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Memorandum to Clients

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FCC Simplifies Protection Process for AM Signals

By Peter Tannenwald
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If you're an AM licensee looking to protect your signal from distortion caused by newly-built (or modified) structures nearby, the FCC has made your life a bit simpler.

The Commission has decided that ***ALL*** FCC-regulated services – broadcast and non-broadcast alike – will have to protect AM stations from signal distortion arising from construction or modification of nearby towers. (For purposes of the new rules, the term "tower" includes a building or any other structure on which a new or modified antenna or antenna-supporting structure is being installed.)

Why do AM's get this special treatment?

Unlike most other radio services – in which the signal is transmitted from an antenna which is mounted on a tower or other structure – AM towers are themselves the antenna. The entire AM tower structure radiates the signal. Other nearby metallic structures can unintentionally re-radiate the signals and distort the AM station's pattern. The problem is aggravated when the AM is directional, because directional AM stations have more than one radiating tower/antenna, with signals phased so as reinforce and/or cancel one another to create the desired directional coverage pattern. Distortion caused to the signal coming off any one of the towers will affect the overall pattern; if the interfering feature(s) – buildings, water towers, etc. – distort(s) the signals coming off more than one of the towers, the effect is exacerbated.

Fixing such distortion usually involves a process called de-tuning, where insulators are installed on one or more structures to alter the electrical height and make the structure a poor re-radiator. De-tuning is often not a cheap or easy process.

The FCC has traditionally required newcomers – *i.e.*, anybody constructing new or modified facilities – to take corrective action for the benefit of pre-existing stations. However, the specific requirements imposed by that "newcomer" policy have varied from one service to another; and as far as protecting AM broadcasting is concerned, there are no rules at all for some services, including those covered by Parts 24 and 90.

The FCC's new approach eliminates all that by establishing a uniform set of rules applicable to *all* services.

These rules require anyone looking to construct or modify structures of a certain size within a certain distance of an AM station to (a) notify the AM station before construction is undertaken and (b) provide the AM licensee the opportunity to complain to the FCC about the impact of new towers. The new rules thus provide uniform codification of the historical first-come, first-served principle.

How big does the new/modified construction have to be, and how close to an AM station, to trigger the new requirements?

That depends on a number of factors, most of them determined by reference to the AM station in question.

If the AM is non-directional, any new or modified tower must be analyzed if it is 60 electrical degrees or taller and located within one wavelength of the single AM tower. If the AM is directional, the size/distance criteria are expanded to 36 electrical degrees or taller and within the lesser of 10 wavelengths or three kilometers of the center of the AM array as shown in CDBS.

Wavelength? Height in electrical degrees? No problem. The FCC provides handy formulas.

To determine an AM station's wavelength in meters, insert

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Inside this issue . . .

FM Translator Update

". . . What Condition My Condition Was In"

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As we reported in last month's *Memo to Clients*, FM translator facilities proposed after June 16, 2013, are – at least in the current view of the Audio Division – subject to interference from any LPFM application(s) that are filed during the upcoming LPFM filing window. The Division staff has been circumspect on this point, not providing any clear and definitive announcement of precisely how its protective stance toward still-unfiled LPFM applications will be implemented.

But thanks to several translator applications that have been granted recently, we now know for sure that some FM translator facilities are definitely at risk.

How do we know? Because a number of recently-issued translator construction permits include the following condition:

> This authorization is subject to modification or cancellation as a result of applications submitted during the October, 2013 LPFM filing window. See DA 13-1385. Any construction is at the permittee's sole risk. LPFM construction permits granted from the October, 2013 window filings may require the permittee to change channels, propose other facility modifications and/or terminate operations with the facilities specified herein. A license will not be granted to cover this construction permit until after the close of the October, 2013 filing window.

[*Editor's Note: The reference to "DA 13-1385" is to the June 17, 2013 public notice announcing the upcoming LPFM window. For our readers' convenience, here's a link to that public notice.*]

Of course, as we also reported last month, conversations with the staff indicate that they feel confident that the likelihood of problems involving translator/LPFM interference is small and such problems should be readily addressable on a case-by-case basis. That may be – but it's going to be a while before we know whether they're right. And we also won't know for sure that the Bureau's approach here is strictly legal for a while, either – that will depend on whether anybody (most likely an FM translator permittee who finds her facilities whittled down by LPFM applicants) has the time, resources and inclination to take this to court, a multi-year prospect at best.

For now, anyone counting on a new FM translator to cover particular areas should be sure to check for this condition on their CP's. That includes not just permittees, but folks looking to buy any new translator permits. Just because you happen to be holding a piece of paper that says "Construction Permit" on the top does ***not*** mean that the facilities specified in that permit are etched in stone. To the contrary, if the permit is subject to the condition quoted above (or some such equivalent language), you're going to have to wait to see what gets filed during the LPFM window before you will know for sure precisely what facilities you'll be able to build and operate.

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Intern-al Affairs:

Unhappy Interns Up In Arms About Unpaid Internships

By Kevin M. Goldberg
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The unpaid internship. It's a rite of passage in the media industry. Every year, communications/journalism majors dust off their résumés and apply for the few highly coveted positions at newspapers, television stations, radio stations and movie studios.

