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Memorandum to Clients

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Ask a consulting engineer

TV Repacking: What the Latest *TVStudy* Materials Mean

By Michael Rhodes, P.E.
Cavell, Mertz and Associates

[*Editor's Note: The FCC's Incentive Auction Task Force recently released a number of materials relating to* TVStudy, *the software that FCC engineers devised to assist them in the modeling and analysis necessary to repack the TV spectrum. Those materials included a public notice, a Technical Appendix, and a boatload of other goodies, all intended to give us a peek into the way the Commission is approaching the repacking process. Unfortunately, the materials are a bit, um, technical in nature, so unless you're well-versed in a lot of sophisticated engineering stuff – stuff that, as it turns out, wasn't offered in law school – you're likely to have a hard time understanding what's what. No problem. Our friend Mike Rhodes, P.E., of the highly-respected engineering firm of Cavell, Mertz and Associates, has come to our rescue. We asked Mike if he could break down the FCC's releases into morsels that might be digestible by non-engineers. Happily, Mike agreed to take on that daunting challenge. Thanks, Mike.*]

The materials recently released by the Incentive Auction Task Force provide considerably more details than had previously been available about the Commission's move to repack the TV spectrum.

Move? Let's stick with that analogy for a moment.

Think of the available spectrum as the empty moving van and all the TV Stations (as well as some other spectrum users) as the entire contents of your house that need to be moved. The first chore in moving is to get organized so that everything will fit in the moving van in one trip. In its recent releases, the FCC has put the entire contents of its TV spectrum house out on the driveway. They're now looking, first, at the piles of boxes and furniture and, next, at the empty moving truck. They're scratching their heads trying to figure out what pieces to start with.

So, like any good engineer, they wrote some software to help solve the problem.

The software determines how many combinations and permutations of all that stuff need to be analyzed before they can start loading the truck. The list of furniture includes: 2,177 U.S. Stations (Full service and Class A); 2,557 Canadian Allotments; 603 Mexican Allotments; 25 Land Mobile Channel preclusions; and 424 other Land Mobile (T-band) users currently operating in the TV bands. Oh, and don't forget to reserve Channel 37 for the radio astronomy listening channel (E.T.). That's a lot of stuff to pack!

The software is a new and apparently improved version of the Commission's *TVStudy* software first released back in February, 2013. The FCC solicited comments about the program and, after evaluating the numerous comments and complaints filed in response, the Office of Engineering and Technology (OET) has apparently concluded that it is going to continue to use *TVStudy* for the repacking.

In releasing its preliminary conclusions about *TVStudy* along with a considerable amount of related information, OET is trying to make good on the FCC's commitment to "transparency" as the agency works its way through the vastly complex problem of repacking (and the equally – if not more – complex problem of designing the forward and reverse auctions processes). Still, some additional explanation may help non-engineers to get a sense of just what's going on here.

How did they look at every possible repacking combination?

Step One for movers usually involves determining the dimensions of all the boxes and furniture. So, using *TVStudy*, the FCC has done the equivalent by first calculating the coverage area and population for every station (or international

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Inside this issue . . .

"Local Government Radio Service"? No thanks.

FCC Tweaks "Travelers' Information Station" Rules

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"Tune to 1610 AM for parking information." "When flashing tune to 530 AM."

We all know these signs. The FCC calls the service behind them "Travelers' Information Stations" (TIS). These are low-power AM stations permitted to broadcast only information on traffic and road conditions, travel advisories, and other information of interest to motorists. Each covers only a small geographic area, most commonly along major highways and near tourist destinations.

The FCC has made minor changes to the rules governing TIS – the first since the TIS was created in 1977.

We blogged about the proposed rules in January 2011, but the proposals go back farther, to 2008, when Highway Information Systems, Inc., proposed sweeping changes. Later that year, the American Association of Information Radio Operators (AAIRO) filed its own, more moderate, proposal. Other groups followed with a variety of ideas that included renaming the service, changing the site and power limitations, and greatly expanding the system's use.

The FCC, in the end, stuck to the middle of the road. (Sorry!) It clarified that permissible content for TIS includes weather alerts regarding difficult or hazardous conditions, plus information on a host of other emergency and non-emergency traffic and travel-related events and locations, along with any communications related directly to the imminent safety of life or property. Also permissible are certain non-travel related emergency information, including Amber Alerts and Silver Alerts, and information on the availability of 511 service (travel conditions by telephone).

The FCC rejected a call to open up TIS to any and all non-commercial content, and specifically disallowed non-emergency, non-travel information, such as routine weather information, emergency-preparedness messages, and terrorist threat levels. Reasoning that this information is widely available through other sources, the FCC concluded that broadcasting it over TIS would dilute the effectiveness of TIS in assisting travelers with geographically focused emergency information. (At the same time, however, the FCC acknowledged that some alternative sources for this kind of information, such as cell phones and mobile Internet access, should not be used while driving.) In keeping with the historical focus on serving the traveling public, the FCC turned down a requested name change to "Local Government Radio Service".

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In what should be a relief to TIS licensees, the FCC acceded to AAIRO and others who asked it, within the bounds of reason, to defer to the discretion of licensees when determining what information to broadcast. The alternative – rejected by the FCC – would have had the FCC set up strict, rule-based criteria. Licensees are equipped with better knowledge of local conditions, the FCC concurred, and are in the best position to determine what constitutes an imminent threat or emergency condition.

Perhaps the biggest change is one allowing licensees to create "ribbon" networks which broadcast the same information through multiple transmitters. This allows a licensee that operates a number of transmitters to produce some information only once. The FCC made clear, though, that all content broadcast from a given transmitter still must be relevant to travelers within the coverage area of that transmitter.

The FCC declined to make changes to the field strength limits or the site location requirements. Although it recognized some evidence of limited interference, it decided this can be resolved by cooperation between licensees and by individual license modifications where necessary.

The FCC's decision also includes a Further Notice of Proposed Rulemaking (FNPRM) on

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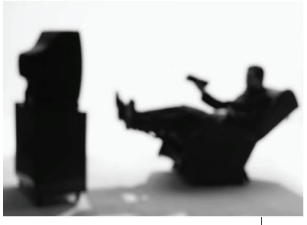
Deadline for waiver extensions is approaching

The CALM Act - Six Months and Counting



By Harry F. Cole
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Back in December, 2010, with considerable fanfare Congress passed and the President signed the CALM Act. As its full name – the Commercial Announcement Loudness Mitigation Act – indicated, it was designed to put the kibosh on "loud commercials".

The Act imposed a number of detailed technical requirements on TV licensees and MVPDs, but it also provided the opportunity for an initial one-year waiver – possibly extendible for a second year. In implementing the Act, the Commission allowed "small" stations and MVPDs essentially to have the initial one-year waiver for the asking: all that was required was a self-certification that (a) the station/MVPD met the limited standards for "small" facilities and (b) it needed the extra year to "obtain specified equipment in order to avoid the financial hardship that would be imposed" if it had to get the equipment sooner. (Check out our post on CommLawBlog for more information on those requirements.)

