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Memorandum to Clients

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Enforcement Relief for "Student-run" NCE Stations

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The FCC's enforcement actions often leave us shaking our heads wondering if the bureaucracy recognizes the challenges faced in real life by those it regulates. But occasionally there are rays of hope. Case in point: the Media Bureau has revised its policy for enforcing certain paperwork obligations against student-staffed noncommercial educational (NCE) radio broadcast stations. The revised policy provides an opportunity for such stations to avoid crushing forfeitures which could end up shutting the stations down.

Last July, we blogged about the stifling impact of the FCC's forfeitures on student-operated stations. Because of frequent student staff turnover, such stations can be prone to rule violations, which in turn result in steep forfeitures often amounting to a substantial portion of – indeed, sometimes even more than – a station's annual budget. That happens when the fine is based on the Commission's schedule of "standard" forfeitures even without any upward adjustments.

While some stations hit with fines have argued to the Commission that their budgets can't sustain the forfeiture amount, the FCC has historically ignored such claims. Instead, it has looked to the resources of the entire educational institution, rather than just the station itself, presumably (but unrealistically) assuming that the institution would pay up. Unfortunately, as we reported in our earlier post here, even though many institutions do pay up, the threat of further severe regulatory enforcement has apparently led some institutions to sell their stations, thereby eliminating opportunities for entry and training of young people in the art of broadcasting.

But now the Bureau has a new policy.

Under that new policy, *certain* stations which violate *certain* rules will be invited to negotiate a consent decree providing for payment of a reduced "voluntary contribution" to the U.S. Treasury and commitment to a compliance plan designed to prevent future violations.

What stations are we talking about? NCE radio stations that are "student-run". And what does that mean? According to the Bureau, for purposes of the new policy, a "student-run station" is:

> a radio station licensed as an NCE station to an educational institution or an entity under the control of an educational institution and which is staffed completely by student volunteers, rather than partially or predominantly by students.

That narrow definition ***ex***cludes more than 85% of all NCE stations – and *all* commercial stations, even those licensed to educational institutions and staffed by students – but it should still be welcome by the fewer than 500 stations that are eligible to take advantage of the new policy. (Note: "student-run" stations ***may*** be supervised by a "faculty advisor", and the term "student volunteers" ***includes*** students receiving either course credit or work/study stipends for the work at the station.) One more thing: the new policy is available ***only*** to first-time violators. If you're a "subsequent or repeated" violator, the new policy is off the table.

What rules are we talking about?

Rules involving "the submission of reports and other materials or public notice of information". The Bureau cites as examples the requirement to the Ownership Reporting rule, the Issues/Programs list requirement, and the requirement to provide notice (on-air or in the local newspaper) about the filing of certain applications.

(Continued on page 12)

Inside this issue . . .

Porn Troll Wars: The Umpire Strikes Back! 2
McCain Introduces "Television Consumer Freedom Act" 3
2013 Reg Fees: The FCC Proposes a Couple of Alternatives 4
Closing Gavel - and FM CP Prices - Come Down in Auction 94 7
The Swami gets McBURNeyed by the Supremes 8
NCE On-Air Fund-Raising For Oklahoma Tornado Relief Efforts 9
FM Translator Application Update: Last Chance Settlement Window Opened 10
Jon Markman Joins FHH 13
Deadlines 14
Mexico Looks to Increase Competition, Foreign Investment in Communications Industries 16
White Space Devices Are Coming - Have You Updated Your CDBS Information? 17
Google, Key Bridge Take Next Step In Database Management Process 17

Porn Troll Wars: The Umpire Strikes Back!

In* Star Trek*-infused opinion, a federal judge beams copyright trolls to Planet Loser.

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[*Editor's Note: We haven't heard much about porn copyright trolls in a couple of years, but a recent decision by a federal judge in California caught our eye. The judge slammed a troll operation, and he did it with flair – his opinion opens with a quote from a Star Trek movie ("The Wrath of Khan") and proceeds to riff off the Star Trek theme throughout its 11 pages. Our colleague Tony Lee volunteered to report on the decision because – or so we thought – he had been involved with porn copyright trolls in the past (defending against them, he assures us). What he didn't tell us is that he is a major league Star Trek fan. The result: the following homage to both Star Trek and the federal judge who mind-melded with the Trekker universe. Tony has graciously prepared a separate, annotated version of his post – accessible here – for anyone who might be interested. And yes, we know that the title of this piece conjures Star Wars, not Star Trek – it's the best the headline-writing department here in the Memo to Clients penthouse suite could come up with.*]

In a decision chock-full of Star Trek references, U.S. District Judge Otis D. Wright, II has levied planet-wasting (or at a minimum, career-ruining) sanctions against a collective of porn copyright trolls looking to assimilate the pocketbooks of alleged porn downloaders.

The trolls incurred the Wrath of Wright by weaving a complicated Tholian web of deceit using the court as an unwitting but crucial element of their nefarious scheme. As the Judge put it: "[W]hen the Court realized [the trolls had] engaged their cloak of shell companies and fraud, . . . the Court went to battlestations."

Before delving into the hull-breaching sanctions resulting from the Judge's full volley of photon torpedoes, a little background.

The case began as porn troll cases generally do.

A company (in this case, "Ingenuity 13 LLC") had gotten its hands on the copyrights for a number of adult movies. The Ingenuity folks then monitored BitTorrent download activity and, when they noted "their" movies being downloaded, they sprang their trap: they filed a lawsuit against "John Doe" defendants, used discovery subpoenas to obtain users' IDs from the ISPs through which the downloads occurred, and then shook down their victims for about $4K a pop. As Judge Wright observed, the $4,000 price to get the case to go away quietly was "calculated to be just below the cost of a bare-bones defense." (For more on the wily ways of the copyright troll, check out the blogs on the subject at www.CommLawBlog.com.)

But wouldn't you know, one of the John Does decided to fight back with the ferocity of a Klingon wielding a bloody bat'leth.

He alleged that the Ingenuity crew was engaging in fraud on the court. Among other things, it appears that Ingenuity hadn't come by its copyrights entirely legally (some identity theft was apparently involved), so their copyright claims were, um, bogus. And it turned out that the lawyers repping Ingenuity owned a piece of Ingenuity (as well as other similar trolling operations), so they presumably knew that everything wasn't on the up and up.

With his tricorder reading beyond "suspicious" and well into the "totally guilty" range, Judge Wright engaged tractor beams to drag the lawyers up onto the witness stand so he could probe behind their cloaking devices to get the inside scoop on their operations, relationships, and financial interests behind their cloaking shields.

In response, the lawyers deployed the only shields they had left: they all took the Fifth.

(Continued on page 12)

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Bungled bundle bill?

McCain Introduces "Television Consumer Freedom Act"

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True to his reputation as a maverick, Arizona Senator John McCain has authored a bill seemingly designed to please nobody, while arguably disserving just about everybody. Dubbed the "Television Consumer Freedom Act of 2013", it consists of clumsily crafted legislative language that mashes together in one bill three disparate and contentious aspects of the current video delivery system. In only one of those three areas does McCain's proposal come to remotely practical terms with the problem it seeks to address.

McCain's bill aims to: (1) promote "a la carte" program availability for MVPD subscribers; (2) discourage broadcasters from removing their programming from over-the-air availability (in response to the success that Aereo has recently enjoyed); and (3) eliminate broadcast blackouts of sports coverage in certain situations.

