announcements then must continue on April 16, May 1, May 16, June 1, and June 16. Once they have been completed, a certification of broadcast, with a copy of the announcement's text, must be placed in the public file within seven days.

Television Post-Filing Announcements - *Television* and *Class A television* stations located in **Indiana**, **Kentucky**, and **Tennessee** must begin their post-filing announcements with regard to their license renewal applications on April 1 . These announcements then must continue on April 16, May 1, May 16, June 1, and June 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly. Also, once all announcements have been completed, a certification of broadcast, with a copy of the announcement's text, must be uploaded to the online public file within seven days.

Radio License Renewal Pre-Filing Announcements - *Radio* stations located in **Arizona**, **Idaho**, **New Mexico**, **Nevada**, and **Wyoming** must begin their pre-filing announcements with regard to their applications for renewal of licenses on April 1. These announcements then must be continued on April 16, May 1, and May 16.

Television License Renewal Pre-filing Announcements - *Television* and *Class A television* stations located in **Ohio** and **Michigan** must begin their pre-filing announcements with regard to their applications for renewal of license on April 1. These announcements then must be continued on April 16, May 1, and May 16. Please note that, with the advent of the online public file, the prescribed text of the announcement has been changed slightly from that of previous renewal cycles.

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. 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 **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, and **Tennessee** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

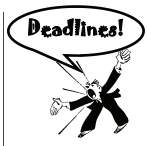
Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Texas** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

April 10, 2013

Children's Television Programming Reports **-** For all *commercial television* and *Class A television* stations, the first quarter 2013 reports on FCC Form 398 must be filed electronically with the Commission. These reports then should be automatically included in the online public inspection file, but we would recommend checking. Please note that the FCC requires the use of FRN's and passwords in either the preparation or filing of the reports. We suggest that you have that information at hand 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 uploaded to the public inspection file.

(Continued on page 9)



(Continued from page 8)

Website Compliance Information - *Television* and *Class A television* station licensees must upload and retain in their online 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 public inspection file. Radio stations will continue to place hard copies in the file, while television and Class A television stations must upload them to the online 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.

June 1, 2013 -

Radio License Renewal Applications - *Radio* stations located in **Arizona**, **Idaho**, **New Mexico**, **Nevada**, and **Wyoming** 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 **Ohio** and **Michigan** 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 **Arizona**, **Idaho**, **New Mexico**, **Nevada**, and **Wyoming** must begin their post-filing announcements with regard to their license renewal applications on June 1. These announcements then must continue on June 16, July 1, July 16, August 1, and August 16. Once all announcements have been completed, a certification of broadcast, with a copy of the announcement's text, must be placed in the public file within seven days.

Television Post-Filing Announcements - *Television* and *Class A television* stations located in **Ohio** and **Michigan** must begin their post-filing announcements with regard to their license renewal applications on June 1 . These announcements then must continue on June 16, July 1, July 16, August 1, and August 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly. Also, once all announcements have been completed, a certification of broadcast, with a copy of the announcement's text, must be uploaded to the online public file within seven days.

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

Television License Renewal Pre-filing Announcements - *Television* and *Class A television* stations located in **Illinois** and **Wisconsin** must begin their pre-filing announcements with regard to their applications for renewal of license on June 1. These announcements then must be continued on June 16, July 1, and July 16. Please note that, with the advent of the online public file, the prescribed text of the announcement has been changed slightly from that of previous renewal cycles.

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in the **Arizona**, the **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. TV stations must upload the reports to the online public file. 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 **Michigan** and **Ohio** 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 **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **New Mexico**, **Nevada**, **Virginia**, **West Virginia**, and **Wyoming** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

FHH - On the Job, On the Go

Heading to Vegas? So are we! If you're going to be attending the NAB Convention, you'll likely run into one or more members of the FHH family. The easiest ones to find should be **Kevin Goldberg**, **Frank Jazzo Harry Martin** and **Peter Tannenwald**. They're each going to be featured at particular events.

Kevin's pulling a double shift on Sunday, April 7. At 10:30 a.m. he'll be on a panel as part of the BEA Conference at the Las Vegas Hotel + Casino. Topic of that panel: "Transitions: Business, Technology and Regulation: Broadcasting in the Cloud". And at 2:00 p.m. the same day he'll be on a copyright-related panel ("Copyright & the Internet: Giving Broadcasters the Cold Shoulder?") at the ABA/NAB/FCBA "Representing Your Local Broadcaster" conference.