So highly coveted are these positions that, more often than not, the intern doesn't get paid. Oh sure, you might get some school credit, a chance to network, and an extra line on your résumé – but no cash. (In my book, the most valuable benefit is the opportunity to discover over a couple of months what you may never want to do again for the rest of your life.)

I was one of those interns. For two summers during college I worked two nights a week and Sundays at the Washington, D.C. Fox affiliate, doing mainly sports.

I was one of those interns. It was a sweet gig: watch some games, tag some highlights, write some copy.

It was a sweet gig: watch some games, tag some highlights, write some copy, go to the occasional sporting event location shoot. My stuff got on the air. One summer I was the World Cup guy. My job was to watch all the Cup games. I'm a soccer fan (if you didn't already know). This wasn't work; it was a dream.

So I didn't get paid. Big deal. I got school credit. That was enough justification (as if I needed any justification to do what I got to do). Back in my day, that's how it was. Nobody complained. (Now get off my lawn, you kids – it's ***my*** ball now!!!)

Not anymore.

Recently, interns have challenged the no-pay condition of their servitude in a number of cases percolating through the U.S. District Courts in New York. And while the legal issues have yet to be finally resolved, there's reason to believe that the "credit in lieu of payment" system may be at risk.

So now's a good time to take a look at the questions being raised about unpaid internships, how the courts have addressed those questions so far, and what might be on the horizon.

The case that initially got everyone's attention was *Glatt v. Searchlight Pictures*, a lawsuit filed by some unpaid interns who worked on the movie *Black Swan*. But we all might have seen *Glatt* coming had we looked more closely at a 1947 Supreme Court case and a 2010 U.S. Department of Labor "Fact Sheet", not to mention another decision issued in an unrelated case just a month or so before *Glatt*.

Walling v. Portland Terminal

Let's start with the grand-daddy of intern cases, *Walling v. Portland Terminal Co.*, issued by the U.S. Supreme Court in 1947. Technically it involved "trainees" rather than "interns", but it comes down to the same thing. The question is *Walling* was whether prospective railroad brakemen participating in a week-long training course were "trainees" under the Fair Labor Standards Act (FLSA), rather than "employees". As "employees", they were entitled to be paid under the FLSA; as "trainees", not so much.

The Court concluded the workers were "trainees". The Court found that regular employees didn't get bumped in order to make room for the "trainees" and still did most of the work, while also supervising whatever the "trainees" did. And for their part, the "trainees" didn't really "expedite" the railroad's business; in some cases they actually "impede[d] and retard[ed]" it. The Court concluded that the FLSA wasn't meant to penalize an employer for providing vocational school-like instruction "at a place and in a manner that would most greatly benefit the trainee", particularly if the employer "receive[d] no immediate advantage" from the trainees' efforts. Bottom line: under these circumstances, the FLSA does not require employers to pay trainees.

Fact Sheet #71

Fast forward to April 2010, when the United States Department of Labor (DOL) released its "Fact Sheet #71: Internship Programs Under the [FLSA]" designed to help for-profit businesses determine whether interns have to be paid minimum wage (and given overtime) under the FLSA.

According to the Fact Sheet, the Supremes (presumably in *Walling*, although the Fact Sheet doesn't specifically name the case) held that, under the FLSA, a worker who is "provide[d] aid or instruction" is ***not*** an "employee" if her/his work "serves only his or her own interest". The Fact Sheet then described a "test for unpaid interns" consisting of six criteria:

- The internship must provide training "similar" to that which would be given "in an educational environment;
- The internship must be for the benefit of the intern;
- The intern does not displace regular employees; instead, the intern should work "under close supervision of existing staff";

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- The company running the internship should derive "no immediate advantage" from the intern's work and, on occasion, may find its operations "impeded" by that work;
- No promise of a job at the end of the internship is given; and
- It's clear up front that the intern is not going to be paid for her/his work.

No problem so far. But the Fact Sheet creates confusion by providing two seemingly inconsistent instructions for how to apply those criteria. At one point it says that whether or not an internship program qualifies for "unpaid" status "depends upon all the facts and circumstances". But at another point, it says that it's a legitimate unpaid internship only "[i]f all of the facts . . . are met". And further complicating matters is the Fact Sheet's admonition that the unpaid intern exclusion from the FLSA's employment requirements is "necessarily quite narrow".

Which brings us to 2013, and the case of ***Xuedan Wang v. The Hearst Corporation.***

From August to December 2011, Wang worked as an intern for five days a week in the accessories department of *Harper's Bazaar* magazine, a Hearst publication. She served as contact between editors and public relations reps, did online research, catalogued samples, maintained the accessories closet and created story boards. She was not paid at all for the work she performed.

In early 2012 Wang sued, along with several other plaintiffs – all unpaid – who had interned for other Hearst publications (*Cosmopolitan*, *Seventeen*, *Marie Claire*, etc.). All the plaintiffs had performed essentially similar duties ranging from gopher work to organizing important files and up to some actual writing and journalism work. It was apparently undisputed that some of the work they did was the type performed by full-time paid employees.