The initial one-year waivers will expire as of December 13, 2013.

The initial one-year waivers will expire as of the first anniversary of the effectiveness of the CALM Act rules, *i.e.*, by December 13, 2013. The Act and the rules provide that a "renewal" of the waiver for another one-year period may be obtained. Requests for the extension of the waiver must be filed at least 60 days prior to the expiration of the currently outstanding waiver, *i.e.*, by ***October 14, 2013***. (Last year the Commission extended the deadline after the fact; it's impossible to say whether it will do the same this time around, but since this is the second time around for CALM Act compliance, we wouldn't bet the farm on a similar extension this year.)

Back in 2011, when it first announced how it would deal with waivers, the Commission said the "filing requirements to request a waiver for a second year are the same as those for the initial waiver request." That seems pretty clear, but you never can tell. If you're still enjoying that first one-year waiver, it may be a good idea to focus now on whether you've got the means to acquire the necessary gear. If so, getting that process underway now may permit you to avoid the hassles of equipment shortages and backlogs as December 13 approaches. And if you still don't have the means, you'll be confident in your ability to so certify come October.

In 2011 a number of skeptics – we among them – suggested that the end result of the new law would be an increased number of complaints but not much real change, since "loudness" tends to be a subjective matter of perception which is not really susceptible to regulation. Thanks to Acting Chairwoman Clyburn's response to an inquiry from the CALM Act's sponsors, we now know that we were right on at least one count.

The number of complaints about "loud commercials" skyrocketed immediately after the rules kicked in on December 13, 2012. In the third quarter of 2012, the Commission received a total of only 192 such complaints. Fast-forward to the first quarter of 2013, where the total was 8,338. So the quarterly total rose more than 40-fold from the 3Q 2012 to 1Q 2013! Dang.

In her letter Clyburn ascribes that dramatic increase to the publicity that surrounded the new rules and the fact that, as part of its CALM Act implementation, the Commission also made available a new, easy-to-use complaint form. She observes that, in the second quarter of 2013 the number of complaints had "subsided significantly and consistently". Perhaps so, but in April, 2013 the FCC received 1,513 complaints, and in May, 2013 the number was 1,065. So in just the first two months of 2Q 2013, the Commission had received 2,578 complaints, a two-month total representing an impressive 13-fold increase over all of 3Q 2012.

According to Clyburn, several thousand of the complaints were "incomplete", but the rest are being analyzed by the Enforcement Bureau to determine whether any action may be warranted.

How exactly are the complaints being "analyzed"? Clyburn's letter gets a bit fuzzy on that point. Pulling her cards very close to her vest, she offers only that, "as with any potential enforcement activities, we refrain from disclosing any information that could compromise our work." But in a delightfully uninformative paragraph, she pretends to tip her hand ever so slightly:

> Identifying a pattern or trend requires complex and multi-dimensional analysis of the complaints. We are continually reviewing the complaints and analyzing them by MVPD, by station, by commercial-complained of, by geography, and by programmer/network, among other factors. The data provided by consumers, however, is often not sufficiently specific or consistent to facilitate reliable analysis. To improve the data, we re-examined the complaint form used for intake and identified improvements to make it easier for consumers to provide the specific data we need. However, implementing the improved

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Let's not hop to any conclusions just yet

Ninth Circuit Tosses Fox into the Hopper . . . For Now

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The TV industry has suffered some setbacks on the copyright front in the Aereo litigation in the Second Circuit and, as we have reported, the industry is keeping its fingers crossed, hoping for support from the Ninth Circuit on the Left Coast (in the pending Aereokiller appeal).

Bad news. In an unrelated case the Ninth Circuit has issued a decision that doesn't help broadcasters although, much like the Aereo decisions so far, the damage here is by no means catastrophic.

The decision involves the "Hopper" from Dish.

You may be familiar with the Hopper from its truly annoying commercials. It's the Dish satellite service's home DVR system, which includes a feature called "PrimeTime Anytime" (PTA). PTA allows a subscriber to record any and all primetime programming on any of the four major broadcast networks every night of the week. The PTA service defaults to recording all the programming, which (again by default) it saves on the user's DVR for eight days (although the subscriber can modify these defaults).

Automatic ad-skipping technology is obviously not something that commercial broadcasters cotton to.

As with most (if not all) other DVR systems, the user can start watching PTA-recorded programming right away, but if they can wait until the next morning, they can take advantage of the Hopper's main selling point: the ability to "AutoHop" over commercials, skipping them entirely, automatically. No need to fast forward through commercials – Dish has taken care of that for you.

The prospect of automatic ad-skipping technology is obviously not something that commercial broadcasters – whose existence depends on the ads that are being skipped – cotton to.

Enter Fox Broadcasting Company.

The network that first introduced the world to *21 Jump Street* filed suit in the U.S. District Court for the Central District of California, trying to ground the Hopper. Since that's the same court that has preliminarily enjoined Aereokiller (now known as FilmOn.com), you might think that the chances would be good for Fox to Arrest the Development of the Hopper technology.

Not so fast.

The same court, maybe, but two different judges. And while Judge Wu (the Aereokiller judge) was inclined to side with the broadcasters, Judge Dolly Gee wasn't. She refused to enjoin Dish from marketing the Hopper. Fox was unable to convince Judge Gee that Fox was likely to be able to prove either that the Hopper infringes (directly or secondarily) Fox programming or that the Hopper constitutes a breach of Dish's carriage agreement with Fox.

In its recent decision, the Ninth Circuit has affirmed Judge Gee.

Now that the appeals court that will rule on the Aereokiller appeal has shown no love for broadcasters, broadcasters should be scared that their victory in that case will be short-lived, right?

Again, not so fast.

Sure, there is some commonality between the Aereokiller and Hopper cases – primarily in the general sense that both call on the courts to apply 1976-vintage copyright laws to technologies that not even Scully and Mulder could have foreseen. But the specific issues in each case are distinct.

Perhaps most importantly, though, both the Aereokiller and Hopper cases – and, sure enough, the Aereo case as well – are all still at the preliminary injunction phase. As we have previously explained (in the context of Aereo), that phase is a *pre-trial* process in which one party (in all these cases, the broadcasters) try to halt the other side's operation until the trial court can hear all the evidence and arguments and resolve the litigation on its merits. The actual trial on the merits of the broadcasters' claims of infringement has not yet happened in *any* of the three cases. It's at least theoretically possible that, having picked up some cues during the arguments relative to the preliminary injunctions, the broadcast plaintiffs will be able to improve their arguments in the merits phase of the proceedings.

And let's not forget that, in reviewing a trial judge's decision on a preliminary injunction, a court of appeals is stuck with the facts as they have been developed thus far

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in the trial court. Further, the appellate court can't overrule the lower court unless the lower court committed an "abuse of discretion", an awesomely deferential standard.

Don't take our word about the importance of those caveats. Just read the Ninth Circuit opinion affirming Judge Gee. It's hard not to get the impression that: (a) the Circuit really didn't want to rule in favor of Dish here; and (b) there's hope for the broadcasters in the Aereokiller case if the three judges on the Aereokiller panel show even a scintilla of the dedication to the abuse of discretion standard as their brethren in the Hopper case.

