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Memorandum to Clients

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The annual reminder

Video Emergency Info MUST be Accessible to Hearing- and Vision-Impaired Viewers

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The Commission has issued its annual public notice reminding video distributors *everywhere* – not just in areas prone to particular types of disasters – of their obligation to make all emergency information accessible to people with vision and hearing impairments. This reminder, usually timed to coincide with hurricane and forest fire seasons, underscores the need to be alert to the needs of ***all*** audience members when emergency information is being provided. (Since this year's notice is substantially identical to last year's, the following recap similarly tracks our post describing last year's notice.)

As broadcasters, cable/fiber system operators and satellite television services have learned from past experience, there are no exceptions to this requirement, and no excuses will be accepted for less than full compliance – even in areas well away from the zones directly affected by the emergency conditions. And let's be clear: this requirement is over and above routine closed captioning or video description obligations. Existing, everyday procedures to meet those routine obligations may not be enough during an emergency.

Section 79.2 of the FCC's rules requires that all video distributors make "emergency information" "accessible" to those with vision or hearing disabilities (the latter by closed captioning or other visual means). "Emergency information" is defined by the Commission as information about a current emergency, that is intended to further the protection of life, health, safety, and property, *i.e.* , critical details regarding the emergency and how to respond to the emergency.

Emergencies covered by the rule include such natural disasters as tornadoes, earthquakes, hurricanes, floods and wildfires. The rule also covers man-made disasters such as discharges of toxic gases and industrial explosions.

The Commission has emphasized that this rule allows for ***no*** exceptions, even in cases of quickly breaking news about any emergency conditions. Importantly, the rule reaches not only scripted presentations, but ad lib statements made in the course of live news coverage. In 2005, several TV stations learned this the hard way. After reviewing days' and days' worth of recordings of the stations' coverage of wildfires, hurricanes and tornadoes, the Commission doled out hefty five-figure fines for what appeared to some to be relatively minor instances of non-compliance.

Example: One TV station was fined because, during coverage of wildfires, it aired a representative of the American Lung Association who gave the unsurprising advice that viewers should stay indoors, run their air conditioners with a filter, and avoid exercise. The station's failure to include visual presentation, by captioning or otherwise, of that advice contributed to a $20,000 fine. (You can check out other examples here, here, here, here or here.)

The FCC's public notice stresses the wide geographical range of the requirement. The obligation to provide emergency information to the sight and hearing disabled applies not only to the immediate geographical area(s) in which the emergency is occurring, but also to areas of the country which might be logical emergency evacuation routes and in which evacuation shelters might be located. Consistent with this concept, "emergency information" includes, for purposes of the rule, announcements about where evacuees from the danger zone may obtain relief assistance.

According to the public notice, some national events can be of local interest and subject to the requirements of Section 79.2, regardless of the seeming lack of any "local" impact. It does not, however, provide any guidance to stations on figuring out when an emergency might fit into this category.

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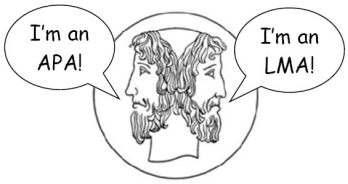
Inside this issue . . .

When is an assignment not *an assignment?*



What's in a Name? Would Not a Sale by Any Other Name . . .

By Davina Sashkin
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In an unusual decision, the Audio Division has dismissed an assignment application because, according to the Division, it wasn't really an assignment application.

For anyone who might not have believed that the FCC cares much about all those convoluted clauses in all those long and tedious asset purchase agreements that form the basis of assignment applications, there's a lesson to be learned here. The Division did indeed read the terms of the deal and didn't like what it found there.

Truth be told, the deal in question was a bit odd. Cumulus, the supposed "seller", controls as many radio stations as it can in the Dallas market (that would be five FM's and three AM's). In an apparent effort to "offload" one of its stations – that's at least how the Division saw it – Cumulus proposed to "sell" one of its FMs in the market to a well-established media broker. Nothing wrong with that. But the purchase price gave the FCC some pause.

The parties' agreement called for the buyer to pay Cumulus the princely sum of $100 – that's for a Class C3 station in the fifth largest radio market in the country. Such a deal. But hold on. If and when the buyer sells the station, Cumulus gets all the proceeds, minus whatever expenses Cumulus's "buyer" may incur while he holds the license, and also minus $50,000 for his troubles along the way. Which means that, unlike most deals, the "seller" here will end up having paid the "buyer" the net amount of $49,900 once the "buyer" re-sells the station.