Promoting "A la Carte" MVPD offerings

McCain has long been an advocate of an a la carte approach to program availability. Under that approach, cable and satellite TV subscribers would be able to sign up for only those channels they want to watch – no more required "bundles" or "tiers", *i.e.*, packages of channels including some really desirable choices and a bunch of others that probably won't be watched much, if at all.

McCain attaches overriding importance to the availability of an a la carte option.

The practice of "bundling", of course, is not unique to the MVPD operator/MVPD subscriber relationship.

Upstream of that relationship, program producers like to make their programming available to MVPD operators in bundles because bundling allows producers to use their popular programs as an incentive for MVPD operators to carry the producers' less popular programs. It's a lot easier to convince the MVPD operator to carry one or more niche channels with limited curb appeal if such carriage is required as a condition to securing an established and guaranteed crowd-pleaser or two. MVPD operators then pass the consequences along to their subscribers by offering subscription packages that require the subscriber to take non-A-list material in order to get the A-list stuff.

Basically, it's a win-win set-up – except (as far as McCain is concerned) for the viewer/consumer, who is forced to pay for channels he or she probably won't watch.

McCain's bill would provide program producers (including broadcasters) and MVPD operators certain "incentives" to offer MVPD subscribers a la carte options. "Incentives", here, is really just a polite term for "threats".

Under the bill, MVPD operators would be free not to provide an a la carte option. But those who don't offer an a la carte option would lose the benefit of the statutory copyright license that for years has made their lives much easier and, probably, cheaper.

Broadcasters who happen to be under common control with non-broadcast program producers (think any of the major TV networks, for the most obvious examples) will be similarly "incentivized": such broadcasters would lose the right to retransmission consent and the protection of network non-duplication and syndicated exclusivity rules if all of the programming under common control is not made available to MVPD operators on an a la carte basis.

And what about program producers who don't happen to control any broadcast licensees? Lacking any legislative benefit to withdraw (such as retrans consent for broadcasters or statutory copyright licenses for MVPDs), McCain would simply say that program producers cannot offer packages of various programs to MVPDs unless those producers also offer those same programs a la carte.

One additional twist: The bill would require that, if a program producer and an MVPD can't come to terms on the availability of programming on an a la carte basis, the two parties would have to notify the FCC of the last terms each side offered the other. The bill is silent about what, if anything, the FCC could or should do with that information.

McCain's proposal isn't likely to thrill either MVPDs, or broadcasters, or program producers. Each derives some benefit from the current bundling system: MVPDs get their desired programming, along with the ability to bundle that programming with a bunch of less desirable programming and charge subscribers more; and program producers (including broadcasters under common control with producers) are able to use their popular material to assure carriage of their less popular material. A mandatory a la carte option would arguably undermine this mutually beneficial arrangement.

That is immaterial to McCain, though, because he attaches overriding importance to the availability of an a la carte option to MVPD subscribers. Let's give the people what they want, and only what they want!

Many MVPD subscribers might agree with him, at least at first blush. But think about the real consequences. Since the current system allows popular programming to subsi-

(Continued on page 11)

Either way they go up

2013 Reg Fees: The FCC Proposes a Couple of Alternatives

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One of the time-honored rites of spring – at least at the FCC – is the release, every April or May, of a Notice of Proposed Rulemaking setting out the schedule of regulatory fees the Commission thinks it may impose on all regulatees come August-September. Historically, we here at the *Memo to Clients* have tried to be Johnny-on-the-spot in letting our readers know the fees that have been proposed, even though the fees that are eventually adopted (usually in July) may vary here and there from the initial proposal.

But this year is different.

Instead of providing one set of proposed fees, the Commission has given us a Notice of Proposed Rulemaking (*NPRM*) laying out two sets of possible fees . . . because it's in the process of a much-needed update of its calculation methodology, and it's still not sure: (a) whether the new approach is exactly right and, even if it is, (b) whether that new approach should be applied this year. Depending on which method it ultimately adopts, the fees for some broadcasters could swing by a couple of thousand dollars. As a result, we've had to prepare more elaborate tables reflecting the proposals which took us a bit longer than usual to sort out.

Depending on which method it adopts, the fees could swing by a couple of thousand dollars.

To understand what's going on here, you have to understand how reg fees are calculated.

The FCC is required by Congress to collect enough reg fees to, in effect, cover the FCC's costs of operation. Those are determined by Congress through the annual appropriations process. This year the FCC's nut is $339,844,000. (Note that the FCC's actual costs are technically lower thanks to the sequester that kicked in earlier this year, but the nut remains the same because of Congress's appropriation.)

Starting with the total amount it must collect, the Commission then allocates that amount based on the number of full-time FCC employees (FTEs) devoted to the various fee categories carried out by its various bureaus. We don't need to get into the nitty-gritty of that particular process – which even the Government Accountability Office acknowledged has been less than fully transparent – except to note that the FTE figures the FCC has been using date back to 1998. Those interested in delving more deeply here may want to check out our post at www.CommLawBlog.com from last fall where we addressed the subject in more detail.

We can all agree (as the Commission itself concedes) that things in the regulatory world have changed a bunch in the last 15 years. As a result, maybe reliance on 15-year-old FTE data isn't the best, or at least the most accurate, way to determine reg fees.

That being the case, the Commission has revised its FTE numbers (using September, 2012 figures) and its overall inter-Bureau allocations (with particular focus on International Bureau activities, which relate in large measure to regulatees across several other bureaus). The result of these revisions: a new allocation of costs that would reduce the reg fee burden to be imposed on regulatory activities associated strictly with the International Bureau, but substantially increase the share of costs to be borne by Media Bureau and Wireless Bureau regulatees.

In its *NPRM* the Commission specifically seeks comment on its revised approach to cost allocation.

The Commission recognizes that its rejiggered allocation method would lead to significantly higher fees for some of its regulatees. Because of that, it is proposing to cap rate increases at 7.5% for this year. But presumably recognizing that any change – and particularly substantial change – can cause discomfort, the FCC is also suggesting that it might instead maintain its historical allocations at least for purposes of calculating the 2013 fees. The end result: two different sets of proposed fees to consider and comment on.

We have laid out the two proposed sets of fees, along with last year's fees (for comparison purposes) in the tables on the next two pages. It's likely that most broadcasters would favor keeping the previous allocation method, since that would result in lower fees for all radio licensees and the vast majority of TV licensees. The difference for some TV folks would be significant: VHF licensees in the Top 10 markets would be on the hook for more than $4,000 more under the updated approach; for Markets 26-50, the difference on the VHF side would be more than $3,000. Bear in mind, though, that it is pretty much a given that the Commission will implement its adjusted allocation method eventually.

Beyond the methodological questions, the FCC is proposing additional changes in the reg fee drill. Of particular interest to TV licensees is the notion of treating VHF and UHF stations as essentially identical for reg fee purposes. This is based on the perception that the historical preference for VHF stations has largely, if not entirely, disappeared as a result of the 2009 DTV transition. Reg fees for TV stations would still be tiered based on market size, but no distinction would be made between UHF and VHF. The Commission is asking for comments on this, and promises that, if the proposal is adopted, it won't kick in until 2014.