Also on Sunday, April 7, **Frank J** will be moderating the Employment Issues panel at the "Representing Your Local Broadcaster" conference at the Encore Hotel.

On April 8, **Peter** will be meeting with Class A TV stations and FCC staff at 5:30 (that'll be at the Convention Center), but if you don't catch up with him there, check out the Broadcast Alliance Low Power TV gathering an hour later in Pavilion 1 of the Hilton. (Since FHH is a Silver Sponsor of that event, don't be surprised if other FHH notables also show up.)

And on April 9, **Harry** will be featured on the Radio Regulatory Revue panel, along with other members of the bar (as well as the Video-Conferencing-Because-He's-Subject-To-Sequester Chief of the FCC's Audio Division, **Peter Doyle**). That panel is scheduled to crank up at 2:30 p.m.

Other FHH folks who are Vegas-bound: **Scott Johnson**, **Dan Kirkpatrick**, **Michelle McClure**, **Frank Montero**, **Kathleen Victory** and **Howard Weiss.**

Meanwhile, FHH's own Internet maven, **Kathy Kleiman,** will be jetting off to Beijing for an ICANN meeting and related hobnobbing. She and other members of the Internet policy crowd will be guests of CNNIC (".CN" is the Chinese country code) and CONAC, the China Organizational Name Administration Center. On the agenda: finalization of the rules governing new "generic Top Level Domains", or "New gTLDs", as they are known to the *cognoscenti*. That in turn is expected to clear the way for the first New gTLDs to be announced and "entered into the root" within the next few months. (Articles by Kathy explaining much of the process leading to those New gTLDs appeared in the June, August and September, 2012 *Memos to Clients*.)

And finally, let's have two and a half cheers for **Kevin Goldberg**, whose by-line recently appeared atop a "Columnist's Opinion" piece in no less a Main Stream Media venue than *USA Today*'s website. As often is the case, **Kevin** was (a) waxing rhapsodic about right-to-know legislation and (b) bemoaning the sorry lack of same when it comes to universities and their athletic programs. Normally, landing a high profile gig like this would mean three full cheers and an odds-on mortal lock on *Media Darling*-ship. But hold on. Yo, Kevin – *USA Today* gave you more than 700 words. Would it have killed you to use three of them to mention "*Memo to Clients*", or even just one for "CommLawBlog"? Seriously? Where's the love? Don't all your previous *Media Darling* recognitions count for anything? Oh shucks, as much as we might want to hold a grudge, we can't . . . you're still our *Media Darling of the Month*!!!

(Continued from page 2)

at least – to get roughed up pretty badly, the parties were able to resolve the *contretemps* to everyone's satisfaction through an amicable settlement before the court issued a decision.)

Faced with this convincing argument, the Division did the Right Thing and canceled the forfeiture. In so doing, though, it took the time to announce a new policy going forward, to wit:

> we will only waive the automatic expiration provision of Section 73.3598(e) and accept a late-filed covering license application where: (1) the permittee demonstrates conclusively that construction in accordance with the construction permit was complete and the station was "ready for operation" by the permit expiration date; and (2) the covering license application is filed within 30 days of the expiration date. [Footnote omitted]

In a footnote, the Division made clear that ***timely completion of construction is an absolutely critical requirement***. That is, don't get cute and try to keep the permit alive simply by filing a license application if any underlying construction remains to be done. That dog won't hunt.

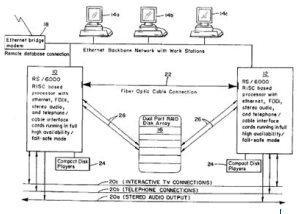
The Division also emphasized that, "subject to this 30-day grace period", it will still be issuing fines to folks who operate facilities specified in construction permits which have expired.

The Division's order provides a welcome measure of certainty in an area that, up until now, had been very loosey-goosey. But in so doing, the order also throws a large burden back onto permittees. They will now have to keep care-

(Continued on page 11)

Delaware court, USPTO both issue rulings

Mission Abstract Data: Developments Aplenty, Clarity Not So Much



By Kevin M. Goldberg
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703-8120462

Talk about mixed signals! March 25, 2013 very likely marked a crucial turning point in the up-and-down, back-and-forth tug of war between Mission Abstract Data (MAD) and many radio broadcasters, but it's hard to tell for sure which way it turned and in whose favor.