From the Division's perspective, this wasn't a "sale" because Cumulus was effectively retaining all the economic risk of operating the station. Rather, the deal terms amounted to a joint venture of sorts, a "brokerage agreement in which [Cumulus's 'buyer'] is tasked with finding a buyer for the Station and is to be compensated for doing so by the payment of a $50,000 flat fee when that transaction closes." Bottom line: the Division concluded that Cumulus "would remain the owner" of the station – so no assignment was being proposed and the purported assignment application could be summarily dismissed.

The Division may have had a point.

The terms of the proposed deal were far from conventional and smacked of an effort simply to re-shuffle Cumulus's station portfolio, presumably for some self-serving purpose. We know from at least one case a couple of years ago that the Division frowns on that kind of thing.

But let's look at it from the parties' perspective. Sure, the deal didn't impose much financial hardship on the "buyer", but it also didn't impose any immediate obligation on him to re-sell the station. In theory he could have held onto it indefinitely (although, admittedly, he had little incentive to do so, since any profits would go back to Cumulus when the station was eventually re-sold). And as long as he did hold onto the station, the contract afforded Cumulus no right to directly influence any of the usual indicia of control – *e.g.*, programming, commercial or hiring policies.

So even if the financial terms of the deal may not have made much conventional sense, what regulatory difference should that make to the FCC? That, presumably, was the argument that Cumulus and its "buyer" planned to rely on, and it's not necessarily a bad one. But as it turned out, they ap-

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The devil is apparently in the details

FCC Seeks Comment on EAS National Test Issues

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Cast your minds back to November 9, 2011. That's when, with much hullaballoo, the Commission and FEMA conducted the first ever nationwide test of the Emergency Alert System (EAS), the point of which was to determine whether the system would operate as designed if it were activated in a real emergency. While the test went off reasonably smoothly, some glitches apparently did surface and now, two years down the road, the FCC is looking to fix them.

In a Public Notice the Public Safety and Homeland Security Bureau has asked for comments on a variety of technical issues that cropped up during the 2011 test.

A number of the issues relate to the header codes inserted in EAS transmission. (We told you they were *technical* issues.) The contents of EAS messages are specified in Section 11.31 of the Commission's rules. But not all the codes worked as planned.

The emphasis is on identifying maximally practical solutions.

For example, the message transmitted by the FCC and FEMA to start the nationwide test apparently included a "Time of Release" code specifying a 2:03 p.m. start time, even though the Commission had gone to great lengths to publicize the start time as 2:00 p.m. Further complicating matters is the fact that the rules require that EAS messages be transmitted "immediately" upon receipt. Many folks receiving the message ran the test at the publicized 2:00 p.m. time, while others ran it at the 2:03 p.m. time in the header code. Obviously, this needs to get worked out. The Commission is looking for comments on how best to address the problem. Indeed, is it practical – given the daisy-chain nature of the nationwide EAS operation – to expect that a nationwide emergency message can be transmitted simultaneously everywhere?

Another problem: the location code. The rules require that such a code be included in the EAS message to indicate the location of the emergency. Oops, the rules contain no code for nationwide Emergency Action Notifications (EAN), triggered by the President and intended to reach EVERYONE in the U.S. But that's just the kind of message that the nationwide exercise was intended to test. (For purposes of the 2011 test, the Commission used the location code for Washington, D.C., which may or may not have affected how receiving gear dealt with the message.) This is another thing that needs to get worked out – for example, should EANs be given their own particular location code, or should EANs be excused from the location code requirement?

And yet another problem: the event code. The rules require that the EAS message specify the nature of the emergency involved, but they include no code for *testing* a nationwide EAN. So when the Commission planned the 2011 test, it opted to transmit an actual EAN, rather than a routine National Periodic Test (or NPT) test message. This in turn meant that the Commission had to undertake considerable publicity beforehand to make sure that the public would not mistake the test for the real thing. Now the Commission is considering adjusting the rules in light of its experience, and it's soliciting suggestions.

Moving beyond header code questions to issues more obvious to folks in the audience, the Commission raises the question of visual text crawls. Should crawls be standardized – size, type font, scroll speed, language – and if so, in what way?