(Continued on page 5)

PROPOSED 2013 REGULATORY FEES

FEE CATEGORY	Final 2012 Fees (USD)	Proposed 2013 Fees (using previous allocation) (USD)	Proposed 2013 Fees (using new allocation and 7.5% cap) (USD)
TV VHF Commercial Stations			
Markets 1-10	80,075	82,025	86,075
Markets 11-25	73,475	81,775	78,975
Markets 26-50	39,800	39,725	42,775
Markets 51-100	20,925	21,150	22,500
Remaining Markets	5,825	5,825	6,250
Construction Permits	5,825	5,825	6,250
TV UHF Commercial Stations			
Markets 1-10	35,350	35,600	38,000
Markets 11-25	32,625	32,825	35,000
Markets 26-50	21,925	22,050	23,400
Markets 51-100	12,750	12,825	13,575
Remaining Markets	3,425	3,450	3,675
Construction Permits	3,425	3,450	3,675
Low Power TV, TV/FM Translators/Boosters	385	390	415
Other			
Broadcast Auxiliary	10	10	10
Earth Stations	275	265	250
Satellite Television Stations			
All Markets	1,425	1,400	1,525
Construction Permits	895	1,200	960

(Continued from page 4)

With respect to TV translator, LPTV and Class A TV and TV booster stations, however, the Commission plans to continue charging only one fee per station, even if the station is transmitting both an analog and a digital signal. This is a hold-over from pre-transition days, and will be re-visited in future years as any remaining analog operations switch over to digital-only.

And perhaps most jarring for the Luddites and traditionalists among us: the Commission is proposing to stop accepting paper and check transactions for reg fee payments, starting as of October 1, 2013. This is in keeping with an overall governmental shift toward a "paperless Treasury". Under the new approach, the Commission would not accept payments by check (not even cashier's checks!) or any accompanying hardcopy forms (*e.g.*, Form 159) in connection with reg fee payments. Those of you with a couple of checks still left in the checkbook may take heart: since this change would not take effect until October, and since 2013 reg fees will have to be paid sometime in August or September (if the FCC's past practice holds true), you'll still be able to make one more paper payment before moving ahead into the 21st Century.

Comments on all of the proposals set out in the *NPRM* are due by ***June 19, 2013***; reply comments are due by ***June 26***. Again, the *NPRM* – and the fees described in it – are still only proposals. We won't know the final fees until sometime this summer, and we won't know the deadline for paying the fees until sometime later – although the fees are generally due in late August or early/mid-September. Check back with CommLawBlog.com for updates.

Proposed 2013 Regulatory Fees (continued)

Commercial Radio Stations Proposed 2013 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	2012	725	600	550	625	700	875
	Proposed 2013 (prev. alloc.)	750	625	575	650	700	875
	Proposed 2013 (new alloc.)	775	650	600	675	750	950
25,001-75,000	2012	1,475	1,225	850	950	1,425	1,550
	Proposed 2013 (prev. alloc.)	1,500	1,250	875	975	1,400	1,525
	Proposed 2013 (new alloc.)	1,575	1,325	925	1,025	1,525	1,675
75,001-150,000	2012	2,200	1,525	1,125	1,600	1,950	2,875
	Proposed 2013 (prev. alloc.)	2,250	1,575	1,150	1,625	1,925	2,850
	Proposed 2013 (new alloc.)	2,375	1,650	1,200	1,725	2,100	3,100
150,001-500,000	2012	3,300	2,600	1,675	1,900	3,025	3,750
	Proposed 2013 (prev. alloc.)	3,375	2,650	1,725	1,950	2,975	3,725
	Proposed 2013 (new alloc.)	3,550	2,800	1,800	2,050	3,250	4,025
500,001-1,200,000	2012	4,775	3,975	2,800	3,175	4,800	5,525
	Proposed 2013 (prev. alloc.)	4,875	4,075	2,875	3,250	4,725	5,475
	Proposed 2013 (new alloc.)	5,125	4,275	3,000	3,425	5,150	5,950
1,200,001-3,000,000	2012	7,350	6,100	4,200	5,075	7,800	8,850
	Proposed 2013 (prev. alloc.)	7,500	6,250	4,325	5,200	7,700	8,750
	Proposed 2013 (new alloc.)	7,900	6,550	4,525	5,450	8,375	9,525
> 3,000,000	2012	8,825	7,325	5,325	6,350	9,950	11,500
	Proposed 2013 (prev. alloc.)	9,000	7,500	5,475	6,500	9,800	11,375
	Proposed 2013 (new alloc.)	9,475	7,875	5,725	6,825	10,700	12,375
AM Radio Construction Permits			2012			550	
			Proposed 2013 (prev. alloc.)			560	
			Proposed 2013 (new alloc.)			590	
FM Radio Construction Permits			2012			700	
			Proposed 2013 (prev. alloc.)			700	
			Proposed 2013 (new alloc.)			750	

Getting' down to bid-ness in a buyer's market

Closing Gavel - and FM CP Prices - Come Down in Auction 94

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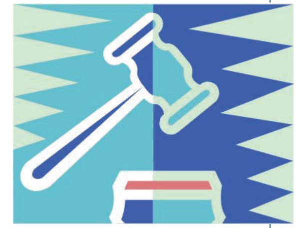

[***WARNING!*** While Auction 94 has closed, strict federal anti-collusion rules remain in effect for several more weeks. Parties who were involved in any way in the auction – *including folks who filed applications but then elected not to participate in the auction* – should refrain from discussing any aspect of the auction with anyone who was similarly involved in the auction.]

Another auction of FM construction permits has come to an end. Plenty of happy bidders are now presumably basking in the warm auction afterglow – because successful bidders in Auction 94 were, in many instances, able to snatch up permits for bargain-basement prices. It's a buyer's market out there.

Of course, as usually happens, a handful of markets saw exuberant bidding, with final price tags hitting six digits and beyond. At a cool $2.015 million, Lake Park, Florida (a community adjacent to Palm Beach) topped the bidding leader board. The Southeast also produced two $400,000+ markets – Silver Springs Shores, Florida (near Ocala) and St. Simon's Island, Georgia. But Big Ticket permits were few and far between: of more than 110 permits on the block, only 11 fetched more than $100,000.

On the other end of the scale, nearly three dozen permits sold at or very near the minimum prices that had been set for them. Looking for a swell Class C-0 opportunity in Grand Portage, Minnesota? It could have been yours for $750 – and even less if you could claim bidding credits. (True fact – once bidding credits are factored in, the Grand Portage C-0 will end up having cost less than $500.)

Unfortunately for the Commission, the bow-wow-woof-woof factor continues to be a problem, as 19 of the available permits – nearly 17% – turned out to be such total dogs that they attracted no bids at all. We will likely see these permits in future auctions, although it's not clear how, if at all, the FCC could apply lipstick to make any of these look more attractive.

The good news for prospective bidders: two-thirds of all bidders walked away with at least one permit. By contrast, half of the bidders in last year's Auction 93 went home empty-handed.

And the sort-of good news for the Commission: revenues from FM auctions remained steady, averaging about $48,000 per, approximately the same as in Auction 93. But don't look too closely at that statistic. While the total of all successful bids in Auction 94 exceeded last year's total by $1,000,000 or so, the details suggest a continuing slump in prices. In particular, the Lake Park, Florida permit – at more than $2,000,000 – dramatically skews this year's totals, particularly since last year the highest bid amount for a single permit was a comparatively paltry $309,000 (who can forget Tishomingo, Oklahoma?). If you remove those two high-end items from each of the calculations, the per-permit average in 2012 drops to about $45K, while this year it was nearly ten grand below that, at about $36K. (By contrast, in 2004, successful bids averaged more than $500K per permit.)