So what did Ninth Circuit say in its decision?

Recall that Fox claimed that the Hopper infringes its copyrights and breaches several provisions in its retransmission consent agreements with Dish. Judge Gee, the trial judge, concluded that Fox had not demonstrated that it was likely ultimately to prevail on those claims, with one possible exception. The exception involves the process by which Dish processes broadcast programming for the AutoHop system.

You may have noted in our description of the AutoHop feature that it's not available until the day *after* the program has aired. Why the wait? Because AutoHop requires the intervention of Dish technicians (located, for some reason, in Cheyenne, Wyoming) who have the wonderful job of reviewing all the primetime programming and manually inserting electronic tags exactly when the commercials begin and end so the Hopper can AutoHop over them. Fox pointed out that that tagging process requires that Dish make a copy of Fox programming for Dish's own use, which would ordinarily be a cut-and-dried copyright violation. (Dish protested that the copy it makes is for "quality assurance" purposes.) Judge Gee figured that Fox will likely prevail on that claim . . . BUT, in order to get a preliminary injunction, Fox would also have to demonstrate that the infringement would cause it "irreparable harm". Gee wasn't satisfied that Fox would suffer such harm here.

On appeal, the Ninth Circuit held that Gee had not abused her discretion in holding that Fox hadn't shown either that it was likely to win on the copyright infringement and breach of contract claims or that it was likely to suffer irreparable harm from continued creation of "quality assurance" copies. In so doing, though, the Circuit panel repeatedly emphasized the narrowness of its focus (thanks to the deferential "abuse of discretion" standard of review) and the consequent narrowness of the overall decision.

Addressing the question of whether Dish's PTA service is directly infringing Fox's copyrights, the Circuit agreed with Gee that Dish's mass copying of Fox's programs was akin to the copying in the Second Circuit's 2008 *Cablevision* case (yes, the same *Cablevision* successfully relied upon by Aereo). In both cases, the key question is "who is making the copy"? And in both cases, the courts concluded that the answer is the viewer, not the technological system. Since we know (from the Supreme Court's *Betamax* decision from the early 1980s) that individual audience members are entitled to record programming for their own personal use, the PTA service did not constitute infringement.

Whether that determination will survive after a full evidentiary trial remains to be seen. It's important to keep that in mind because even Gee acknowledged that Dish's PTA service went well beyond the system approved by the Second Circuit in *Cablevision* in terms of Dish's "exercise of control" over the recording process. She found that "Dish decides how long the copies are available for viewing, Dish maintains the authority to modify the start and end times of the primetime block, and a user cannot stop a copy from being made once the recording has started."

AutoHop requires the intervention of Dish technicians.

Curiously, that wasn't enough to convince Gee that Dish doesn't exercise control of the recording process. The Ninth Circuit, in full deferential mode, accepted her conclusion with the less than ringing endorsement that "the District Court did not err" (as opposed to, say, "we wholeheartedly agree with the District Court").

The Circuit's affirmance of Gee's ruling on the secondary infringement issue was also hardly solid as a Roc. Fox's theory on that point is that, even if Dish isn't infringing Fox's programming, Dish users are, and Dish is contributing to that infringement. But Gee found that the end users – *i.e.*, the viewers – were engaging in mere "time-shifting", which is a "fair use" of the programming (thanks to the Supremes' *Betamax* decision), so no infringement appears to be occurring. If anyone is aggrieved by the AutoHop process, according to the courts, it should be the advertisers whose commercials are being hopped.

In terms of Shaky Ground, though, Dish's initial success on Fox's breach of contract claims appears to be the shakiest of all. Fox had argued that its deals with Dish prevented Dish from recording, copying or duplicating Fox programming or distributing it on an interactive, time-delayed, video-on-demand basis or the like.

In Gee's view, if anybody was engaging in such conduct, it was Dish's customers, not Dish itself. And the Ninth Circuit didn't find enough in the lower court's record to

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FHH - On the Job, On the Go

On July 17, **Kathy Kleiman** appeared as a member of the "Closed Generics" panel at ICANN 47 in Durban. (Yes, that would be the Durban in South Africa.) But hold on there, she wasn't *really* in Durban – that was just her voice and image, thanks to the magic of Skype. Still, it's closer to Durban than many of us have ever gotten.

Frank Jazzo will be a panelist on the "Legal, Regulatory and Legislative Session" on August 7 at the annual conference of the Tennessee Association of Broadcasters in Murfreesboro.

And the next day, **Harry Cole** will participate on a panel discussing recent regulatory developments at the Texas Association of Broadcasters Convention and Trade Show in Austin.

Scott Johnson will also be at the Austin shindig, as well as the South Carolina Broadcasters Television And Radio (STAR) Awards event in Columbia on August 9-10 and the Alabama Broadcasters Association Convention August 16 -17 in Birmingham.

As we have previously reported, **Matt McCormick** will be speaking at the Nebraska Broadcasters Association Convention, which will be shaking up Omaha on August 14-15. **Matt**'s scheduled to appear on the Legal Session set for August 15.

If you're planning on attending the NAB Radio Show in Orlando from September 18-20, count on seeing a crew from Fletcher Heald. **Kathleen Victory**, for one, reports that she'll be there. We'll provide a complete roster of all FHH attendees in next month's *Memo to Clients*.

You've read his blog posts – now you can hear him in person, sort of. Our colleague (and CommLawBlog regular) **Mitchell Lazarus** will be sharing his expertise on seeking FCC approval for new radio-based technologies in a September 25 webinar. Titled "What to Do When the FCC Says No", it's billed as a webinar for wireless device developers confronting the question, "What should technology companies do when developing a new device to assure it can be placed on the market legally?" The affair is sponsored by Washington Laboratories, Ltd. It's not free ($149 per person; site license also available), but Prof. Lazarus assures us that technology companies should find it well worthwhile.

And finally, there's **Kevin Goldberg**. Forget your Orlandos, your Austins, your Omahas, your Murfreesboros. From August 11-17, **Kevin**'s going to be participating in a program on Access to Information and Freedom of the Press in the Maldives and Sri Lanka. (Yes, those would be the Maldives and the Sri Lanka in the Indian Ocean.) **Kevin** assures us that he will *not* be participating by Skype.

FOX vs. dish

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reverse her on that point. The Circuit did observe that Fox's contractual claims – specifically as to whether Dish was distributing the programming – were at least "plausible"; however, so too was Judge Gee's take on those claims, so that darned "abuse of discretion standard" standard carried the day again. Significantly, though, the Circuit emphasized that it was expressing "no view on whether, after a fully developed record and arguments the district court's construction of 'distribute' will prove to be the correct one."

Again, it'll be important to see how the full trial-on-the-merits shakes out before declaring any final victors here.

Fox also argued that Dish's operation violated a contractual bar against fast forward functionality in a VOD service. In the District Court, Judge Gee held that, if PTA were a VOD service, it would indeed be a contract breach. But Gee somehow concluded that, while having some VOD elements, PTA is more akin to a DVR service. And on that point, the Ninth Circuit was as close to Undeclared as it could be: "The district court's finding that [PTA] was more akin to a DVR than to video on demand was not clearly erroneous".