Another formatting question: the length of the nationwide test. Apparently, most EAS equipment "times out" if an EAS message lasts for more than two minutes and then releases the station to go back to regular programming. A real EAN, however, may be of any length – the 2011 test was originally set for three minutes, although it was ultimately decided that the national test should run 30 seconds. Some stations, however, had EAS equipment which could not rebroadcast an EAS message shorter than 75 seconds. Obviously, if the Commission plans to run any more nationwide tests, it will need to resolve these issues.

While many of these questions affect equipment manufacturers, they also affect everyone who has already EAS equipment installed, particularly if any rule changes will require adjustments to that equipment. The Commission is seeking input from all concerned on how to solve the technical difficulties that turned up during the 2011 nationwide test. The emphasis is on identifying maximally *practical* solutions, taking into account the complications of reprogramming widely spread EAS equipment and the associated expense in advancing workable solutions.

Comments are due by ***October 23, 2013***, and reply comments by ***November 7***.

Except for the Second Circuit

AereoKiller Cuffed Nationwide

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Score one for the broadcasters! A federal district judge in the District of Columbia has enjoined FilmOn X (that would be the folks formerly known as "Aereokiller" who operated at "BarryDriller.com") from operating its dime-sized wannabe-MVPD service, much like a judge did in Los Angeles late last year.

But get this – the D.C. judge went way further than the L.A. judge by extending the injunction ***NATIONWIDE*** (except for New York, Vermont and Connecticut).

To say that this complicates matters in the overall Aereo/Aereokiller universe would be an understatement.

First things first. The latest decision was issued by Judge Rosemary M. Collyer, of the U.S. District Court for the District of Columbia. FilmOn X had cranked up its service in the D.C. area last spring, which prompted D.C. broadcasters to ask the D.C. federal court to shut it down – essentially the same scenario that had already played out in New York (with Aereo's similar service) and L.A. (where FilmOn X, but not Aereo, was the defendant). As our readers already know, the Second Circuit judges in NYC declined to enjoin Aereo's operation, but a U.S. District Judge in the Ninth Circuit in L.A. did enjoin FilmOn X. (We're still awaiting a decision from the three-judge panel of the Ninth Circuit reviewing that latter decision.)

Collyer's decision should buoy the spirits of broadcasters everywhere outside the Second Circuit.

Both the NYC and L.A. decisions were based on the same facts and underlying precedent presented to Judge Collyer, so she had two flatly inconsistent model approaches (in her words, "a binary choice") that she could use as guidance. She opted to go West Coast, but with a couple of twists.

First, instead of simply citing Judge Wu's decision in the initial FilmOn X case and chiming in "me too", Judge Collyer undertook her own detailed analysis of the Copyright Act and its legislative history. Her conclusion: the FilmOn X operation clearly infringes the plaintiffs' copyrights. In so doing, she tipped her hat to Judge Chin's dissents in the Second Circuit litigation and Judge Wu's analysis in the L.A. case. But she went further than either of those by (among other things) directly challenging the claim that the Aereo/FilmOn X mini-antenna approach creates a cute little "one-to-one relationship" between a single mini-antenna and a single viewer/subscriber. Characterizing that as a "charitable description", Judge Collyer offered a far more critical assessment:

> [W]hile each user may have an assigned antenna and hard-drive directory temporarily, the mini-antennas are networked together so that a single tuner server and router, video encoder, and distribution endpoint can communicate with them all. The television signal is captured by FilmOn X and passes through FilmOn X's single electronic transmission process of aggregating servers and electronic equipment. This system, through which any member of the public who clicks on the link for the video feed, is hardly akin to an individual user stringing up a television antenna on the roof.

Her take on the technology skewered the Aereo/FilmOn X theory of the case.

Not stopping there, she also found considerable support in the Copyright Act for the notion that Congress intended to extend copyright protection to transmissions through "all kinds of equipment", including the innovative mini-antennas deployed by FilmOn X.

Having determined that the broadcaster plaintiffs are likely to win on the merits of the case and would suffer irreparable harm if FilmOn X is permitted to continue its operation pending the trial of the case, Judge Collyer had no problem concluding that an injunction should be issued.

But then came the next twist.