On the one hand, in the federal court lawsuit in Delaware, on March 25 the judge denied MAD's motion to lift the stay that has held that case in suspended animation for more than a year already. But in the same order the judge held that the stay would be lifted "upon the issuance" by the U.S. Patent and Trademark Office ("USPTO") of "Notices of Intent to Issue Reexamination Certificates" (NIRCs) with respect to MAD's two patents. As our loyal readers know, those patents have undergone not one, but two separate reexaminations at the USPTO over the last year or two. Indeed, it appears that the judge in Delaware has held his case in abeyance until the USPTO reaches some final conclusion about the nature and validity of the patents.

But in a remarkable coincidence, also on March 25 it appears that the USPTO issued an NIRC relative to Patent No. 5,809,246 (the 246 Patent) ***and*** a "final rejection" relative to at least some aspects of Patent No. 5,629,867 (the 867 Patent). (The term "final rejection" appears in the PTO's online description of the document.)

If you weren't confused already, hang on.

The NIRC reflects that 19 of the 30 claims made under the 246 Patent have been "confirmed and/or allowable", while three claims have been cancelled. And the "final rejection" of the 867 Patent reflects that six of the ten claims under that patent have been "confirmed and/or allowable", while two have been rejected and two have been canceled. As to the resulting status of the patents, we're fairly certain that: (a) they still exist in some way, shape or form, but (b) they are not broader (and almost definitely are narrower) than when the second reexamination process began.

All of this provides us with a reminder (which we really didn't need) that we are ***not*** patent attorneys. There is obviously much going on here, but we are not now in a position to try to explain it. (We expect to be getting with patent counsel in the near future to review all of these developments so that we can have a better handle on them.) But based on our experiences thus far in the MAD saga, we expect that these developments may cause MAD to begin another high-pressure outreach effort to sign radio stations up to patent license agreements. Because of that, we think it important to provide our readers with access to the underlying documents – the order from the Delaware judge and copies of the USPTO's actions, all linked above – so that they can review them first-hand and share them with their own counsel.

As we have repeatedly suggested in previous posts on our blog (and corresponding articles in the *Memo to Clients*), radio operators would be well-advised to consult with their own patent experts before making any decisions as to how best to proceed. The PTO's recent decisions will have to be carefully parsed to determine, among other things: (a) precisely what aspects of MAD's patents may remain; (b) whether any particular station's facilities in fact can be said to infringe on what's left of the patents; and (c) even if there may be some infringement, what the likely exposure would be if MAD were to sue for damages. Again, the area of patent law is complicated, as the March 25 developments plainly demonstrate. Before you try to tiptoe through the minefield, you'd best get yourself some expert advice from patent-savvy folks.

(Continued from page 10)

ful track of their permits' expiration dates and, more importantly, they will have to be extra-careful to get (a) construction completed by the expiration date and (b) the covering license application filed no later than 30 days after that expiration date.

It is particularly important that the permittee keep track of these chores ***because the FCC won't***. In the Division's view (and, indeed, in the very language of Section 73.3598), a permit's expiration occurs automatically, without any further action or notice by the Commission. The 30 extra days the Division has now tacked onto the rule (with respect to the filing of the license application) is a gift that's not likely to be expanded. So if you wake up on Day Thirty-One following your CP's expiration and it suddenly occurs to you that you haven't filed your license application, don't expect the Division to cut you any slack.

You have been warned.

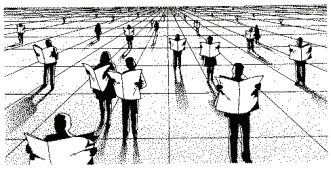
(Further cautionary note: The decision described above was issued by the Audio Division, not by the Media Bureau. It thus might be read to announce only *that* Division's policy. But bear in mind that Section 73.3598 applies to *all* broadcast construction permits, including TVs. While one might ordinarily expect – and the law ordinarily requires – similar cases to be treated similarly, it's not clear that the folks in the Video Division will take the approach the Audio Division has staked out. And it's also not clear whether, if Video were to adopt a different take on Section 73.3598, that alternative take would ultimately be upheld, either by the Bureau, the Commission or the courts.)

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

Updates On The News

In the long-running reality show "Survivor – 2003 FM Translators", if you happen to be a player whose FM translator applications haven't yet been kicked off the island, heads up: the Media Bureau has announced the next challenge. This time affected applicants have been given a 19-day window (from ***April 1-19, 2013***) within which to submit their Preclusion Showings.

Which applications are subject to the challenge? Any of the 639 still-pending FM translator application originally filed in the 2003 window (for Auction 83) which specifies a transmitter site that is (1) inside a Spectrum Limited market and/or (2) within 39 km of any Spectrum Limited Market Grid.