And let's not forget that the successful bids don't reflect the effect of bidding credits, which will significantly reduce the amount of cash the FCC actually pockets at the end of the day.

But the feel-good story of this auction has got to be that of Mr. Robert E. Lee of Reno, Nevada. Mr. Lee is the proud winner of a construction permit for (we're not making this up) Robert Lee, Texas, named after the other Robert E. Lee (*i.e.*, the Confederate general, ***not*** the late FCC commissioner). Gen. Lee reportedly may have set up camp nearby while serving in the U.S. Army (1856-1861) several years before the Late Unpleasantness. The town of Robert Lee, located 70 miles from Abilene, has a population of 1,000 people and will soon have a Class A on 105.7 MHz purchased with a bid of $910. Fortunately for Mr. Lee (the bidder), he'll be on the hook for only about $600, thanks to bidding credits. Unfortunately for him, both the call signs KLEE and KREL have already been assigned to other stations – but NOT to any FM stations, so it's at least possible that he could arrange for KLEE-FM or KREL-FM. We're keeping our fingers crossed.

6-3? Um, how about 9-0, the other way?

The Swami gets McBURNeyed by the Supremes

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[*Editor's Note: Paging Dr. Heimlich! A couple of months ago, our Supreme Court Haruspicator Extraordinaire, the Swami (a/k/a Kevin Goldberg) confidently predicted that the petitioners in McBurney v. Young would win, 6-3, in the Supreme Court. That's the case involving a constitutional challenge to Virginia's FOIA law, which is available only to Virginia citizens The decision is now out and, oops, the Court went 9-0 the other way. When we were finally able to track the Swami down for a follow-up post on the decision, his initial response was to send us a tear-stained resignation letter expressing his sense of commitment, his pride, his dedication to process, etc., etc. Upon closer examination, however, the letter turned out to be a transparent semi-plagiarism of Richard Nixon's 1974 resignation speech. We talked the Swami off the ledge, leaned on him a bit, and he has now provided the following take on the Court's decision.*]

Yep, I was wrong, but seriously, nobody – and I mean NOBODY – saw this coming. Sure, plenty of folks might have thought the Court would uphold the law. But none of them would have put their own hard-earned money on a 9-0 verdict. Not even the most accommodating bookie would have given odds on a unanimous verdict in this one. And even knowing the final result, I stand by my earlier words that "Justices Ginsburg, Sotomayor and Kagan seemed clearly to favor Messrs. McBurney and Hurlbert".

Seriously, nobody – and I mean NOBODY – saw this coming.

So I'm shocked – not only by the result, or the Court's unanimity, but by the overwhelming and radical antipathy toward open records laws expressed by the entire Court through Justice Alito's pen. And I'm angry at the Court's liberal block for signing onto that position (more on that below).

As I outlined in my earlier post (where you can find the underlying facts, in case you've forgotten them), this case came down to two issues: (1) whether the Virginia statue's restriction violates the Privileges and Immunities Clause of the Constitution because it affects fundamental rights, and (2) whether it violates the "Dormant Commerce Clause" because it interferes with the "natural functioning of the interstate market either through prohibition or through burdensome regulation". Petitioners McBurney and Hurlbert advanced four separate Privilege and Immunities Clause-based attacks on the Virginia law.

Here's how Alito addressed each of those attacks:

- *"Virginia's citizens-only FOIA provision abridges [Hurlbert's] ability to earn a living in his chosen profession, namely obtaining property records from state and local governments on behalf of his clients".* The Court agreed that the Privileges and Immunities Clause protects the right of citizens to "ply their trade, practice their occupation, or pursue a common calling". But according to Alito, a law violates the Clause only when the law is enacted for "the protectionist purpose of burdening out-of-state citizens". Here the Court found no such "protectionist purpose". The Virginia statute was enacted to "ensure [Virginians] ready access to public records in the [state government's] custody . . ., and free entry to meetings of public bodies wherein the business of the people is conducted." The law is, thus, ***non***-protectionist: it merely allows citizens to oversee the actions of those who govern them.
- *"The Virginia FOIA abridges the right to own and transfer property in the Commonwealth".* Alito simply found the Virginia law has no such effect, since it provides for the release of these property records through other means (primarily the court system).
- *"[The Virginia law] impermissibly burdens [Petitioner's] 'access to public proceedings'".* Alito responded here (figuratively, unlike his literal, but silent, mouthing during the 2010 State of the Union Address): "Not true". First, the Privileges and Immunities Clause doesn't require that citizens and non-citizens be treated equally. But, more important, citizens and non-citizens ***do*** have equal access to Virginia's judicial records. In fact, when McBurney's FOIA request was denied, he used another law to receive much of the same information he had sought under FOIA. So the restriction cannot be said to impermissibly burden non-citizen's ability to access Virginia courts.
- *"[T]he Virginia FOIA . . . denies [non-Virginia citizens] the right to access public information on equal terms with citizens of the Commonwealth".* Here, Alito claimed that the Court has "repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws". Taking a stroll through the history of access to information, he observed that, prior to the enactment of the federal FOIA in the late 20th Century, any access to information was guaranteed only to persons with a direct interest in the matters contained in the requested records. So, while Petitioners might have legitimate constitutional rights to earn a living, own or transfer property, or have access to public proceedings (*i.e.*, the rights addressed in the first three arguments summarized above), there simply is no fundamental right in access to information. [Swami's note: I just threw up in my mouth a little as I wrote that].

However, as I made clear in my post-argument prediction,

(Continued on page 9)

NCE On-Air Fund-Raising For Oklahoma Tornado Relief Efforts

The time has come, yet again, for broadcasters to respond to a natural catastrophe with their characteristic humanity, offering help wherever and whenever possible. As the horrific stories and images from tornado-devastated Oklahoma – and particularly the community of Moore – make their way out of the storm's heartless swath, broadcast stations may want to undertake fund-raising efforts to support relief efforts. The FCC clearly does not want to do anything to discourage such laudable humanitarian impulses. However, rules are rules – and the Commission's rules (Sections 73.503(d) for radio and 73.621(e) for TV) generally prohibit noncommercial educational (NCE) broadcasters from engaging in on-air fund-raising activities on behalf of anybody but the station itself.

Not to worry. The Commission has historically waived that prohibition following "disasters of particular uniqueness or magnitude" – Hurricane Katrina, the 2010 Haiti earthquake, the 2011 Japanese tsunami and Superstorm Sandy come to mind as ready examples. And just to be sure that we all know that the FCC views the Oklahoma tornado to be in the same league, the Commission has issued a public notice laying out the procedures by which NCE licensees may request waivers so that they can engage in fund-raising for relief efforts.

Stations seeking such waivers should prepare an informal request providing the following basic details of their fund-raising activity:

- the nature of the fund-raising activity;
- the proposed duration of the activity;
- the organization(s) to which fund will be donated; and
- whether the fund-raising activity will be part of the station's regularly-scheduled pledge drive or fund-raising efforts.