The injunction would be effective ***not*** just in D.C., but rather ***NATIONWIDE***, with the limited exception of states within the Second Circuit's jurisdiction – *i.e.*, New York, Vermont and Connecticut. That limited carve-out was a matter of "comity" in recognition of the fact that the Second Circuit has thus far declined to enjoin Aereo from operation there. But since there is no precedent in any other circuit contrary to Collyer's decision, she figured that the Copyright Act "commands a nationwide injunction", so she could and should enjoin FilmOn X everywhere but the Second Circuit.

So how does this affect the overall battlefield?

First, Collyer's decision will almost certainly be appealed to the D.C. Circuit, but even if it is, we probably won't see a Circuit decision for a year at least. So her injunction will likely remain in effect for the foreseeable future. That means that FilmOn X's operations will be in check for the time being everywhere but in the Second Circuit.

Second, Collyer's decision should buoy the spirits of broadcasters everywhere outside the Second Circuit, all of whom are facing the continuing roll-out of Aereo's service. While

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Good news for news folks!

One Step Closer to a Federal Shield Law

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We have some good news for journalists – *and* broadcast stations that still boast real news operations!

The Senate Judiciary Committee has approved the Free Flow of Information Act (that would be S.987) by a 13-5 vote. If ultimately enacted (more on that below), this bill would establish a federal "shield law" or "reporter's privilege". As a result, certain journalists would be protected from having to testify in federal court – a protection most often invoked by the reporter unwilling to disclose the identity of a confidential source. Journalists' communications records would also not be subject to subpoena by federal authorities seeking to use those records to identify a reporter's source.

The reporter's privilege is nothing new. Approximately 40 states and the District of Columbia already have their own shield laws. Every other state (with the exception of Wyoming) affords either absolute or qualified privilege based on state court precedent. But the Free Flow of Information Act would create a privilege applicable in ***federal*** proceedings for the first time ever.

The privilege would be "qualified". That means that the government or an interested civil litigant could still force the journalist to testify or produce documents in certain situations. (The precise showing necessary to overcome the privilege would vary according to the type of case – civil, criminal, cases involving the receipt of classified information.) Nevertheless, the protections afforded by the proposed shield law would apply across the board, not just to cases involving national security issues. In other words, it would benefit a wide range of news operations.

I recently wrote a piece for the Association of Alternative Newsmedia (full disclosure: they're a client of mine), explaining why the law is important to ***all*** journalists, not just those who cover national security and intelligence issues. If your business involves any kind of news operation, you will likely benefit from the law. Take a look my analysis and decide for yourself.

If your business involves any kind of news operation, you will likely benefit from the law.

Next up, the bill will go to the Senate floor. When? We don't know yet. In 2009, when an earlier version of the Free Flow of Information Act made it through the Judiciary Committee, it got bogged down in the Senate. Hopefully, this time around there is enough additional momentum and support for the bill to avoid any parliamentary tactics designed to prevent a vote.

Of course, even if S.987 passes the Senate, House approval will still be required. It's uncertain whether the House, which has its own version of the bill (H.R.1962), would try to pass that version as is or instead simply try to move the Senate version to a vote. (The former approach, of course, would eventually require resolution of any differences between the House and Senate versions.) President Obama has already expressed his support for the Free Flow of Information Act, so we expect that he would sign this bill if presented to him.

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Aereo is not itself subject to Judge Collyer's injunction (since Aereo is not a party to that proceeding), the fact that an Aereo-like system has been enjoined from operation nationwide may prompt other judges in other circuits to similarly enjoin Aereo. There's already a parallel copyright infringement suit pending in U.S. District Court in Boston (that would be in the First Circuit); the broadcast plaintiff there has already requested an injunction. (A hearing on the broadcaster's motion was held on September 18.) And Aereo is now up and running in Atlanta and Utah as well, so we won't be surprised to see new lawsuits filed there (for readers keeping score, those would be in the Eleventh and Tenth Circuits, respectively.)

Third, the likelihood of a "circuit split" – and consequent Supreme Court review – has increased. Yes, we're still waiting to hear what the Ninth Circuit will do in its review of Judge Wu's FilmOn X decision and no, we won't know for a while where the D.C. Circuit stands, but having yet another federal judge weigh in against FilmOn X clearly adds heft to the anti-Second Circuit position. That's especially true to the extent that the nationwide scope of Collyer's injunction may induce other courts to adopt her approach with respect to Aereo.