Analysis of the six Fact Sheet criteria seemed inconclusive. At least two of the factors (no promise of a paid job at the end of the internship, no expectation of pay during the internship) clearly supported Hearst's claim that these were legitimate unpaid positions. But while some of the plaintiffs had been given some form of training sessions, others had not. And the work performed by the interns at times overlapped work performed by actual employees and was not always supervised by employees (according to the plaintiffs). In other words, the remaining four criteria were not obviously conclusive for one side or the other.

Wang and her fellow plaintiffs moved for summary judgment, arguing (among other things) that they were all "employees" under the FLSA. They claimed that their work had provided Hearst an "immediate advantage" and that, under *Walling*, they were thus "employees" entitled to pay. Alternatively, they argued that, under the DOL Fact Sheet, Hearst would have to satisfy all six criteria and that it had not done so.

Hearst, of course, disagreed. In its view, the six DOL Fact Sheet factors were not a "rigid checklist". Rather, according to Hearst, the court should use a "balancing of the benefits" test looking to the "the totality of circumstances to evaluate the 'economic reality' of the relationship".

Siding with Hearst, Judge Harold Baer, Jr., of the U.S. District Court for the Southern District of New York, denied Wang's motion for summary judgment. He determined that *Walling* requires the court to consider not merely the existence of an "immediate advantage" to the employer (as argued by the plaintiffs), but rather the "totality of the circumstances". He ascribed particular importance to determining "who is the primary recipient of benefits from the relationship". The Fact Sheet criteria could provide a "framework" for performing this analysis but, since four of the six factors were not obviously conclusive one way or the other, summary resolution of the case was not appropriate. Accordingly, the plaintiffs' motion was denied, and the case will proceed to trial.

Judge Baer's "totality of the circumstances/ primary recipient of the benefits" test was good news for employers.

This was good news for employers, since Baer's "totality of the circumstances/primary recipient of the benefits" test would seem to afford them considerable leeway in the design of unpaid internships.

But then, hot on the heels of *Wang*, came ***Eric Glatt v. Fox Searchlight Pictures.***

In a decision released less than a month after *Wang*, Judge William Pauley (also sitting in the Southern District of New York) granted plaintiffs' motion for summary judgment, holding that interns working on certain movie productions (including *Black Swan* and *500 Days of Summer*) had indeed been employees entitled to payment under the FLSA.

As in *Wang*, the unpaid intern plaintiffs had been assigned various chores running the gamut from the menial (*e.g.*, janitorial) to the quasi-professional (*e.g.*, bookkeeping). There had been no promise of payment and no promise of a job once the internships wrapped up. And, as in *Wang*, the other four criteria from the DOL Fact Sheet were less than conclusive for either side.

As did Judge Baer in *Wang*, Judge Pauley read *Walling* to require consideration of the "totality of the circumstances". But Pauley parted ways with Baer on how to do that. In particular, Pauley expressly rejected the "primary beneficiary" approach taken by Baer, *i.e.*, the approach which assigned considerable importance to determining "who is the primary recipient of benefits from the relationship". (He did, however, opine in passing that, in his view, Fox Searchlight was the "primary beneficiary" here, since any benefits the interns received were supposedly "incidental" at best.)

Judge Pauley then analyzed the internships against the six

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DOL Fact Sheet criteria, concluding that, while no payment or future employment had been promised, the other four factors favored the interns. The employer received a benefit even though the interns' work was "menial". While the interns gained "resume listings, job references, and an understanding of how a production office works", those benefits were merely "incidental". The interns performed work that would have had to be performed by actual employees.

Even where the underlying facts were a bit cloudy – and, thus, ordinarily not appropriate for summary decision – he came down firmly on the interns' side. (Example: One of the interns did ***not*** claim that he hadn't received any training; all he said was that he "didn't learn much" – a very different thing. Pauley nevertheless resolved this factor for the intern.)

Here's Pauley's wrap-up analysis of the "totality of the circumstances":

> They worked as paid employees work, providing an immediate advantage to their employer and performing low-level tasks not requiring specialized training. The benefits they may have received – such as knowledge of how a production or accounting office functions or references for future jobs – are the results of simply having worked as any other employee works, not of internships designed to be uniquely educational to the interns and of little utility to the employer. They received nothing approximating the education they would have received in an academic setting or vocational school. This is a far cry from *Walling* where the trainees impeded the regular business of the employer, worked only in their own interest, and provided no advantage of the employer.

Judges Baer and Pauley have taken two markedly different approaches.

Obviously, Judges Baer and Pauley have taken two markedly different approaches to analyzing intern programs for FLSA purposes.

What does this all mean for you?

For openers, it's important to recognize that neither *Wang* nor *Glatt* has much precedential effect, yet. Both decisions involve summary judgment motions and are interlocutory; the underlying cases must still be tried. Moreover, the losing side in each of the summary judgment decisions (plaintiffs in *Wang*, defendants in *Glatt*) has asked the Second Circuit to review their respective cases *now*, rather than wait until the final trial disposition. Interestingly, while the intern-plaintiffs in *Glatt* have (as might be expected) opposed Fox Searchlight's immediate appellate efforts, in *Wang* Hearst has supported Circuit resolution of the key issue sooner rather than later – presumably reflecting Hearst's confidence in the soundness of Judge Baer's reasoning.