The informal request should then be emailed to the FCC. NCE ***television*** licensees should address their requests to Barbara Kreisman (barbara.kreisman@fcc.gov). NCE ***radio*** licensees should address their requests to Peter Doyle (peter.doyle@fcc.gov) and Michael Wagner (michael.wagner@fcc.gov). Those points of contact are also available for any particular questions you might have about such things.

(Continued from page 8)

I didn't think the case would turn on the Privilege and Immunities Clause, even though I firmly believe that access to information is and should be a fundamental right in a democracy. The fact that at least some members of the Court don't share my belief was apparent during the argument (as I reported). But I sensed at least a split on the Dormant Commerce Clause issue, which entails a two-part analysis: (a) FOIA-obtainable information is part of the stream of commerce, and (b) the law impermissibly favors Virginia citizens over non-citizens.

How wrong could I be? As it turns out, the Court didn't even get to the second portion of that analysis because the nine Justices, led by Alito, concluded that Virginia's law doesn't regulate or burden interstate commerce. Rather, the Virginia FOIA law – and, presumably, ***all*** FOIA laws – are purely political creatures not related to commercial matters. (This will doubtless come as news to the biggest single segment of requesters of information under the federal FOIA: commercial requesters seeking information about competitor businesses). Further, the Court decided, even if there were a "market" for public documents in Virginia, it's a market that Virginia created and administers, which, based on earlier cases, means it cannot implicate or violate the Dormant Commerce Clause.

So where does this leave us?

In the short term, we can expect to see more states start to limit FOIA requests to citizens only (for those keeping score, states already doing so include, in addition to Virginia: Alabama, Arkansas, Missouri, New Hampshire, New Jersey, Tennessee and, though the Third Circuit threw out their law, Delaware). Why? Because from the state's perspective, such citizens-only restrictions keep costs down and limit the amount of information the state must produce. What state doesn't want to do that? And now everybody knows exactly how to draft and justify such a restriction to ensure they withstand constitutional scrutiny.

More disturbingly, perhaps, we have all nine Justices of the Supreme Court of the United States on record as viewing open records laws with disdain, if not outright contempt. How could the Court – and especially its liberal members – endorse this flip blow-off of the right to access public information:

> [The broad-based right to access public information is not] "basic to the maintenance or well-being of the Union." . . .. FOIA laws are of relatively recent vintage. The federal FOIA was enacted in 1966 . . . and Virginia's counterpart was adopted two years later. . . . There is no contention that the Nation's unity foundered in their absence, or that it is suffering now because of the citizens-only FOIA provisions that several States have enacted.

I expected that from Alito and Scalia (shoot, I've heard Scalia express it in so many words before). But not from some of the others. It's very disheartening.

Still, the Swami will press on, firmly committed to the goal of maximum access to government information. I won't let this get me down. I can't let this get me down. Big majorities of the Court have been wrong before (obvious examples: *Plessy v. Ferguson* 7-1, *Dred Scott* 7-2). Let's just hope that this latest instance can somehow get turned around before too much damage is done.

Next stop – Auction-ville!

FM Translator Application Update: Last Chance Settlement Window Opened

By Harry F. Cole
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703-812-0483

If you've still got one or more FM translator applications pending from the infamous 2003 window, listen up! The Media Bureau has opened a 62-day "Settlement Period" – up to and including ***July 22, 2013*** – during which applicants with mutually exclusive (MX) applications may attempt to resolve their differences through engineering amendments or settlements.

For those of you who may have forgotten exactly which (if any) of your applications may still be alive and kicking, the Bureau has provided a list of the apps that the Bureau thinks are eligible for settlement (*i.e.*, applications MX with one or more other applications). You can check that list out here (or in a more sliceable and diceable Excel version here). There are a total of 539 MX groups, so you'd better start looking now.

Important alert: The Bureau recognizes that its list may not be 100% complete, and it expressly encourages anybody who believes that one or more applications may have been omitted to get in touch with the Bureau immediately. Remember, to be on the list, your application has to be MX with at least one of the applications already listed.

The relevant deadline: ***July 22, 2013***

All MX groups are heading to auction. But the Settlement Period affords pending applicants the chance to avoid the auction scenario by eliminating mutual exclusivities, either through negotiated settlement or unilateral amendment. Proposed negotiated resolutions may be universal – *i.e.*, involving *all* members of a particular MX group – or non-universal – *i.e.*, involving less than all members. But ***any*** proposed resolution – whether unilateral or negotiated – must "eliminate all mutual exclusivities between at least one application and all other applications in the MX group."

In other words, all the applicants in a particular MX group can get together and work out a deal, or any subset of applicants can do the same, or just one applicant may be able to figure out a technical way to get itself out of mutual exclusivity hell. But in any of those situations the bottom line has got to be that at least one application is freed of all mutual exclusivities and thus becomes a (theoretically) grantable "singleton".

The concept of "negotiation", of course, requires that the MX applicants communicate among themselves. But as we all know, in the pre-auction context, MX applicants are absolutely prohibited by the FCC's rules from engaging in ***any*** application-related communications with one another. No problem. The regulatory Cone of Silence has been lifted during the Settlement Period to permit inter-applicant discussions looking to resolve mutual exclusivities.

There are, of course, a number of gotcha's here. For example, negotiated settlements are subject to the standard limitations on such deals, including restrictions on reimbursement. That means, among other things, that a dismissing applicant cannot expect to be paid anything more than its "legitimate and prudent expenses" in return for its dismissal. (The rules provide that that "legitimate and prudent expenses" cap does not apply to "bona fide merger agreements", although whether such a merger arrangement might make sense in the FM translator context remains to be seen.)

And for anyone contemplating a unilateral engineering route out of mutual exclusivity, note that any amendment must be "minor" in nature, and it cannot create any new mutual exclusivities. Heads up, too: if the amendment specifies a transmitter site within either (a) 39 kilometers of any Appendix A Market and/or (b) any Top-50 Spectrum Limited Market, the amendment must include a Preclusion Showing. (For a refresher on Preclusion Showings, check out our previous posts on the subject.)

One more caution flag on the technical amendment front: our colleague Matt McCormick reports that, according to some informal advice from the Bureau's staff, technical amendments will be processed on a "first-come-first-served" basis. That means an earlier-filed tech amendment will cut off any later-filed amendments that happen to be MX with the earlier-filed. So anyone contemplating an engineering fix should act sooner rather than later.

The Bureau's public notice lays out the various procedural niceties involving in getting any proposals filed. We won't get into the deep weeds on these here, but readers should know that some items are to be filed on paper and some electronically through CDBS – and there are even very specific instructions for how CDBS items are to be identified in the pre-form. Anyone contemplating the submission of any such proposal should review the notice carefully and be sure to comply with all details.

The big thing for all to remember: the deadline for any settlement proposal or technical amendment is ***July 22, 2013***.

The Bureau's notice also includes an additional opportunity for anyone proposing a noncommercial educational (NCE) station as the translator's primary station to avoid dismissal. As we reported last month, applicants seeking NCE authorizations are ***not*** permitted to participate in auctions. Since that prohibition cropped up after the 2003 FM trans-

(Continued on page 11)

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dize, in a sense, the production of less popular programming, the cost to access the less popular shows would likely increase in an a la carte universe, where the potential for such subsidization would be dramatically diminished. As with ordering a la carte at a restaurant, sure, you can get exactly what you want, but in the end you'll probably end up paying more and getting less. Can we be sure that that's what viewers really want?