Finally, the Ninth Circuit agreed with Gee that Dish's "quality assurance" copies were likely to constitute copyright infringement, but it also agreed such infringement would not irreparably harm Fox (since, if it ultimately prevails, Fox could be adequately compensated via monetary damages).

Bottom line: PrimeTime Anytime and the Hopper will remain in operation and the case goes back to Judge Gee for further proceedings. Fox could seek en banc review from all the judges on the Ninth Circuit but we saw how well that went for the broadcasters in the Aereo case. Given the Firefly-level energy radiating from the Ninth Circuit's opinion, I suppose there may be hope that the full 27-judge Court would step up and reverse the District Court. But let's get real – it's far more likely that Fox's best chance lies in building a full record before the District Court, especially on the breach of contract claims. With a better factual record, the network should have a much better idea as to whether it will be Grounded for Life or whether, like Parker Lewis, it Can't Lose.

But the broadcast ban persists

Foreign Ownership Rules Loosened For Common Carrier and Aeronautical Licensees

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While Congress continues to debate fundamental issues of immigration policy, the FCC has taken steps to make it considerably easier for aliens to own controlling and non-controlling interests in common carrier and aeronautical stations. The odd result is that aliens can now own such licenses but may find it difficult to immigrate here to operate them. And, oddly enough, the newly relaxed rules do ***not*** apply to broadcast licenses.

As we reported when the FCC initially proposed changing its alien ownership rules, the impetus for the FCC's Second Report and Order (*Second R&O*) was two-fold. First, the Commission recognized that its cumbersome alien-ownership approval process was impeding foreign investment in the United States at a time when capital investment is being strongly encouraged. Second, the process of trying to identify exactly who a company's foreign owners are and where they are from can be difficult, if not impossible. The Commission and its regulatees found that they were spending inordinate amounts of time and money trying to ascertain where alien owners were from for purposes of the rules without any concomitant public benefit for the effort involved.

The disparate treatment of broadcasters is coming under increasing attack.

While the new rules retain the basic structure of requiring prior FCC approval for aliens either to: (a) indirectly control a US common carrier licensee, or (b) own more than 20% of a licensee company, they greatly simplify the procedures and detailed ownership accounting that created so much wasted effort. We hasten to emphasize that the rules continue their very strong prohibition on alien ownership or control of broadcast licensees above the benchmark levels, even though those licenses are statutorily eligible for the same treatment as common carrier and aeronautical licenses. This disparate treatment is coming under increasing attack, most directly by Commissioner Pai. For the time being the disparity remains firmly in place, although the Commission has invited comment on a request for "clarification" of limitations on alien ownership of broadcast licensees.

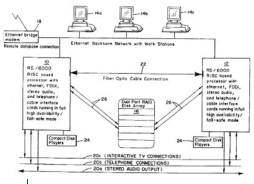
Here are some of the highlights of the new rules:

- The FCC is eliminating the distinction between aliens from World Trade Organization (WTO) countries and those who are not. It seems to have consumed considerable resources of the FCC and parties involved to try to determine which aliens in a company's structure were from WTO countries and which were not. The FCC has dropped that distinction but has retained its requirement that all foreign investment be subject to an "open entry standard". The Commission did not really discuss what this meant, but in the past the FCC has used this term to refer to whether the alien's home country provided open entry to U.S. investment – absent such reciprocal investment opportunities, the U.S. would look unfavorably on the alien being allowed to invest here. The WTO membership standard was a shorthand means of reaching that conclusion because all WTO members were presumed to allow such reciprocal opportunities. It is unclear how dropping the WTO criterion but retaining the underlying "open entry" requirement simplifies things, since the Commission would still need to determine whether, in the cases of non-WTO member aliens, their countries allow open entry.
- The procedures now permit named alien entities to be approved for increasing ownership levels in the future without the need for new approval.
- The requirement that ownership interests below 5% be identified and tracked has been eliminated. This feature alone eliminates a lot of paperwork for what were truly *de minimis* interests.
- The rules permit other subsidiaries and affiliates of the approved alien-owned company to benefit by an approval of their parent or affiliate.

The FCC estimates that these reforms will reduce the number of required alien ownership filings by a whopping 40% to 70% and will simplify those filings that do need to be made. The Commission emphasizes, though, that government agencies charged with investigating foreign ownership will continue to have the opportunity to perform that function in the context of either application approvals or requests for declaratory rulings.

Significantly, the Commission reiterated its position that companies must obtain permission either via the forbearance approach for ownership by aliens of significant non-controlling interests or by other FCC approval for alien control of these entities, *before* the alien ownership reaches the pertinent 20% or 25% threshold. It also stressed that different approvals are required under the forbearance approach (applicable to non-controlling interests) and the standard approach (for controlling interests). This leaves in question the peculiar situation of Verizon Wireless, which did not obtain the requisite approvals before Vodafone acquired a greater-than-20% non-controlling interest in it.

The new rules adopted in the *Second R&O* are currently set to take effect on August 9.



Shrewd move or last gasp?

Mission Abstract Update: Queen Sacrifice or Path to Broadcaster Checkmate?

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Today's metaphor is chess – more specifically, the queen sacrifice, a strategy in which a player gives up a strong piece in the hope of gaining some compensating tactical advantage. What does this have to do with the long-running patent infringement lawsuit being pressed by Digimedia (formerly known as Mission Abstract Data) against a number of prominent radio broadcast groups, or with Digimedia's related efforts to convince other broadcasters into signing licensing agreements?

Digimedia may have made its own queen sacrifice . . . or it may just be bluffing to stall for time.

When last we checked in on the Digimedia situation in March, the United States Patent and Trademark Office (USPTO) had issued a Notice of Intent to Issue Reexamination Certificate (NIRC) effectively affirming the patentability of some, but not all, elements of Digimedia's 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). Lately you may have read that the USPTO on July 8 issued a further NIRC affirming the patentability of some, but not all, elements of the 867 Patent, too. This latest action follows a second reexamination proceeding regarding the 867 Patent.

If claims 4 and 5 are so important, why would Digimedia relinquish them?

Sounds like the tide has turned in Digimedia's favor, doesn't it? Certainly a number of press accounts have suggested that the USPTO's latest decision is a blow to broadcasters and a victory for Digimedia.

We're not so sure.

As we've said many times in the past, we here at the *Memo to Clients* are ***not*** patent attorneys. But you can't be involved in an issue for more than two years without picking up a thing or two along the way. One thing we expected was a further USPTO ruling on the 867 Patent sooner or later. Despite the fact that the March USPTO action was termed a "final rejection" of the 867 Patent, Digimedia still had an opportunity to seek further review, which it did. And as we suggested last March, it seemed clear that at least *some* aspects of the 867 Patent were likely to survive – the big questions were how much of Digimedia's patents would be left when the dust settled and how great a threat (if any) would they pose to broadcasters.