We can expect the Second Circuit to be asked to announce precisely how the FLSA (as seen through the lenses of *Walling* and the DOL Fact Sheet) is to be applied to unpaid internships. Ms. Wang and her fellow intern-plaintiffs will doubtless press for an analysis akin to Judge Pauley's, requiring an employer to "make more than *some* showing that each of the six [Fact Sheet] factors is met". According to Ms. Wang, an internship must involve shadowing opportunities under "close and constant contact supervision where the intern performs no or minimal work" in order to qualify as an educational experience. Such a standard would likely increase substantially the burden on many employers, especially if other judges adopt Judge Pauley's intern-friendly inclination.

Employer-defendants, of course, will argue that Judge Baer got it right, and that the facts underlying each of the Fact Sheet criteria should be carefully assayed in the crucible of a trial before any conclusions can be drawn.

Whichever side prevails in the Second Circuit (or beyond), we can expect the impact to be substantial.

That's because there has been an explosion of FLSA-based intern lawsuits in the Second Circuit. That is not a coincidence, because the same law firm that represents Ms. Wang (and her co-plaintiffs) and Mr. Glatt (and his co-plaintiffs) also represents plaintiffs in ten other FLSA/intern cases filed since the beginning of 2012. Prominent media companies on the wrong side of those cases include NBCUniversal, Warner Music Group, News Corp, Gawker Media, Elite Model Management Group. Seven of these cases were filed after Judge Pauley's *Glatt* ruling.

Oh, and by the way, that law firm is actively courting even more potential plaintiffs through an aptly-named website (http://www.unpaidinternslawsuit.com/). We can probably count on that firm – and others like it – to continue to press the arguments we have already seen in *Wang* and *Glatt*. We should also assume that, as word of the possibility of collecting money for past intern work circulates (having a handy recruitment website certainly doesn't hurt), a large universe of past interns is likely to provide that law firm plenty of opportunities to press those arguments. And, while the litigation to date has arisen in the Southern District of New York, none of us should be surprised if kindred cases start popping up in other jurisdictions.

Note also that, in both *Wang* and *Glatt*, the plaintiffs asked for class certification, meaning that they were hoping to litigate their respective cases as class actions on behalf of all similarly-situated interns. Judge Baer denied certification, while Judge Pauley granted it. The prospect of class actions in this context is likely to incentivize the plaintiffs' bar.

In other words, there is a concerted movement to push for pay for previously unpaid internships, and that movement is not likely to dry up and blow away unless and until the

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FHH - On the Job, On the Go

Hail to the Chiefs! **Anne Goodwin Crump** has been re-elected to the board of directors of the Association of Federal Communications Consulting Engineers. Meanwhile, **Frank Jazzo** has been appointed co-chair of the Continuing Legal Education Committee of the Federal Communications Bar Association, while **Steve Lovelady** has been named co-chair of the FCBA's Professional Responsibility Committee.

Heading to Orlando for the NAB Radio Show? So are we – "we", in this case, being a phalanx of FHH lawyers. The current list includes: **Frank J**, **Steve, Scott Johnson**, **Dan Kirkpatrick**, **Matt McCormick, Frank Montero**, **Jim Riley, Davina Sashkin**, **Kathleen Victory** and **Howard Weiss**. **Davina** will be appearing on a panel ("And the Answer is: What is Radio Regulation Jeopardy?") on September 18.

On September 25, **Mitchell Lazarus** will present a webinar on seeking FCC approval for new radio-based technologies, titled "What to Do When the FCC Says No." Registration information can be found at http://www.wll.com/When-the-FCC-Says-No.html.

Meanwhile, **Frank M** will be moderating a panel entitled "*Distribution Roundtable: Carriage in an Expanding Video Environment*" at the Hispanic TV Summit presented by Broadcasting & Cable Magazine at the Marriott Marquis in New York City on October 2.

And if you're interested in the FCC's recent relaxation of its foreign ownership rules – and the impact that that relaxation might have on commerce nationally and globally – **Don Evans** and **Frank M** will be sharing their expertise in a webinar titled "What the FCC's Relaxed Foreign Ownership Regulations Mean for Global Commerce"on October 23. Check out the registration information at http://www.bna.com/fccs-relaxed-foreign-w17179876114/.

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courts reject the legal premises underlying that movement.

What are the chances of that happening? It's impossible to say just now. But it is clear that the standards broadly laid out in *Walling* and DOL Fact Sheet have some newfound teeth. How sharp those teeth turn out to be, and precisely how they may be used to bite employers, remains to be seen. Which party – intern or employer – will bear the burden of establishing whether any particular internship does or does not constitute "employment"? And how strict is the "totality of the circumstances" test – are we talking Judge Baer or Judge Pauley here?

Regardless of the ultimate resolution, the overall nature of internships is being scrutinized, and the conventional wisdom – that, by giving an intern academic credit, an employer can avoid paying him or him – is out the window.