And let's not forget the niche programming that might not garner enough viewers to warrant continued production. While many of us may share the Boss's despair at the seeming lack of viewable programming fare, the fact is that even the narrowest of niche programming presumably has some viewers. And niche programming contributes to the much-vaunted diversity of information we hear so much about. By discouraging various bundling practices, McCain's bill could threaten that diversity by forcing lesser-viewed programming out of production.

Deterring broadcasters from defecting from OTA operation

Since Aereo started to get traction with its system allowing mobile Internet access to over the air broadcasting – and particularly since that system survived an initial challenge in the Second Circuit – some broadcasters have been making noises about removing their programming from their OTA operations in favor of some subscription-only venue (*e.g.*, cable, satellite, or maybe even their own version of an Aereo setup). McCain obviously thinks that that's not a good idea, and he means to do something about it in the second section of his bill.

Here's where he hauls out the big guns: TV stations that engage in such mischief will lose their licenses! Yikes! While that threat is guaranteed to get your attention, upon closer scrutiny that threat largely disappears, thanks to some truly bad wording.

According to the bill, the mischief that would lead to license loss occurs when a "television broadcast station does not retransmit the signal over-the-air that is identical to the signal retransmitted" to an MVPD.

Can we be frank here? That language makes no sense at all. A TV station doesn't "retransmit" its signal – it *transmits* it. And in practical terms, it's unlikely in the extreme that a broadcast station would attempt to broadcast one batch of programming while simultaneously feeding a different batch to the local MVPDs. More likely, the broadcasters' threat alluded to above would play out by having the networks opt not to provide their affiliates with primo, prime-time programming. So, for example, the Fox prime-time schedule might end up exclusively on the MVPD-only FX channel, while the Fox Network feeds its affiliates re-runs of old Fox shows. In that case, the station affiliates would still be feeding their OTA programming to the MVPDs, so McCain's proposed threat wouldn't reach them.

Maybe we're missing something, but this proposal would achieve nothing in terms of addressing the issues swirling around Aereo. (If McCain really wanted to revolutionize copyright law to ensure that the next Aereo controversy doesn't occur, he would take a crack at redefining "MVPD" in a way that reflects the increasing level of online viewership that is tied to the decreasing level of scheduled OTA television viewing.)

Can we be frank here? The bill's language makes no sense at all.

Prohibiting blackouts of certain sports programming

The final section of the bill is probably the only one likely to please both the broadcast and cable industries. It addresses sports programming blackouts (like when an NFL team doesn't sell out its home game within a certain period before kickoff). Under the bill, blackout regulations would not apply when the game is played in a publicly-financed stadium. Hard to argue with that, unless you're a professional sports league or team that has negotiated out extensive agreements based on the existence of the blackout.

But really, in the overall scheme of things the blackout issue alone isn't likely to compel support for McCain's bill.

Hopefully, the bill wasn't intended as something to be enacted, but rather as a starting point for further change. But even there, you have to wonder: why? After all, McCain's bill is more or less a recycling of identically titled legislation originally introduced by Rep. Ron Paul in 2007.

Over the years, John McCain's maverick nature has garnered him his fair share of supporters and detractors. That's not just because he's been willing to go out on a limb for what he believes in, popular support be damned, but also because he's been a very skilled and effective legislator that produced results on a regular basis. Sadly, this time, it looks like he's just gone off on a tangent.

(Continued from page 10)
lator filing window had come and gone, a number of still-pending applicants identified themselves as "NCE", which was the kiss of death. To give those applicants a chance to avoid dismissal, the Bureau allowed them a brief opportunity to "de-select" the NCE status. As it turns out, though, there was yet another potential problem: an FM translator proposing an NCE station as a primary station is deemed to be NCE, so even if an applicant has chosen not to identify itself as "NCE", it's still subject to dismissal of its application specifies an NCE primary.

Because of that, the Bureau is giving applicants in that position the green light to amend their applications to specify a non-NCE primary station. Such amendments will be treated as "minor", but they must be submitted during the Settlement Period, *i.e.*, no later than ***July 22, 2013***. Failure to take care of this detail will result in the summary return (as unacceptable) any application specifying an NCE primary station – even if the applicant in question took advantage of last month's "de-selection" opportunity.

(Continued from page 1)

The new policy will ***not*** be available with respect to non-paperwork violations. Thus, violations relating to improper or undisclosed underwriting announcements, misleading contests, engineering violations, or (as you might expect) obscene or indecent material will ***not*** be entitled to the new, arguably lenient approach.

And what happens when the new policy is invoked? The case which triggered the new policy provides an illustration. William Penn University is the licensee of NCE Station KIGC (FM) in Oskaloosa, Iowa, a "student-run" station with less than 250 watts of power. Its annual budget is currently $6,650. The Bureau determined from the station's most recent license renewal application that the station hadn't filed a number of Ownership Reports on time, hadn't prepared a couple of Issues/Programs lists on time, and had failed entirely to prepare the remainder of its Issues/Programs lists at all. (It should go without saying that these are likely to be fairly common problems at stations with transient novice staffs.)

Normally, violations of this sort would result in a fine of $20,000 or more. But in this case, under the terms of the Consent Decree resolving the problem, the University will have to pay only $2,500 ("only" being a relative term, since in this case it represents more than one-third of the station's annual budget). The FCC says that in the future, in determining the amount to be paid in such cases, it will take all financial circumstances into account. In other words, student-run stations caught in violations will be able to argue, for example, that their own budgets, rather than the licensee institution's overall resources, should determine the level of financial penalty imposed.

In addition to committing to making the $2,500 "voluntary contribution", through February, 2021 (*i.e.*, the end of the next license term), the University will have to implement a "Compliance Plan" imposing on-going obligations. In particular, the University will have to institute a number of internal logging, monitoring and training activities, over and above any required by the Commission's rules, to reduce the risk of further violations.

And for each of the next three years, the University will have to file a certification, signed by a University officer, affirming that the station is in compliance with the ***all*** FCC rules. That requirement could pose a challenge – after all, there are five volumes of FCC rules. Would any of our readers certify under penalty of perjury that they are in compliance with *every single one* of those rules – or even just all of the 419 pages of rules devoted primarily to broadcasting?

Would ***you*** *certify under penalty of perjury that you are in compliance with every single FCC rule?*

The purpose of a consent decree is to avoid litigation over a violation, so a station opting to take the consent decree option foregoes any chance to challenge the validity of the FCC's action. It's akin to copping a plea – although most consent decrees include a proviso that the incident cannot be used as a black mark against the station in the future. For that reason a consent decree can afford a pretty good escape from permanent harm (assuming, of course, that the licensee does indeed comply with the requirements of the decree).

In a post on CommLawBlog last year we raised many of the reasons underlying the Bureau's decision to change its policy. If our discussion there helped bring about the policy change, we are pleased that we might have had some influence.

(Continued from page 2)

(Litigation tip: When an angry judge asks you questions, your best play is usually to answer honestly and completely. Taking the Fifth is generally *not* the way to go.)