For those of you who may be unclear about whether you're still in the game (and, thus, facing this next chore), the Commission has provided a list of all 639 lucky applications. You can find a PDF version of the list at this link, but we suspect that you may find this MS-Excel version a bit more useful in terms of slicing and dicing the data on the list, which spans ten single-spaced pages. Here's the Bureau's explanatory description of the list:

Attachment A lists each Auction 83 Filing Window tech box proposal for which a Preclusion Showing amendment must be electronically submitted by the April 19 deadline. The list is sorted by the state in which the specified community of license is located. The "Market" column lists, if applicable, the Fall 2011 Arbitron Market number as set forth in Appendix A in the Fourth Report and Order. Each market designation was based on the location of the proposal's specified transmitter site. The "In SL Buffer" column identifies with a "Yes" each proposal that specifies a transmitter site that is within 39 km of at least one Spectrum Limited Market Grid.

And what the heck is a "Preclusion Showing" anyway?

The Bureau's initial announcement of the window walked everybody through the practical end of how and what it expects you to file. In addition, the Bureau issued a separate summary description of the tests (*i.e.*, the "Grid Test" and the "Top-50 Transmitter Site Test" that will have to be satisfied in the Showings).

That initial announcement, however, apparently didn't do the trick. From the filings that proceeded to roll in the door with respect to the initial round of amendments (relative to singleton applications), the Bureau's staff concluded that at least some of the affected applicants hadn't fully grasped what's expected of them. Accordingly, the Bureau tried, tried again, this time by issuing yet another public notice providing further "guidance" or "clarification" of the filing requirements.

That second notice, which reads like "Preclusion Showings for Dummies", is relatively short and to the point. Where preclusion showings are required, the notice thoughtfully **bold faces** the word "**required**" as an additional helpful visual cue. The concepts don't appear to be particularly complicated (but then we didn't think they were particularly complicated when they appeared in the *Fourth Report and Order* or in the previous public notices). In any event, anybody with a translator application still in the hunt should be sure to review the public notice carefully and to follow its directions thoroughly.

Hint: We gather from indications we have received from Bureau personnel that one particular bugaboo involves applications which, as originally filed, proposed facilities within 39 km of a "Spectrum Available Market Grid". If no changes at all are being proposed to those originally-specified facilities, then no preclusion showing is required. But if the applicant proposes to amend its original proposal – by changing power, height, channel, location, antenna pattern, etc. – then a preclusion study ***is*** required.

That's because the staff's initial determination that the application was in a "Spectrum Available Market Grid" (and, thus, not subject to the preclusion showing requirement) was based on the originally-proposed facilities. Any change in those facilities could alter the underlying factors that made the application's market "Spectrum Available" in the first place. The preclusion study, based on the application's amended proposal, will allow the Bureau staff to assess whether the market remains "Spectrum Available" or whether it has become, as a result of the amended proposal, "Spectrum Limited".

Some might view the most recent public notice as an annoying bit of unwelcome bureaucratic niggling, but

(Continued on page 13)

(Continued from page 12)

hold on there. The Bureau is trying to get the word out to all affected applicants sooner rather than later to ensure that those applicants will have been given every possible opportunity to satisfy the Bureau's requirements before the applicable deadlines come and go. If, as appears to be the case, the Bureau has already noted considerable shortfalls along those lines in what has been submitted thus far, the Bureau is doing everybody a favor by trying again to point applicants in the right direction.

Again, we strongly recommend that any applicant planning to file one or more Preclusion Showings review both of these notices in detail and be prepared to jump through all the hoops set out in each.

Anyone who may be a little fuzzy on what this whole FM translator application situation is all about may want to revisit our extended collection of posts on the subject, which may be found here. (Just keep scrolling down - there are a lot of posts covering several years' worth of developments.) At this stage of the game, though, if you're wondering what a "Grid Test" is or whether you're in a "Spectrum Limited Market", you've got a lot of catching up to do.

For those of you who are still in the game and playing to win, remember: the window for Preclusion Showings opens on ***April 1*** and slams shut on ***April 19***. Good luck.

And one last item on the FM translator front: Last December the Commission released its Fifth Order on Reconsideration and Sixth Report and Order in the long-running LPFM proceeding. Five parties weren't 100% happy with the results so – surprise, surprise! – they have filed for reconsideration of various aspects of the FCC's decision. The petitioners (with links to their respective petitions) are:

Prometheus Radio Project
Michael Couzens and Alan Korn
REC Networks
LET THE CITIES IN!!
LifeTalk Radio, Inc.