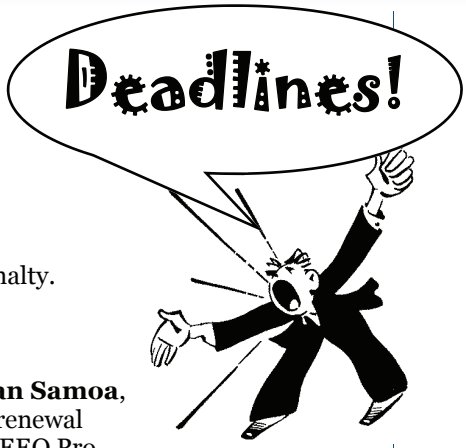
So what should an employer do?

In view of the still-developing precedent, it's impossible to say for sure precisely how the treatment of internships under the FLSA will be finally resolved. But from the decisions described above, some potentially helpful steps may be identified.

Focusing on the first four Fact Sheet criteria would be a good place to start. In particular, it's probably a good idea to make sure that all internships include a truly training-focused, educationally-based component. Interns can still be given scut work – like fact-checking, tape-logging, game-watching, even story writing. But it appears that the program should include ongoing oversight of interns' day-to-day activities and a few education-focused sessions every week beyond the work-related tasks that dominate. Some work alongside full-time employees could also help to show that the interns aren't there just to work for free. And, yes, extra points if having interns around makes your life more difficult. But remember, none of this has been written in stone yet – so nobody can guarantee at this point that any particular steps will necessarily lead to any particular result.

And remember, too, that no matter how difficult it might be to train these kids now, it's likely to be easier (or at least less painful) than paying out a lump sum judgment later on.

[*Editor's Note: We here at the Memo to Clients are primarily communications lawyers, **NOT** employment lawyers, and we are **NOT** trying to provide advice in the employment area. The recent spate of intern-related cases involving media companies suggested to us that our readers – many of them media companies – should be given a heads up about what's been brewing. While we will continue to provide occasional coverage of these and other employment issues when we think it's a good idea, readers looking for a steadier, and more diverse, diet of employment law should be aware that there are other sources of useful information out there. For example, a blog edited by our friend, Bill Schreiner, recently posted an interesting piece on the enforcement of noncompetition agreements in a broadcast context.*]



September 20, 2013

Annual Regulatory Fees **-** Regulatory fees are due from *all broadcast licensees and permittees* by 11:59 p.m. The fees will cover Fiscal Year 2013, which began on October 1, 2012, and will end on September 30, 2013. The payments must be initiated in the FCC's electronic payment system, Fee Filer. Note that while Fee Filer pre-fills much information, it does not always include every license on which fees must be paid, nor does it include any broadcast auxiliary licenses. It remains the licensee's responsibility to make sure that its payments are complete. Late payments are subject to 25% penalty.

October 1, 2013

Radio License Renewal Applications **-** *Radio* stations located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **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**, **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.

Television Post-Filing Announcements - *Television* and *Class A television* stations located in **Iowa** and **Missouri** 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. 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 Connecticut, , **Maine, Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** must begin their pre-filing announcements with regard to their applications for renewal of licenses on October 1. 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 license on October 1. 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**, **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.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

Up, up and away!

2013 Reg Fees Set

By Harry F. Cole
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The final 2013 regulatory fees have been announced by the Commission, and you can mark your calendar: ***11:59 p.m. (ET) on September 20, 2013*** is this year's deadline. For those of you anxious to cut to the chase, we're providing some convenient tables setting out the new fees on the next couple of pages (and, for TV-related services, comparing (a) the fees the FCC has now adopted against (b) last year's fees). But before you head on out to the tables, you might want to brace yourself – this year's fees are, with very limited exceptions, a lot steeper than last year's.

How much steeper? About 7.5% across-the-board on the TV side – which, for a VHF TV station in one of the top ten markets translates to an impressive $6,000 bump up. For radio, the increases tend to be more in the 5% range – preferable to 7.5%, for sure, but still likely to sting a bit.

This year's fees are, with very limited exceptions, a lot steeper than last year's.

The relative uniformity in the fee increases over last year should not be a surprise. As we reported last May, when the FCC first proposed this year's fees, the Commission is re-jiggering the cost allocation method underlying the annual calculation of fees. That re-jiggering means serious upticks for some services, including broadcasting. In fact, the anticipated increases were so serious that, to cushion the initial blow, last May the Commission was contemplating capping increases at 7.5%. And that's just what it's done. (For a somewhat more detailed discussion of the allocation method that has led to the increases, see our posts on CommLawBlog.com here and here.)

In addition to the fees themselves – and the cost allocation method underlying them – the Commission has announced a number of reg fee-related changes that will kick in ***next year***. So while we need not worry about these changes for this year's filing, heads up for next year. Those changes include:

- VHF and UHF stations will be merged into a consolidated reg fee category (although the consolidated VHF/UHF fee category will presumably still include differing tiers according to market size);
- Internet protocol TV (IPTV) licensees will be subject to reg fees (the new IPTV category will be included in a new fee category along with cable TV);
- Reg fees for FY 2014 (*i.e.*, those that will be paid next year) will have to be paid electronically; and
- The Commission plans to transfer unpaid reg fees to the Department of the Treasury for collection at the end of the payment period, rather than 180 days after the close of the payment period, as is its present practice.