Judge Wright responded to the lawyers' reticence as you might expect: he reset his phasers from "stun" to "kill." Drawing every possible adverse interest from Ingenuity's (and its lawyers') refusal to testify – which he could do, since this was a civil, not a criminal, case – he found that they had: engaged in identity theft (using a fraudulent signature); attempted to deceive the court in order to engage in early-discovery requests; lied to the Court; and generally used (actually, abused) the Court's authority in order to improperly pressure defendants to settle.

As punishment for the Ferengi-like ways of Ingenuity and its counsel, Judge Wright cranked up his doomsday machine. He awarded Ingenuity's target-turned-nemesis $40+K in attorney's fees, and then doubled it to north of $80K as a punitive measure. (Direct hit on forward shields!) He thoughtfully pointed out that the "punitive portion [was] calculated to be just below the cost of an effective appeal." Ouch!

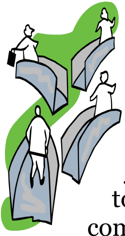
But wait, there's more!

The Judge announced plans to refer all the lawyers to their respective state and federal bars to let those bars know that the lawyers suffer "from a form of moral turpitude unbecoming of an officer of the court" (Shields are failing!). And because their operations resembled RICO-like activities, Ingenuity and its counsel are also going to be referred ***BOTH*** to the U.S. Attorney's office for investigation (Hull breach on deck four! We can't take another hit!) ***AND*** to the Criminal Investigation Division of the IRS for failure to pay taxes on their ill-gotten gains. (Abandon ship! Abandon ship!)

Ingenuity's lawyers thought that they had boarded the ship bound for Risa at warp speed, but instead they found themselves on the Kobayashi Maru.

For us earth-bound practitioners, Judge Wright's decision is a breath of fresh air: knowing a scam when he saw one, he was not reluctant to take effective action to get to the bottom of things and then issue stiff sanctions. Those sanctions, ideally, will send a message through the copyright troll universe that fol-de-rol with the courts is a bad idea. We shall see.

And to Judge Wright: Live long and prosper!



FHH - On the Job, On the Go

On May 15, **Kathy Kleiman** was one of seven presenters for an evening session (dubbed "7 Techmakers and a Microphone") at Google I/O, the annual (and huge) conference hosted by (who else?) Google for web, mobile and enterprise developers. Sharing the stage with six Google executives – including four VP's, one member of the board, and the Chief of Staff for Project Glass – **Kathy** spoke about the ENIAC Programmers Project, which she founded. The focus of the Project is to bring to the public's attention the six women who programmed ENIAC, the first all-electronic programmable computer during WWII. Although uncredited at the time, those six were instrumental in founding the field of modern software.

On June 1 **Frank Montero** will be teaching a class on "Operating for Success: How to Effectively Use Your Attorneys" for the NAB's Broadcast Leadership Training Program. And then a couple of weeks later, he's on the road again. First, he'll be in San Juan (June 13-14), attending and speaking about FCC and Federal issues on the "Washington Update" panel at the Puerto Rico Broadcasters Association convention. From there, it'll be on to Atlantic City, where **Frank M** will wax eloquent as a member of the panel titled "FCC Legislative and Regulatory Roundtable" at the New Jersey Broadcasters Association convention.

On June 4-6, **Frank Jazzo** (the Other Frank) will be attending the 2013 Joint Annual Convention of the Mississippi Association of Broadcasters and the Louisiana Association of Broadcasters in Biloxi, MS. On June 6, **Frank J** (along with the NAB's **Ann Bobeck** and LAB Counsel, **Charles Spencer**) will participate in the Legal Update session.

And from there it's on to the Land of Enchantment for **Frank J –** on June 6-8, he's scheduled to attend the New Mexico Broadcasters Association's annual convention in Albuquerque. On June 7, **Frank J** and the NAB's **Chris Ornelas** will be participating in the "Coffee, Tea or FCC" session.

On June 6, **Harry Cole** will appear as part of the keynote presentation at the 30th Annual SNL Kagan TV and Radio Finance Summit in NYC.

Meanwhile, from June 20-22, **Howard Weiss** will be attending the Virginia Association of Broadcasters Annual Summer Convention in Virginia Beach.

And the Other Harry, **Harry Martin**, will expound on FCC regulatory matters at the Calvary Chapel Conference Center in Twin Peaks, California (in San Bernardino County) on June 25. The session will include representatives of the 100+ Calvary Chapel churches and entities which operate broadcast stations.

Looking further into the future, **Matt McCormick** is scheduled to attend the Nebraska Broadcasters Association in Omaha on August 14-15. He'll be appearing on a panel where, he assures us, he'll be discussing "hot issues in FCC law."

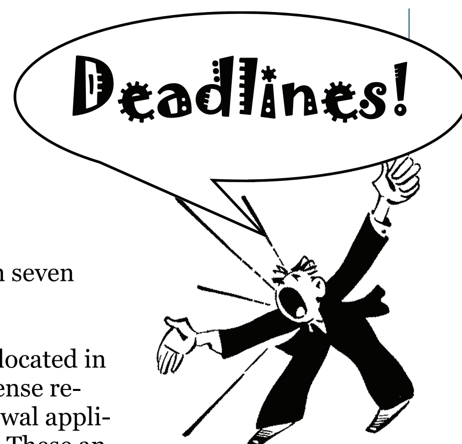
Davina's a Real Mother! — And a bit of Fletcher Heald family news. Our colleague, Davina Sashkin, and her hubby, Bill Schreiner, welcomed William A. Schreiner, III, into their family – and the greater FHH fold – this past month. Mom and young Liam are doing well. Liam is pictured, angelically asleep, at left. (Tip to Davina and Bill: don't get used to this.) We here in the *Memo to Clients* penthouse suite wish them all the best.

Wilkommen, bienvenu, welcome!

Jon Markman Joins FHH

Fletcher, Heald & Hildreth is pleased to announce that Jon Markman has joined our team as an associate attorney effective May 1, 2013. Jon is a 2008 graduate of Yale, where he copped both a B.A. (with honors, thank you very much) *and* an M.A. before heading off to Ann Arbor for a law degree (*cum laude* again – hubba hubba!) from Michigan. Jon has interned for a U.S. District Judge and, most recently, was a Fellow at the Institute for Justice in Arlington, Virginia. He also served as an Associate and Contributing Editor for the U. of Michigan Telecommunications and Technology Law Review. Jon admits to being a long-suffering Cleveland sports fan, although he's prepared to work at being a long-suffering D.C. sports fan. He claims to have replaced the wall outlets in his home with outlets featuring built-in USB ports (although that claim has not yet been independently confirmed by the *Memo to Client*'s Official Fact Checker). Jon and his wife, Ligia, live in D.C. with a dog (named Eli – talk about your loyal alums) and two cats (Leo and Zipper). Oh yeah, he makes his own ice cream!

June 1, 2013



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. We would suggest, however, that those licensees filing renewal applications on the filing deadline of June 3 delay the post-filing announcements until June 3. These announcements then must continue on June 16, July 1, July 16, August 1, and August 16. Once complete, 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. We would suggest, however, that those licensees filing renewal applications on the filing deadline of June 3 delay the post-filing announcements until June 3. 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 complete, 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**, **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.

June 3, 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.

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.

July 10, 2013

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

(Continued on page 15)

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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.

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.

August 1, 2013

Radio License Renewal Applications - *Radio* stations located in **California** 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 **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.