So while the seemingly inexorable roll-out of Aereo's service may have dispirited broadcasters, the cavalry may just have arrived, thanks to Judge Collyer. The next few months should prove interesting. Check back here for updates.

Discount Daze!

FCC Proposes Tossing UHF Discount, Creating VHF Discount

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In one of the least surprising developments in recent memory, the FCC has proposed elimination of the "UHF discount" – but, in one of the *more* surprising developments, it has proposed adoption of a "VHF discount". What a difference a DTV transition makes!

Before we can understand exactly what's going on here, we need to understand the relevant regulatory context, and that context happens to be the multiple ownership rule governing broadcast television. The national TV ownership cap (contained in Section 73.3555(e), to be precise) currently prohibits any entity from owning or controlling a group of TV stations with "an aggregate national audience reach exceeding thirty-nine (39) percent." The 39% level is thus the starting point from which the "UHF discount" is calculated.

The discount was first adopted back in the mid-1980s (simultaneously with the adoption of the national ownership cap), in recognition of the fact that UHF stations provided less coverage than their VHF counterparts. That disparity arose mainly from the characteristics of UHF frequencies transmitting analog signals. VHF frequencies tend to go a long way in the analog mode; UHF not so much. Because of the "coverage limitations of the UHF band", the Commission decided that it would be appropriate, for national cap purposes, to attribute UHF stations with only 50% of the households in their respective markets. Theoretically, then, any particular licensee has been able to own more UHF stations than VHF stations.

Apparently, the FCC is not yet inclined to attach much importance to the "cut-the-cord" movement.

Fast-forward to June, 2009, when the full-service TV industry converted from analog operation to digital.

The FCC and others had predicted that UHF would perform considerably better than VHF when it comes to digital operation. Sure enough, when the DTV transition occurred, it was apparent almost immediately that the traditional hierarchy of TV channels had been reversed. Now UHF rules while VHF struggles.

The reversal is so complete that the Commission has tentatively concluded that no further need exists for the UHF discount. Indeed, it's now thinking about affording a VHF discount instead, to compensate for the limitations of VHF operation in the digital mode – essentially for same reasons that triggered the original UHF discount in the 1980s. This time around, though, the Commission asks (among other things) whether today such a discount may be "less important" because "many television consumers today receive local broadcast stations via an MVPD rather than over-the-air". Apparently, the Commission is not yet inclined to attach much importance to the "cut-the-cord" movement in which viewers are relying on over-the-air reception combined with Internet-accessible video in place of cable or satellite TV.

Interestingly, the *NPRM* does not mention a consideration that would appear to weigh heavily in favor of a VHF discount. With the upcoming incentive auctions and consequent re-packing of the TV spectrum, we can expect major congestion in the UHF band. By contrast, the VHF band – and particularly the lower portion of the VHF band – is relatively vacant. To the extent that a VHF discount might serve as an incentive for some licensees to relocate to the VHF band, the Commission's re-packing chores could be eased somewhat.

The Commission's Notice of Proposed Rulemaking (*NPRM*) seeks comment on both the elimination of the UHF discount and the creation of a VHF discount. It also asks whether the Commission has the authority to mess with the UHF discount at all or alter the 39% national cap level. That question is particularly interesting because, over the last 15 years or so, both Congress and the courts have had a fair amount to say about those particular topics. (The *NPRM* provides a useful summary of the legislative, judicial and regulatory history of the discount and the cap.) To make a long story short, the Commission has now tentatively concluded that it ***does*** possess the authority to change either or both the cap and discount. But it is currently proposing to change only the discount.

The Commission was not unanimous in adopting the *NPRM*. Commissioner Pai dissented for two reasons.

First, he thinks it inappropriate for the Commission to alter the UHF discount without also addressing the correctness of the national cap. In his view, the elimination of the discount will have the logical effect of reducing the national cap. If the FCC is going to alter the cap from a de facto point of view, why not do it from a de jure perspective as well? He figures that, since the 39% level has not been formally addressed by the FCC in more than a decade, now would be a good time to do so. After all, as he correctly observes, "the media landscape has changed dramatically in the many years since" the 39% level was adopted.

Second, he objects to the grandfathering approach tentatively approved by his colleagues. According to the *NPRM*, existing ownership groups which (a) are currently in compliance with the national cap but (b) would be out of compliance if the UHF discount were to be eliminated would be permitted to retain their existing interests. The *NPRM* indicates that there are only a "small number" of licensees to whom this would likely apply.