With respect to that last point – shipping unpaid fees to Treasury for collection sooner rather than later – the FCC advises that regulatees "will not likely see any substantial change in the current procedures of how past due debts are to be paid". That, of course, remains to be seen.

With respect to TV translator, LPTV and Class A TV and TV booster stations, the Commission will 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.

As has always been the case, failure to pay reg fees on time can have dire consequences. Those include: a late payment penalty of 25 percent of the unpaid amount, starting immediately after the deadline; additional processing charges for collection of late fees; and administrative penalties, such as withholding of action on any applications from delinquent parties, eventual dismissal of such applications, and even possible revocation proceedings.

Remember, the FCC will ***not*** be sending you a hard-copy reminder of your reg fee bill.

And here's our standard final cautionary heads up: Historically, the FCC's fee calculator has ***NOT*** included fees for any auxiliary licenses that may be associated with the main license. (We've told you about this in the past . . . and it's still true.) Since separate fees are due for those auxiliaries over and above the main license reg fee, it's *very important* to doublecheck your records and the FCC's records to be sure that your payment includes the necessary fees for ***all*** applicable authorizations. Since a failure to pay even a single $10 fee for a remote pickup could result in the dreaded red light status, extreme care should be taken on this front.

(*See the sidebar on page 12 for additional reg fee tips.*)

FINAL 2013 REGULATORY FEES
(FCC 13-110, released 8/12/13)

FEE CATEGORY	2012 Fees (USD)	Final 2013 Fees (USD)	Differential (USD)
TV VHF Commercial Stations			
Markets 1-10	80,075	86,075	+6,000
Markets 11-25	73,475	78,975	+5,500
Markets 26-50	39,800	42,775	+2,975
Markets 51-100	20,925	22,475	+1,550
Remaining Markets	5,825	6,250	+425
Construction Permits	5,825	6,250	+425
TV UHF Commercial Stations			
Markets 1-10	35,350	38,000	+2,650
Markets 11-25	32,625	35,050	+2,425
Markets 26-50	21,925	23,550	+1,625
Markets 51-100	12,750	13,700	+950
Remaining Markets	3,425	3,675	+250
Construction Permits	3,425	3,675	+250
Low Power TV, TV/FM Translators/Boosters	385	410	+25
Other			
Broadcast Auxiliary	10	10	NC
Earth Stations	275	275	NC
Satellite Television Stations			
All Markets	1,425	1,525	+100
Construction Permits	895	960	+65

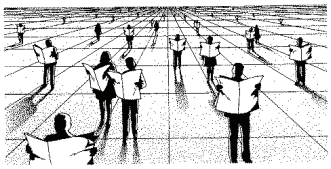
Commercial Radio Stations Final 2013 Regulatory Fees						
Population Served	AM Class A	AM Class B	AM Class C	AM Class D	FM Classes A, B1 & C3	FM Classes B, C, C0, C1 & C2
< 25,000	775	645	590	670	750	925
25,001-75,000	1,550	1,300	900	1,000	1,500	1,625
75,001-150,000	2,325	1,625	1,200	1,625	2,050	3,000
150,001-500,000	3,475	2,750	1,800	2,025	3,175	3,925
500,001-1,200,000	5,025	4,225	3,000	3,375	5,050	5,775
1,200,001-3,000,000	7,750	6,500	4,500	5,400	8,250	9,250
> 3,000,000	9,300	7,800	5,700	6,750	10,500	12,025
AM Radio Construction Permits		590				
FM Radio Construction Permits		750				

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

Updates On The News

Clutching the same old NADS – A recent item in the Federal Register caught our eye. According to an "informational" notice published by the National Geodetic Survey (an office within the Commerce Department's National Oceanic and Atmospheric Administration), new realizations of the North American Datum of 1983 (you may recognize that as "NAD83") have now been finalized. These new realizations supersede all previous NAD83 realizations.

(Possibly helpful aside: the North American Datum defines the geodetic network in North America. Geographical coordinates are based on it. The two major Datums – or should that be "Data"? – currently available are NAD27, computed in 1927 using whatever hand-crank methods were available back then, and NAD83, computed in 1983 using whiz-bang satellite technology and refined periodically since then. The smart money figures that NAD83 is probably the more reliable of the two.)



In geodetic circles, the new realizations are probably a Very Big Deal, although it appears from at least one explanatory item we found on the Internet that any variations between the latest version and its most recent predecessor involve only a couple of centimeters one way or the other.

But talk of NAD83 got us to thinking about an item that appeared in the June, 2011 *Memo to Clients* (we also posted it on CommLawBlog.com).