Our initial review indicates that the 867 Patent, as reissued, may not be all that strong. In its response to last March's USPTO decision, Digimedia amended some claims in the 867 Patent – and in so doing acceded to the cancellation of Claims 4 and 5 of that patent. Again, we're not patent lawyers, but from what we understand, those were not insignificant claims and their removal constitutes a marked change in the breadth of the 867 Patent.

You're probably asking the same question we did: If claims 4 and 5 are so important, why would Digimedia relinquish them? Consider this. The 867 Patent is valid only until May 13, 2014. The clock is ticking in terms of Digimedia's ability to leverage the patent. Meanwhile, the main lawsuit filed against larger broadcasters in the U.S. District Court for the District of Delaware has been stayed since November, 2011 and wasn't going to be lifted until the USPTO reissued both of Digimedia's patents in some official form. If you're Digimedia, you're pinned down, unable to rattle your litigation saber (for whatever good that might do), and time is running out. What do you do?

Maybe you play the queen sacrifice: give up a major piece to get more in return.

As hard core chess aficionados among us realize, there are actually two types of queen sacrifice: the "real" sacrifice and the "sham" sacrifice. The "sham" sacrifice is not a sacrifice at all; rather, the "sacrificer" expects an immediate return from the move (checkmate, the ability to take multiple important pieces from the opponent, etc.), so the loss of a queen is really no big deal. By contrast, the "real" sacrifice is a longer term play by which the "sacrificer" is looking for some eventual strategic benefit.

So which is this? Perhaps, as is often the case in chess itself, there are elements of both. Sacrificing Claims 4 and 5 was likely to – and did – result in the USPTO granting the reexamination proceeding in short order. That, in turn, was likely to result in an immediate lifting of the stay in the Delaware court. (Digimedia has already notified the court there of the USPTO action and has asked that the stay be lifted.) So was Digimedia's sacrifice really a sham, intended to assure the re-opening of the Delaware litigation?

Maybe, but that's hardly the equivalent of an immediate checkmate. The broadcaster/defendants in the Delaware suit have been litigating that case hard for a couple of years already. They're not likely to throw in the towel now, particularly if they sense that Digimedia's patents may have been rendered largely harmless thanks to the USPTO's repeated reexaminations.

But if the sacrifice here is a "real" sacrifice, Digimedia may be looking for a longer term, less direct, result. Digimedia may be figuring that it can spin both the reissuance of its patents and the lifting of the Delaware stay to its advantage

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Google Becomes Third Approved "White Space" Coordinator

Providing us with the first test of our our new approach (announced in last month's *Memo to Clients*) to further developments on the white space database administrator front, the FCC has approved Google's system. We have updated our table accordingly.

Coordinator	Test Started	Test Finished; Comments Sought	Coordinator Approved
Comsearch			
Frequency Finder Inc.			
Google Inc.	Feb. 27, 2013	May 29, 2013	**June 28, 2013**
LS telecom AG	June 18, 2013		
Key Bridge Global LLC	March 4, 2013	May 29, 2013	
Microsoft Corp.			
Neustar Inc.			
Spectrum Bridge Inc.	Sept. 14, 2011	Nov. 10, 2011	Dec. 22, 2011
Telcordia Technologies	Dec. 2, 2011	Feb. 1, 2012	March 26, 2012
WSdb LLC			

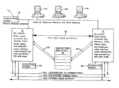
Another Memo to Clients sidebar!

Broadcasters Eager to Have Digimedia Bring It On

As reported in the article on the preceding page, immediately after the USPTO issued the NIRC regarding the 867 patent, Digimedia (f/k/a Mission Abstract Data) asked the judge presiding over its Delaware patent infringement case to lift the longstanding stay on that case. The judge in turn asked the broadcaster/defendants to respond to that request, which they did. Here is their response.

Essentially, the broadcasters seem eager to get the case moving, too – because they apparently figure that the USPTO's actions, and the passage of time, have largely gutted Digimedia's case. The letter lays out a reasonably clear path forward – a path which takes the broadcast defendants directly to No-Liability-Ville. Of course, whether the case eventually follows that path remains to be seen but, as we ourselves (who aren't patent lawyers, mind you) mentioned in the March *Memo to Clients*, the mere fact that Digimedia may have obtained some kind of ruling from the USPTO does ***not*** necessarily mean that Digimedia can or will prevail in its lawsuit. There are still plenty of questions to be answered, and the broadcasters' letter suggests that the answers aren't likely to be helpful to Digimedia.

We'll try to keep you updated as developments warrant. In the meantime, we remind any of our readers who may have been approached by Digimedia to be sure to run all this past knowledgeable patent counsel before deciding how to proceed.



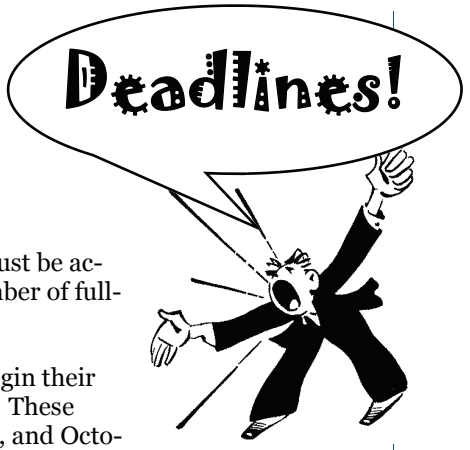
(Continued from page 8)

by launching a new round of high-pressure solicitations to broadcasters regarding the licensing agreements. We won't be surprised to see this before long.

How should broadcasters respond if and when those calls and FedEx packages start arriving again?

Since we don't give legal advice here at the *Memo to Clients*, you're on your own. As we have repeatedly urged, any broadcaster approached by Digimedia should consider consulting with an honest-to-goodness patent attorney. Whatever remains of Digimedia's patents should be carefully reviewed in the context of each broadcaster's own particular equipment configuration.

And remember, it's a chess match – a speed chess match, actually – and Digimedia has less time left on its clock than you do. Take your time and reflect carefully before making your next move (and make sure that move is right for you, not just what you think everyone else would do). And remember that everything may not be as it seems: Digimedia's most recent move may not have been a Queen Sacrifice of any kind; rather, it may have been a last-ditch effort to avoid a stalemate that would be fatal to Digimedia's hope for ultimate success. It remains to be seen whether Digimedia's move will achieve that goal, or whether that move will simply accelerate checkmate for broadcasters.



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. 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 licenses. 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.

August 6, 2013

Media Ownership – Reply Comments are due with regard to the MMTC study entitled *The Impact of Cross Media Ownership on Minority/Women Owned Broadcast Stations*.

August - September

Annual Regulatory Fees – While we do not have an exact due date as yet, this is a reminder that annual regulatory fees will be due from all non-exempt broadcasters, satellite earth station licensees, cable systems, and other FCC licensees at some point in the August to September time frame, and the due date most likely will be at least a couple of weeks before the end of the fiscal year on September 30. The fees will cover Fiscal Year 2013, which began on October 1, 2012, and will

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end on September 30, 2013.