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Defining the strings to be attached

FTC Seeks Comments on Proposed Terms of Nielsen/Arbitron Consent Agreement

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As many readers probably realize, in a move that would shrink the competitive field of media measurement companies, the nice folks at Nielsen are planning to acquire the nice folks at Arbitron. As often happens when one competitor proposes to absorb another, the Federal Trade Commission (FTC) has involved itself in the proposed takeover. While the FTC has green-lighted the deal, it is insisting that the parties enter into a consent agreement.

And now the FTC has requested public comments about the terms of that proposed consent agreement.

The FTC's concern arises from the proposed acquisition's potential for the complete elimination of competition in the cross-platform media measurement service market. (A cross-platform media measurement service can measure the audience of a "television" program regardless of whether or not it was watched on a traditional television set, or through online or mobile devices.) To offer cross-platform audience measurements on a national scale, a firm must have access to television audience data along with individual demographic data. Establishing the infrastructure to recruit and maintain a representative sample of the population and developing technology capable of collecting the underlying data is extremely expensive.

Nielsen and Arbitron are currently the only two companies with the potential to provide these services, and their combination could lead to a lack of innovation and higher prices for customers. Additionally, advertisers have come to trust Nielsen and Arbitron as the only reputable and reliable services. Any competitor would likely face pushback from the buyers of advertising time.

The FTC has concluded that the acquisition is likely to cause significant competitive harms in the national cross-platform audience measurement services market. In the consent decree, the FTC imposes several requirements on Nielsen designed to remedy those anticompetitive effects. The FTC is now seeking comments on those proposed remedies. The terms the FTC is proposing include:

- a requirement that Arbitron divest assets related to its audience measurement business to an as-yet-unidentified "Acquirer" within three months;
- a requirement that Nielsen provide that Acquirer with a perpetual, royalty-free license to data and technology related to Arbitron's cross-platform audience measurement business;
- nullification of certain non-compete clauses in employment contracts that would otherwise deter certain Arbitron employees from accepting employment with the Acquirer; and
- a requirement that Nielsen provide the Acquirer with technical assistance "to facilitate the Acquirer's ability to replicate Aribtron's position in the cross-platform audience measurement market."

The FTC has appointed an agent to monitor and oversee Nielsen's compliance with these requirements.

FTC Commissioner Joshua D. Wright dissented, mainly because he doesn't believe that there's enough evidence that the proposed deal will in fact substantially lessen competition. In his view, the cross-platform measurement service is a "future market" and, because Nielsen and Arbitron do not currently compete in cross-platform audience measurement, any alleged anticompetitive effects are merely theoretical at this point.

Since the FTC has technically approved the transaction (albeit subject to the terms of the consent agreement), the deal will likely close, possibly in very short order. However, any comments submitted to the FTC will be taken into consideration in determining the final nature and extent of the remedies the FTC will impose on the parties and how vigorously the FTC will enforce those remedies. Anyone interested in offering the FTC their views on the proposed consent agreement (the terms of which are set out in here) may file comments with the FTC through ***October 21, 2013***.

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Additionally, any station combinations for which FCC approval had already been sought and/or approved as of the adoption of the *NPRM* (*i.e.*, by September 26, 2013) would also be grandfathered. But going forward from that date, no new proposals would be entitled to the discount, even though formal endorsement of the discount's elimination is still many months away. Commissioner Pai is concerned that this approach effectively imposes the elimination of the UHF discount ***now***, well before it has been officially adopted. To him, that's straight out of Alice in Wonderland ("[S]aid the Queen. 'Sentence first – verdict afterwards.'").

It has been no secret for a couple of months that Chairman Clyburn appears committed to tossing the UHF discount, probably sooner rather than later. The *NPRM* makes that official. But because the discount is contained in the multiple ownership rule, the Administrative Procedure Act requires that the FCC undertake a rulemaking proceeding. As a result, the *NPRM* invites comments and reply comments on all of these points. Comments will be due 30 days after the *NPRM* is published in the Federal Register; reply comments 30 days after that. Check back here for updates on those due dates.

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What steps are video providers expected to take?