There we reported on an effort by the Society of Broadcast Engineers (SBE) to get the Commission to convert CDBS to NAD83, instead of NAD27. After all, as the recent Federal Register item points out, since 1989 NAD83 has been "the official civilian horizontal datum for the United States surveying and mapping activities performed or financed by the Federal Government." As we pointed out in our earlier post, the FAA has used NAD83 since 1992 and the FCC's Wireless Bureau has used it since 1999.

So we looked around and could find no evidence that the Commission has taken any action on the SBE petition, which was filed in 2007 (although for some reason it wasn't stamped "received and inspected" by the FCC Mail Room until 2011). For what it's worth, the SBE petition still shows up in ECFS as a pending petition for rulemaking. [*Editor's Note: For an interesting glimpse into the odd "in limbo" status of numerous petitions for rulemaking such as SBE's, check out our friend Dr. Michael Marcus's blog post on the topic.*]

The Commission's glacial – or should that be tectonic? – pace with respect to transitioning to NAD83 is puzzling. Maybe they're waiting for the day when CDBS is merged into the other Commission databases, another plan whose pace has seemed decidedly snail-like. Maybe it has something to do with the incentive spectrum auction, which seems to be absorbing the majority of the FCC's energy these days. Maybe the folks at the Commission know something we don't know about, like, maybe, some imminent topography-altering event – perhaps an impending asteroid strike, or a nationwide rash of giant sinkholes – that could render NAD83 inaccurate and necessitate the computation of a whole new NAD.

Whatever the reason, the bottom line is the same: CDBS remains tied to a geographical coordinate system which is fast approaching its centenary. We'll keep an eye out for any changes as NAD27's Big 100th approaches. Check back here for updates.

2013 Biennial Ownership Report deadline extended . . . already – Yikes, time is just screaming past us. Has it *really* been *two years* since the last biennial Ownership Report (FCC Form 323) was filed? Apparently so – and we know this because the FCC, apparently looking to get a jump on things, has *already* extended the deadline for the next biennial Form 323. In an order issued on its own motion (*i.e.*, nobody even had to ask), the Media Bureau has announced that the 2013 biennial Ownership Reports will be due no later than ***December 2, 2013***. (That's a month later than the original deadline.)

The Commission provided a similar one-month extension the last time around, back in 2011.

These biennial reports must be filed by all commercial full-power AM, FM, TV, and LPTV stations (including Class A stations), as well as any entities that happen to have attributable interests in any such stations. While the deadline for filing has moved, the "as of" date – that is, the date as of which the information in the report must be accurate – has *not* moved. So this year's Ownership Reports must reflect the reporting entity's information as of October 1, 2013.

The Commission still has taken no action in the rulemaking proceeding it kicked off last New Year's Eve. You may recall that, in that Sixth Notice of Proposed Rulemaking, the Commission proposed ditching the "special use FRN" (SUFRN) that has been a feature of the biennial Form 323 since late 2009. (The SUFRN has an interesting history, which you can read about on CommLawBlog here (and in the earlier links you'll find there). It's a device that

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the station's frequency into this equation:

(300 meters)/(AM frequency in megahertz) = AM wavelength in meters.

(Example: if the AM station is operating on 1000 kHz – which is the equivalent of one megahertz – the calculation would be: 300 meters/1 MHz = 300 meters. Answer: the station's wavelength is 300 meters.)

To determine a structure's height in electrical degrees, use the following:

[(Structure height in meters)/(AM wavelength in meters)] x 360 degrees = Structure height in electrical degrees

(Example, again using a station on 1000 kHz – which, as we saw in the calculation above, has a wavelength of 300 meters – and a structure that's 75 meters tall: (75 meters/300 meters) x 360 degrees = 90 degrees tall at 1000 kHz.)

It looks like we may need a new clause in tower leases.

The proponent of any construction or modification of any towers meeting the criteria described above must notify the affected AM licensee at least 30 days before commencement of construction and "examine the potential impact" on the AM pattern using the recently adopted "moment method" analysis. The proponent will be responsible for the "installation and maintenance of any detuning apparatus necessary to restore proper operation" ***IF*** that examination shows that: (a) in the case of non-directional AM's, the tower construction/modification would distort the AM pattern by more than 2 dB; or (b) in the case of directional AM's, the tower construction/modification would "result in radiation in excess of the AM station's licensed standard pattern or augmented standard pattern values".

Where an antenna or antenna-supporting structure is being installed or modified on top of a building, the FCC will evaluate the added structure alone – ***not*** the building beneath it. It has not escaped the FCC's notice that AM pattern distortion can be caused by structures over which the FCC has no jurisdiction, like power lines, water towers, and buildings. But the Commission *does* control its own licensees. So the Commission has decided that, rather than claim jurisdiction over the likes of water towers, it will simply forbid any party holding an FCC license from operating from a structure which has not been subjected – by the structure's owner or a tenant – to a compliance check for impact on AM stations. Determining compliance won't be so simple for operators who lease a little space on a big tower full of who-knows-what kind of stuff. It looks like we may need a new clause in tower leases where the tower owner represents and warrants that the tower does not have any adverse impact on AM stations.

The new rules will be phased in, applying as soon as they are effective to new construction near pre-existing AM stations. Proponents of new or modified structures may ask for expedited action, in which case they may start construction immediately upon receiving an OK from the AM station. Emergency construction must be followed by notice to the AM station within five days and a promise to cooperate in resolving any problems.