October 1, 2013

Radio License Renewal Applications – *Radio* stations located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, the **Mariana Islands**, **Oregon** and **Washington** 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 **Iowa** and **Missouri** 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 **Alaska**, **American Samoa**, **Guam**, **Hawaii**, the **Mariana Islands**, **Oregon** and **Washington** must begin their post-filing announcements with regard to their license renewal applications on October 1. These announcements then must continue on October 16, November 1, November 16, December 1, and December 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.

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Radio License Renewal Pre-Filing Announcements – *Radio* stations located in **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** must begin their pre-filing announcements with regard to their applications for renewal of licenses. These announcements then must be continued on October 16, November 1, and November 16.

Television License Renewal Pre-filing Announcements – *Television* and *Class A television* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota** and **South Dakota** must begin their pre-filing announcements with regard to their applications for renewal of licenses. These announcements then must be continued on October 16, November 1, and November 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 **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, the **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands** and **Washington** 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 **Iowa** and **Missouri** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

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form has been and continues to be delayed by lack of funding due to the Commission's reduced budget and the belt-tightening associated with sequestration.

This doesn't really tell us anything, although props to the Chairwoman for that last sentence in the quote, which deftly dumps any continuing problems back into Congress's lap.

We expect the Commission may provide further guidance as the deadline for waiver renewal requests gets nearer. Check back with CommLawBlog for updates.

In some cases, apparently not . . .

Will LPFM Applications Have to Protect Amended FM Translator Applications?

By Harry F. Cole
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703-812-0483

If you've got an FM translator application in one of the mutually exclusive (MX) groups identified by the Commission back in May and you amended your technical proposal to resolve the mutual exclusivity prior to the July 22 deadline for such amendments about which we alerted you in the May *Memo to Clients*, there's something you should know.

It appears that the folks in the Audio Division believe that any such technical amendments to pending translator applications filed on or after June 17 will ***NOT*** (repeat, ***NOT***) be entitled to protection from LPFM applications filed during the next window opportunity. As we have previously reported at CommLawBlog, that next LPFM window is set to open on October 15 and close on October 29.

This possible lack of protection may come as a surprise to many. After all, when the Commission invited such technical amendments back in May, it did not even hint (much less state outright) that amendments filed in response to that invitation might not be entitled to protection. And it certainly didn't suggest that amendments filed by June 16 (*i.e.*, within the first half of the amendment window, which stretched from May 22 to July 22) might be entitled to more protection than those filed after June 16. But from informal contacts with members of the Audio Division staff, we have heard that that's how they're planning to handle things, at least as of now.

The possible lack of protection may come as a surprise to many FM translator applicants.

The issue about protection for after-filed LPFM applications has arisen thanks to the Division's June 17 public notice announcing the October LPFM window opportunity. As we reported back then, that notice provided that LPFM applicants would have to "protect pending applications" for full-power, FM translator and FM booster authorizations "that were filed prior to the date of the notice [*i.e.*, June 17]". You might think from that language that any to-be-filed LPFM applications would have to protect FM translator applications filed ten years ago, even if those translator apps might have since been amended to facilitate a grant.

The Audio Division, apparently, doesn't see it that way.

As best we can figure – and, bear in mind, nobody at the Commission has yet bothered to provide any authoritative clarification of any of this – when the June public notice referred to "pending applications . . . filed prior to the date of the notice", what it *really* meant was "facilities specified as of June 16 in any pending applications".

The language of the June 17 public notice, of course, doesn't support that reading – it speaks only of applications, *not* particular facilities. (Ditto for the rule it's based on.) Whether or not an application is said to be "pending" ordinarily does not depend on the particular facilities specified in the application. (The only situation where that would not be the case would be if a "major amendment" is filed, requiring the application to be assigned a new file number reflecting the date on which the amendment was filed. Since the FM translator amendment window appeared to contemplate only minor amendments, that exception shouldn't be of concern here.)

The Division's apparent position is especially odd in view of the May 21 public notice, where the Commission advised translator applicants that the door for technical amendments would be wide open through July 22. If such amendments – or, more accurately, some but not all of such amendments – weren't going to get full protection from later-filed LPFM applications, why wasn't that made clear up front? Also, don't *Ashbacker* and its early descendant, *Kessler*, indicate that timely-filed (*i.e.*, by July 22) translator proposals should be entitled to comparative consideration as against other timely proposals including, presumably, LPFM applications?

While the most immediate impact of the Division's interpretation would fall on translator applicants contemplating technical amendments in response to the May 21 invitation, that interpretation would also affect other translator applicants and even full-service licensees.

The May 21 invitation, after all, was addressed only to MX applicants. But the FCC still hasn't cleared the way for a boatload of translator applications, previously identified as singletons, to move forward in the application process. Those applications were all filed more than ten years ago. As a result, the odds are overwhelming that the technical specs of many, if not most, will need to be amended. Does the Commission sincerely believe, for example, that every transmitter site specified in 2003 is still available and/or suitable for use a decade later?

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So the Commission can and should expect a lot of those singleton applications to need to be amended, but it hasn't yet permitted any amendments. As a result, under the Division's apparent position, any such amendments will *not* be entitled to protection from LPFM applications to be filed during the upcoming October window unless the amended facilities remain within the protection umbrella of the original proposal. (That would mean no channel change or increase/shift in signal coverage.) Is it really fair to subject those singleton applicants to a ten-year delay and then, just steps from the Promised Land, force them to continue to sit idly by while the gates are opened to LPFM applications that end up slamming closed those same gates on the still-outside-looking-in translator applicants?

And was it fair to force folks with more than 50 translator applications to pick and choose which they would forego without letting them know in advance that amendments to their surviving applications would not be entitled to protection from later-filed LPFM applications?

Is it really fair to force singleton applicants to sit idly by while the gates are opened to LPFM applications?

And beyond fairness, there's just plain silliness. As the Division seems to see things, upcoming LPFM applications won't even have to protect full-service applications filed after June 16. Really? Since full-service stations are deemed to be "primary", by definition they trump such secondary services as LPFM. So why should *any* full-service amendment take a back seat to any LPFM application, ever? Indeed, even if a full-service licensee filed a mod application now and an LPFM application in October didn't protect it, it seems that the full-service licensee could simply dismiss its pre-October filing and re-submit it after the close of the LPFM window.

Such a re-filed application would ordinarily be entitled to protection from LPFM applications (again, a secondary service must make way for a primary service), so any conflicted LPFM application would be out of luck. If that's the case, why bother to create the pleasant illusion for LPFM applicants that, somehow, some way, they may be able to get the better of full-power stations? Under the Division's apparent theory, everybody ends up doing a bunch of work that could easily be avoided.

The Division's apparent approach would also have the undesirable effect of injecting considerable confusion and uncertainty into the LPFM process. The Commission has worked hard to sort out the Rubik's cube of FM translator and LPFM applications, and appeared to be making excellent progress in resolving the ten-year-old translator mess before giving LPFM applicants the green light. By suggesting that LPFM applicants can ignore translator mods proposed after June 16, the Division would be opening itself up to a host of potential challenges that could tie up significant chunks of the LPFM and translator application processes for more years to come. That would appear to be precisely what the Commission should ***not*** want to happen.