Radio Post-Filing Announcements - *Radio* stations located in **California** must begin their post-filing announcements with regard to their license renewal applications on August 1. These announcements then must continue on August 16, September 1, September 16, October 1, and October 16. Once complete, 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 **Illinois** and **Wisconsin** must begin their post-filing announcements with regard to their license renewal applications on August 1 . These announcements then must continue on August 16, September 1, September 16, October 1, and October 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly. Also, once complete, 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 **Alaska**, **American Samoa**, **Guam**, **Hawaii**, the **Mariana Islands**, **Oregon**, and **Washington** must begin their pre-filing announcements with regard to their applications for renewal of licenses on August 1. These announcements then must be continued on August 16, September 1, and September 16.

Television License Renewal Pre-filing Announcements - *Television* and *Class A television* stations located in **Iowa** and **Missouri** must begin their pre-filing announcements with regard to their applications for renewal of license on August 1. These announcements then must be continued on August 16, September 1, and September 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 **California**, **Illinois**, **North Carolina**, **South Carolina**, and **Wisconsin** 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 **Illinois** and **Wisconsin** 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 **California**, **North Carolina**, and **South Carolina** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

Mexico Looks to Increase Competition, Foreign Investment in Communications Industries

By Ernesto Velarde-Danache, Guest Contributor

[*Editor's Note: We welcome a new guest contributor, Ernesto Velarde-Danache, an attorney with offices in Mexico and Texas who is familiar with Mexico's regulatory activities vis-à-vis its telecommunications industries. Ernesto has provided us with the following recap of a new law recently passed by the Mexican national legislature. As outlined below, the law, which is awaiting ratification by a majority of Mexico's states, will have a major impact both on Mexico's telecom industries and on foreign investors who might now be able to participate in those industries.*]

For so many years important sectors of the telecommunications industry in Mexico have been under the control of the Mexican government or in the hands of a few private investors. This practice has been systematically denounced as oligopolistic by both Mexican and foreign entrepreneurs frustrated by the lack of opportunities within the sector.

Fortunately, this situation is nearing a most anticipated end. The Mexican congress recently approved a bill that, once approved by the majority of the Mexican states' legislatures, will result in unprecedented opportunity for Mexican and foreign investors who have been waiting for this dramatic and, for many, most welcome breakthrough.

Under the new law, foreign investors will be allowed to invest up to 100% in the telecom industry. Historically, foreigners have been limited to owning no more than a 49% interest in Mexican telecom businesses. The new law will also dramatically change Mexico's long-time bar against foreign ownership of any share of Mexican broadcast stations. The new law permits foreign investment in broadcast stations up to the higher of: (a) 49% of the corporate capital, or (b) the percentage of corporate capital investment made available to Mexican nationals in the investor's home country.

Final approval by the necessary majority of state governments is viewed as a near certainty and likely to be completed within a matter of months. Once that occurs, the telecom and TV sectors – each long dominated by one or two companies – will be open to competition, ideally affording the Mexican people access to services that have historically been prohibitively expensive for many. The new law will elevate broadband Internet access to a constitutional right to be made available to all by the federal authorities in Mexico. Cable "must carry and must offer" mechanisms will be implemented and will become a legal obligation for cable TV systems.

As a result and as evidence of the very important and positive impact that this reform will have, the bidding process for two new private, nation-wide television networks will soon commence. Additional licenses to operate will be offered for those willing to invest in the national television system.

> *The new law constitutes a fundamental reform to Mexico's approach to telecommunications regulation.*

In an effort to make the telecom industry more effective and its operation less bureaucratic, the new law also creates the *Instituto Federal de Telecomunicaciones* (Ifetel), an autonomous and independent agency roughly equivalent to the U.S.'s FCC. It will be responsible for regulating, promoting and supervising the telecom industry. Its regulatory authority will include oversight of competition, with powers similar to the Antitrust Division of the U.S. Department of Justice, including the power to order divestitures to correct anti-competitive circumstances. (Precisely how that power may ultimately be exercised has not yet been determined.)

This new law constitutes a fundamental reform that will change both Mexico itself and the perception of Mexico that many outside the country have. It will also create new opportunities for foreign investment and involvement in Mexican communications industries.

[*Editor's End-note: Should you have any questions regarding Mexico's new telecommunications reforms, you may contact our contributor, Ernesto Velarde-Danache, or FHH's own Francisco Montero.*]

LoPo TV Alert!

White Space Devices Are Coming - Have You Updated Your CDBS Information?

If you're the licensee of an LPTV or a TV Translator or a Class A TV station – collectively for our purposes here, "low power stations" – that rebroadcasts the over-the-air signal of another station, the FCC's trying to help you out. In the near future, TV white space devices will take to the air, creating a potential source of interference to your ability to receive the signals you rebroadcast. As the FCC proceeds with tests of databases to control those white space devices, it has simplified the steps necessary to ensure the protection to which you are entitled from those devices.

White space devices, as we hope you know by now, operate in locally vacant TV channels. They are required to protect not only household TV reception but also various other facilities, including some (but *not* all) low power stations that rebroadcast the signals of other TV stations. These stations receive two kinds of protection. White space devices (except for those at very low power) are not permitted to operate inside or close to the stations' service contours – a matter not at issue here. Also protected, and the subject of this article, are the *receivers* these stations use to pick up the signal of the originating station for rebroadcast.

White space devices will have to consult a special database to identify available channels. That database in turn will draw on CDBS to identify low-power stations whose receivers are entitled to protection.

A public notice announces a special web page at which qualifying stations can register their receiver channels into the FCC's CDBS system.

For protection purposes, low power stations fall into one of three distinct situations:

- Low power stations located within the protected service contour of the originating station they rebroadcast – these low power stations are automatically protected under the umbrella of the originating station.
- Low power stations located outside the protected service contour of their originating stations, but within 80 km of the originating station's service contour – these low power stations are entitled to protection from white space devices, but ***only if*** the low power station's facilities have been properly entered in CDBS.
- Low power stations located more than 80 km beyond their originating station's protected service contour – these low power stations are not entitled to protection *unless* the FCC has granted a waiver.

The FCC reminds low power stations, particularly those in the second group described above (or in the third group with waivers), to make sure that their CDBS entries are current and correct. When full-power stations changed channels as part of the 2009 digital transition, and low power stations adjusted their receivers accordingly, many forgot to tell the FCC. Since protection of those receivers from white space devices will be dependent on the information for those stations in CDBS, this is a good time to visit the FCC's new web page and make sure all the information there is current and accurate.

Two more join the club

Google, Key Bridge Take Next Step In Database Management Process

In separate public notices, the FCC has asked for comment on white space database tests recently conducted by Google, Inc. and Key Bridge Global LLC. (The FCC paperwork misidentifies the second company as "Keybridge Global Inc.") Their respective test reports are here and here. Mark your scorecards: once approved, these will be database managers numbers 3 and 4. You can find more information about these tests on our blog (www.CommLawBlog.com) here and here.

Comments on both tests are due on ***June 13, 2013*** and reply comments in ***June 20***.

For background on the databases and what they do, see this article.

[*Editor's Note: In keeping with the practice we introduced with our last white space database update (in the March, 2013 Memo to Clients), we have sought to capture the essence of these recent developments poetically*:

An FCC Haiku to the Public

Key Bridge and Google
filed database test reports.
Comments? We're all ears.]