While the opening of a new pleading cycle – with the consequent opportunity for a pleading war – is often a harbinger of delay, our guess is that that's not the most likely scenario here. As we have reported, the Media Bureau is doing its darnedest to tee the next LPFM application window up as quickly as possible (maybe even by next October, if the Chairman gets his wish). It's unlikely that a handful of recons will distract the Bureau from that mission, but you never know.

(Continued from page 1)

submit certain information with their response: applicant resumes, licensee/station training manuals, posters, employee handbooks, or company guidebooks. You can summarize what's in them if you think it's useful or appropriate, but don't submit them to the FCC.

According to the Commission, it "intend[s] for reduced response burdens to encourage stations to have vigorous recruitment without needing to provide as much detail as before in audit responses." While the sentiment there may be applauded, on closer analysis the Commission's claim doesn't make much sense. After all, licensees are ***still*** required to generate the same amount of paper records as before in connection with their EEO efforts. The only thing that's changed is that the FCC isn't requiring that all of that paperwork be copied and shipped to Washington in audit responses. But it's hard to imagine that any licensee's recruitment efforts have ever been less "vigorous" than they might otherwise have been because of concern for the amount of paperwork that might have to be packaged up and shipped to the Portals.

As a practical matter, the real beneficiary of the Commission's new approach appears to be (wait for it) the Commission! Now the FCC won't have to deal with the problems associated with the voluminous submissions, problems like "where do I put all this stuff" and "do I really have to read all this?" If the Commission really feels that undue busy-work aspects of the EEO rules are depressing the "vigor" with which broadcasters are recruiting, then the Commission should address those busy-work aspects. The changes reflected in the latest audit don't do that.

If you happen to get an EEO audit letter, be sure to review it carefully and follow all instructions. It includes specific provisions for LMA'd stations. Even stations with fewer than five full-time employees are required to respond by providing (a) a list of all full-time employees (along with their job titles and numbers of hours each is regularly assigned to work each week) and (b) disclosure (all details, please) of any pending or resolved EEO-related complaints that have been filed.

And now for something completely different . . .

TV "White Space" Devices Update

By Mitchell Lazarus
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TV "white space" devices, which operate on an unlicensed basis in locally vacant TV spectrum, are now authorized nationwide. This is pretty fast, by Government standards; just last December the FCC okayed the first large-scale roll-out to seven eastern states plus Washington, D.C. The class of approved coordinators for the database these devices rely on to find open channels is growing much more slowly. Also growing slowly is the number of FCC-approved devices that can use the service; we count just five so far.

And in more "white space" news, we can add Key Bridge Global LLC to the list of TV "white space" database coordinators ready for testing. Most "white space" systems, we all know, must consult a database of other users to avoid causing interference. Of the ten FCC-approved coordinators eligible to provide access to the database, Spectrum Bridge, Inc. and Telcordia Technologies, Inc. have successfully completed their tests and are authorized to support white space devices nationwide, while Google and now Key Bridge Global are in the test preparation phase.

We will keep on keeping track.

[*Editor's Note: As much as we here at the Memo to Clients enjoy keeping everybody up-to-date on doings at the FCC, there are limits. Since the FCC started implementing its white space database coordination process, we've reported on the appointments of nine – and then a tenth – database administrators, three test launches, two requests for public comment on test results, and two final approvals. The addition of Key Bridge Global marks the fourth test launch. They are all starting to look the same. We're happy to keep reporting as we have done but, frankly, the repetition gets a bit tedious. So we offer here an alternative approach: limericks! We encourage our readers to try their hand, too – submit them as comments on our blog. (Nothing X-rated, please.) We'll post them without criticism. Honest.*]

Key Bridge Global Authorized to Test

Said the FCC Chief Engineer
To Key Bridge: "Do your test, do you hear?
Just prove you comply --
No, there's no second try.
Get it right, or you're out on your rear."

Summary of the White Space Coordination Program To Date

The FCC said to the nation:
We've settled on this delegation –
Just ten firms – no more –
That will take on the chore
Of inputting white space co'rdination.

Spectrum Bridge, Inc. became number one.
Telcordia's next in the sun,
And then Google was blessed
With permission to test . . .
But the FCC still wasn't done.

Next in line: Key Bridge LLC Global
Coordinates fixed and, yes, mobile
Devices that choose
Just what spectrum to use
And with no interference – that's no bull.

The Commission has clearly mandated
That each of the firms designated
Will assure straightaway
That white spaces will stay
Non-color co-ordinated.