We understand that, in conversations with various lawyers and consulting engineers, members of the Commission's staff have optimistically indicated that they don't expect many problems to arise. We should all hope so. But bear in mind that, according to some reports, back in 2003 the staff didn't expect to receive more than 2,000 or so translator applications; they ended up receiving more than six times that many. Some folks expect at least that many LPFM applications will be filed in the October window – one estimate we have heard gets the number up to 100,000 or more. (Given efforts being made by LPFM cheerleaders to encourage applications in the window, and given also the more-than-ten-year hiatus since the last LPFM filing opportunity, we don't think that 100,000 estimate is far-fetched.) If anywhere near that number are ultimately filed, is it really reasonable to think that only a small handful of problems will arise?

Division staffers have also suggested that MX FM translator applicants should proceed without regard to the LPFM window – that is, they should go ahead and file their technical amendments by July 22. The staff has assured that they expect to be very accommodating if and when conflicts arise between amended translator apps and LPFM proposals. They have also indicated that they plan to continue to process routine FM translator applications not involving those still pending from the 2003 window.

That's much appreciated, and if the number of conflicts turns out to be minimal, that may do the trick. But individualized case-by-case resolution of problems will be less helpful if there are scads of conflicts. And we still don't know how translator applications filed after June 16 and granted before the LPFM window will be affected by later-filed, potentially MX LPFM applications. Will their construction permits be subject to conditions? We don't know.

Again, at this point we have no formal confirmation from the Division, the Bureau or the Commission as to exactly how it will in fact deal with protection issues when the LPFM window opens. We have, though, had enough conversations with the staff, and been advised of other such conversations, that we figure it's important to alert all parties of what we have heard. Of course, as developments warrant we'll try to keep our readers up to date. Check back with CommLawBlog for updates.

(Continued from page 1)

allocation) in the U.S., Canada, and Mexico. The FCC started by dividing much of North America into little 2 km blocks and counting the people in each block. For every TV station, they calculated the coverage at every block within every station's protected contour. Then they calculated interference from all the other stations in each block. After removing the interference blocks, what was left was the interference-free coverage and population for each television station in the country. That became the baseline population for each station.

Step Two. Narrow down the number of channel/station combinations. Use all the international and land mobile constraints (don't forget E.T.) to determine a list of channels (2 to 51) on which each station could potentially operate. The resulting list of stations and potential channels determines the starting point for an allocations scheme.

This exercise provided interesting results. For example, a preliminary version of the resulting list shows the critical locations in the U.S. where the number of available channels is severely limited. [*Editor's Tip: It has come to our attention that the link in the preceding sentence, and a couple of others below, take you to "csv" files that may open up in your browser as plain text files consisting of a bewildering bunch of numbers seemingly indecipherable unless you happen to own the secret decoder ring they hand out to engineering school graduates. Prof. Rhodes assures us that these csv files – that's apparently engineer-ese for "comma separated value" – are supposed to be opened in Excel "relatively painlessly".*] We expected this to be in the Northeast – and, sure enough, we were correct. A handful of stations in western New York and Vermont have only one or two possible channels available after everything else is culled out. There are also a few stations in south Texas, Washington State and Maine with only a handful of available channels.

Instead of calculating every station on every channel relative to every other station, the FCC came up with a clever short cut.

Step 3. Find the Pairs. In order to repack stations, the FCC needs to determine which stations could not operate on co-channel and first adjacent channels to each other. Instead of calculating every station on every channel relative to every other station, they came up with a clever short cut. Using only three channels called "Proxy Channels" (a Lo-VHF, a Hi-VHF, and a UHF channel – in this case Channels 3, 10, and 20, respectively), the Commission calculated whether stations could operate on the same or an adjacent channel. If operation on these channels was predicted to cause interference to more than 0.5% of the baseline population of the desired station, it was added to the Interference Paired list. [*Editor's Tip: This link takes you to another "csv" file. You have been warned.*] The Technical Appendix is not clear on how the Proxy Channel facilities relate to a station's actual facilities (*i.e.*, how the software calculates the power level used for a VHF proxy of a UHF station.) But for the time being we won't worry about that.

You may ask why the FCC is calculating station pairs in the Lo-VHF band or UHF station coverage in either VHF band. The Technical Appendix (footnote 21, to be precise) addresses this issue. While the Spectrum Act does not permit stations to be involuntarily relocated to a lower band, some stations could offer to voluntarily relocate in exchange for a piece of the auction proceeds. In case this happens, the FCC is ready to evaluate that request.

Let's try a short example. For a given station – we'll call it WAAA – we find all the TV stations that might be near enough to cause interference to that station (*i.e.*, WAAA). Then we analyze every station individually paired with WAAA as if it was operating cochannel, then again on an upper adjacent channel to WAAA, and once more on the lower adjacent channel. Let's first run WAAA on Channel 20, the "proxy channel" for all of UHF. First interferer on the list is Station WBBB.

Start with the UHF option. WAAA's coverage as a Channel 20 station is predicted in *TVStudy* against interference from WBBB also operating on Channel 20. If WBBB would create interference to more than 0.5% of WAAA's baseline population (from Step 1), we record this combination (WAAA & WBBB cochannel on UHF) as "prohibited". Change WBBB to first adjacent Channel 19, rerun it and analyze the result. Can they coexist on adjacent channels with no more than 0.5% interference? Next run WBBB on Channel 21. Same question: does the WBBB operation meet the interference threshold or not? In each case, if prohibited interference is caused, we record the failed stations and channel relationship.

Then move WAAA to the next proxy channel, Channel 10, and do the same thing with WBBB (on Ch 10, then 9, then 11), and again on Channel 3 (with WBBB on 2, 3, and 4).

Then we go to the second station in the list of stations near WAAA and run it through the same process on Channels 3, 10, and 20 with WAAA as our desired station. Nine studies for each pair of stations. Wash. Rinse. Repeat.

The end result of this process is a list of stations with a corresponding list of stations that will not work on co-

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(Continued from page 14)

and/or first adjacent channels if they were operating in each of the three TV bands. (*Editor's Note: Heads up! The list consists of a spreadsheet with more than 25,000 channel pairings . . .* ***and*** *it's a csv file, to boot.*)

Of course, this is all based on some preliminary assumptions made by the OET staff. As OET appropriately emphasizes, final decisions about the parameters that will be used for the actual repacking process will be made by the full Commission . . . although, in making those calls, the full Commission will almost certainly be taking its cues from OET. But we digress.

So what can we do with all this transparent information?

While it's nice that the Commission has given us all this access to the sausage-making process, what are we to do with it?