If a new structure is built, a pre-existing AM station will have two years to discover problems and file a complaint if problems cannot be privately resolved. If an AM station is newly built or modified near a pre-existing tower, the AM station must take the other tower into account in adjusting its pattern. Where both the AM station and other tower were built before the new rules became effective, the AM station will have one year to file a complaint. Complaints that are currently pending will be resolved under the prior rules if possible; otherwise, the FCC may require the complaint to be dismissed and re-filed under the new rules.

Stations trying to resolve potential pattern distortion situations should remember that they may take advantage of the FCC's moment method of predicting whether a new structure will adversely affect their pattern. That method increases reliance on computer modeling and reduces the need for signal strength measurements in the field.

The new rules include new "information collections" and will, therefore, not take effect until the Office of Management and Budget has checked them out pursuant to the Paperwork Reduction Act. Check back on CommLawBlog.com for updates on that front.

(While the Commission's recent action relates only to the protection of AM stations, we note that it ringingly affirms the first-come, first-served "newcomer" principle mentioned in an article that appeared in the June *Memo to Clients* from spurious FM broadcast radiation to new LTE wireless services. Since the Report and Order about protecting AM stations came from the full Commission – and not just the Enforcement Bureau – it appears to undercut, if not completely eliminate, the validity of the Notices of Violation we described back in June.)

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permits some reporting individuals to avoid having to cough up their Social Security Numbers in order to get an official FCC Registration Number (FRN) to include in the Ownership Report.) The Bureau's order doesn't mention SUFRNs, which is par for the course. But since the Commission has not adopted that proposal, it seems at this point that it's a reasonable bet that the SUFRN will still be available for 2013 Form 323 filers. You can never be too sure, though, so it would probably be prudent to check back here periodically between now and then.

Update: OET Releases the Latest and Greatest* Version of TVStudy

(for now, at least)

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From our Moving Targets file, we are pleased to report more developments from the FCC's Incentive Auction Task Force. Less than a month ago, the Office of Engineering and Technology released a bunch of materials relating to Version 1.2.6 of *TVStudy*, which was an upgrade from April's Version 1.1.2. (The original version – presumably Version 1.1.1 – was released last February.)

And now OET has given us Version 1.2.7.

TV Study, of course, is the software that will be used in the modeling and analysis necessary to repack the TV spectrum.

The new version allows studies of potential interference between U.S. stations and stations in Canada and Mexico (on proxy channels, of course). It also cleans up a couple of bugs that had apparently surfaced in the earlier version. (For ***ALL*** the gory details, hard-core techies may want to consult the "Upgrade Guide and Change Log" the FCC has posted.)

OET continues to solicit input on *TVStudy* from any interested parties, and from the turn-around time between Versions 1.2.6 and 1.2.7, they sure seem to be moving quickly to tweak the program.

If you're still getting oriented with this whole repacking thing – or if you want to get even further into the details of the FCC's repacking plans than you already are – you may want to take a look at the PowerPoint slides presented during a Task Force-conducted webinar on "repacking data" that was held on August 22, 2013. You can find a copy of those slides on the FCC's website.

Another Clip 'n' Save Memo to Clients Sidebar!

Some Reg Fee Payment Tips

The online "Fee Filer" system is now up and running; you can get to it at this link. That's the first stop you'll have to make in paying your fees. Once you log into the Fee Filer system (using your FCC Registration Number (FRN) and password), you'll be able to generate a Form 159-E, which you'll need to tender with your payment.

While Fee Filer will ordinarily list fees associated with the FRN used to access the system, WATCH OUT: the list of fees shown in Fee Filer may not be complete. (The same is true for the broadcast reg fee "lookup" page provided by the Commission.) On the first day that Fee Filer was up and running we heard at least one report of significant omissions from (and incorrect inclusions in) the FCC-generated list of fees owed. The FCC makes clear that it's the payer's responsibility to confirm the "fullest extent of [the payer's] regulatory fee obligation." Double- and triple-checking other FCC databases, as well as your own records, is prudent, since failure to file any required reg fee, even if inadvertent and even if only for a very small amount – like, say, a $10 auxiliary license fee – can result in very unpleasant complications (thanks to the Debt Collection Improvement Act).

As outlined in the public notice announcing ***the September 20 deadline,*** there are a number of ways in which the fee can be paid, once you have your Form 159-E. Helpful tip: the online approach, using a credit card, is extremely efficient. Wire transfer and ACH payments are also good, although they may involve some additional steps. For our money, the least desirable approach is the old-fashioned way, *i.e.*, sending a paper check to the FCC's bank in St. Louis. Lots of things could go wrong between the times (a) you stick the envelope in the mail box and (b) the payment is ultimately credited by the Commission.

Remember, the FCC will ***not*** be sending you a hard-copy reminder of your reg fee bill. And remember, too, the FCC imposes a 25% late filing fee, starting immediately after the deadline. You've got just about a month to get your payment in – there is no reason to run afoul of that deadline. Good luck.