First and foremost, TV Station licensees should check to see if the facilities being used in these repacking studies are the correct ones. For full service TV stations, this should be the facility that was licensed on or before February 22, 2012. There's no reason to suspect the Commission got the wrong data but it doesn't hurt to check, because let's face it, accidents do happen. Class A stations (and full service stations with incoming interference from a Class A stations) should take note. The Class A facilities used were also from the February 2012 database, although the Spectrum Act allows for protection of Class A facilities licensed as of a yet to be determined date in the future. You can check the facilities used for any particular station by perusing the FCC-provided report which includes a lot of interesting statistics (if you're a math major). Along with the statistics, Appendix A of the report (which runs from page 20 to page 48) shows coverage contours for each station on a large US map for each channel in the TV band. Appendix B, starting on page 49, lists all the television facilities and their pertinent details (power, height, and FCC File Number, etc.) included in the study.

OET stresses that this is ***NOT*** *the final version.*

Second, using *TVStudy*, you – or, more likely, your preferred engineering consultant – should independently calculate the coverage and interference of your station(s) based on the current set of FCC assumptions. The interference-free population and coverage calculated by this software will determine the baseline or starting point for relocated stations. (The FCC has provided the results of their sample study as well.) Running *TVStudy* is not for the faint of heart (or the technologically challenged) – it requires decoding several gigabytes of data and importing it into a GIS program, which is not a trivial task. Nevertheless, the program, the input data, and some sample results have been made available here for us to use. The FCC has even included a template for viewing the results in an open source GIS program.

Third, if you are so inclined, use the tables the FCC has provided to run scenarios on what stations may change channels and where they might go. That isn't trivial either. However, now that we have an indication how the FCC will perform the preliminary repacking analysis, it becomes a little clearer to see how various repacking scenarios can be developed by the FCC, the broadcasters, and the wireless industry.

As complicated and seemingly well-developed as all this may seem, OET stresses that this is ***NOT*** the final version. The facilities included in the study were "intended for illustrative purposes only". Moreover, "some assumptions had to be made about which facilities to include for protection". Still, we applaud the OET staff for making the effort to publish the methods and data used in this process.

Back to our moving van analogy.

Now we know everything that might need to be packed in the truck, and we have a preliminary idea of which combinations might work and which probably won't. But wait, there's more. We will still need to factor in wireless spectrum which, in some areas, will probably require some television stations choosing to stay behind to move to a different location on the spectrum (*i.e.*, to the VHF band). In other words, we're still a considerable ways away from any final determinations of how we're going to pack the truck. Indeed, the questions of how much spectrum (and which stations) should get repacked are likely to remain a moving target for some time. But at least the FCC has created a tool to help along the way . . . and it has shared that tool with us so that we have a better understanding of the way it works and also so that we may be able to assist in honing it to provide the best possible results.

(Continued from page 2)

whether to drop the present requirement for filtering TIS audio frequencies above 3 kHz. The filtering gives TIS broadcasts a "low fidelity" quality, sounding more like a telephone than a radio broadcast. The rule is intended to limit interference, but some parties say it is ineffective and reduces intelligibility.

Check back with CommLawBlog for comment deadlines relative to the FNPRM.

[*Editor's Note:* FHH represents parties in this proceeding.]

Image obtained from www.aereo.com

Still no decision on the merits

Aereo Update: Second Circuit Nixes En Banc Review

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Put another one in the "W" column for Aereo. The Second Circuit has denied the petition for *en banc* review filed by the broadcast plaintiffs last April.

It may be some comfort to the broadcasters that the Court's decision technically did not address the merits of the case. That's because of the nature of *en banc* procedures. As we previously summarized that process, when a petition for *en banc* review is filed, the petition is circulated to all the active judges on the Circuit. If any of them asks for a vote to be taken on whether or not to grant *en banc* review, then all the active judges are polled. Note that they're not polled on the bottom line substantive issue(s) involved; rather, they're just polled on the limited question of whether the Court should agree to let the parties slug it out before the full Court.

In this case, one active judge (we're guessing that was probably Judge Chin) did ask for a vote, and the bottom line was 10-2 in favor of *not* reviewing the earlier panel decision. So there will be no *en banc* review.

Judge Chin's dissent provides a road map to the Supreme Court.

It should come as no surprise to folks who have been following the Aereo case that the two judges who dissented – that is, the two who wanted the Court to take on the case *en banc* – included Judge Denny Chin. (The other dissenter was Judge Richard Wesley.) Judge Chin, of course, is the judge who dissented from the panel decision in the Aereo case in April. And before that, Judge Chin presided over the trial of the *Cablevision* case. He held for the broadcasters/program producers in that case, but was reversed by the Second Circuit in 2008, in a decision that his two colleagues on the Aereo panel relied on extensively.

Judge Chin's 30-page dissent provides the broadcast plaintiffs yet another road map to the Supreme Court. He again takes pains to lay out, in detail, all the reasons why Aereo's arguments don't, or shouldn't, hold water. The fact that he has thus far been unable to persuade any of his colleagues (other than Judge Wesley, apparently) of the soundness of his views does not appear to have weakened his commitment to those views.

So where do we go from here?

The broadcasters have a choice. Bear in mind that the Second Circuit's April decision concerned the trial court's denial of preliminary injunctive relief. That means only that Aereo was permitted to continue to operate while the trial itself went ahead. The trial is indeed going ahead – it's still in the discovery phase (which is currently set to wrap up at the end of October) – although Aereo has sought summary decision. In other words, at this point the parties are still probably months away from any disposition on the merits of the broadcasters' claims in the trial court.

That being the case, the broadcasters might opt to take no further action in response to the denial of their initial *en banc* effort, and instead press forward in the trial court, seeking perhaps to assemble a stronger factual showing than before.

Alternatively, the broadcasters might decide to seek Supreme Court review of the Second Circuit's April decision. While they cannot now claim any "circuit split" on the underlying copyright issues, they could certainly point to the decision of the Federal judge in Los Angeles in the Aereokiller case as an indication that the Ninth Circuit may disagree with the Second Circuit. (By the way, Aereokiller's appeal of that lower court ruling has now been fully briefed in the Ninth Circuit; oral argument is currently scheduled for August 27.) And Judge Chin's dissents – both to the April panel decision and to the denial of *en banc* review – also identify issues and arguments that might get the Supremes' attention.

Petitions seeking Supreme Court review (we call them *cert* petitions, or petitions for *certioriari* – feel free to use the technical term to impress your friends) are due within 90 days of the entry of judgment in the Second Circuit, so the broadcast plaintiffs have some time to decide how they want to line up this particular shot. With the Ninth Circuit set to hear the Aereokiller appeal before September, the possibility still looms that a head-on conflict between the Second and Ninth Circuits will indeed materialize. Check back with CommLawBlog for updates.

We should also note in passing two other potentially related developments on this front. As discussed in the article on page 4 in this issue, the Ninth Circuit recently affirmed a lower court's decision ***not*** to enjoin the operation of Dish's Hopper service (which provides automatic fast-forwarding through commercials in recorded programming). While the broadcast parties in that case would obviously have preferred to get the injunction, for a number of reasons the Ninth Circuit's decision there does not appear to be catastrophic. And Back East, at least one broadcaster has sued Aereo in U.S. District Court in Boston – First Circuit territory. But that case is in its earliest stages, and it seems unlikely that we'll be seeing any decisions out of the Boston court that might influence the immediate decisions of the Second Circuit parties. But you never know.