For audience members who are blind or visually impaired, emergency information that is provided in the video portion of a regularly scheduled newscast or a newscast that interrupts regular programming must be accompanied by an aural description of the video presentation in the main audio portion of the programming. For example, the text of on-screen images or graphics (*e.g.*, a list of available emergency shelters) must be accompanied by a voice-over describing the video action or reading the text of the on-screen material.

Emergency-related screen crawls that are not part of a regular or unscheduled newscast must be accompanied by an aural tone to alert visually impaired people to tune to another information source, such as the radio. The Commission recommends frequent repetition of that tone, at least as often as the information in the crawl is repeated.

To reach people who are deaf or hard of hearing, Section 79.2 requires either closed captioning, or other methods of providing the audio portion of the emergency information in a visual presentation. Such alternative presentations may not, however, block the closed captioning, nor may any closed captioning block another form of visual presentation such as a crawl.

Network affiliate TV stations in the top 25 markets have a significantly greater burden in this area. Those stations are *required*, by hook or by crook, to arrange for closed captioning services. The Commission cuts such stations a little slack by allowing them time for the captioning personnel to travel to the station, but in the meantime any emergency information being broadcast must be made accessible to the disabled by some method. The method of providing this information can be somewhat crude, such as holding up a whiteboard with handwritten information.

Additionally, depending on affiliation and market, some stations are allowed to use the electronic newsroom technique (ENT). Such stations must insure that their ENT systems caption non-scripted materials; if the systems don't caption such materials – whether automatically or as a matter of choice by the station – the station must nevertheless make all emergency information disabled-accessible in some manner.

The bottom line is this: ***ALL*** emergency information aired by video distributors ***without exception***.

This includes information provided before, during and after the emergency. For example, weather alerts (including watches and warnings) and emergency preparation information about impending storms – including school closing announcements and changed school bus schedules; announcements about circumstances (downed power lines, washed out bridges, etc.) during the storm; and the availability of relief assistance after the storm. It must ***ALL*** be made available both visually and aurally. The substance of even an off-hand remark, if it contains any relevant information, must be conveyed in a way that makes it accessible to the vision and hearing disabled.

Perhaps most importantly, the Commission emphasizes that it is the responsibility of the local station to make sure that ***all*** emergency information is accessible, regardless of whether the station is viewed over the air or on cable or satellite.

It is the responsibility of the local station to make sure that **all** *emergency information is accessible.*

And lastly, as has become its custom, the Commission devotes an entire page of the public notice to letting the public know how to file a complaint against video providers who don't follow the rules. Now would be a good time to confirm that your contact information on file at the FCC is current and accurate: the public notice informs consumers to first contact their video provider directly for a quick resolution of the problem. Since 2010 all video distributors have been required to file their contact information with the FCC so that any audience member experiencing a problem with closed captioning can reach out to you directly. (We reported on that requirement way back when.) Even if you're confident that the FCC has the correct contact information for your operation, it wouldn't hurt to check, just to be sure.

(The only substantive addition to this year's version of the public notice is a footnote alluding to some recently-adopted-***but-not-yet-effective*** requirements. Those requirements – compliance with which will be obligatory as of May 26, 2015 – involve: (a) use of a secondary audio stream to convey televised emergency information aurally, when such information is conveyed visually during programming other than newscasts; (b) specification of certain types of video programming apparatus that must be capable of delivering such emergency information in an accessible manner to the deaf, hard of hearing, blind or visually impaired; and (c) use of an initial aural tone for information imparted over the secondary audio channel, to alert blind or visually impaired audience members to the presence of an emergency situation, allowing them to switch to that audio stream.)

Commission looking to cut corners?

What Incentive Auction-Induced Reassignment Expenses Should be Reimbursable?

By Harry F. Cole
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If you're a full-power or Class A TV licensee and you haven't started to do the math relative to what the much-heralded incentive auction could mean for you dollars-and-cents-wise, here's a *Memo to Clients* tip – it's time to get started . . . because the Media Bureau clearly has. Don't believe us? Check out the Bureau's request for comments on the "catalog of eligible expenses" that it has compiled. You've got until ***October 31, 2013*** to let the Bureau know what you think about its catalog (and some related issues); you'll also be able to file reply comments until ***November 14***.

FCC wants to know: Do broadcasters normally pay list price, or do they get discounts for bulk orders or for group owners?

The Bureau's (and the Commission's) interest here arises particularly from the Middle Class Tax Relief and Job Creation Act of 2012 (what many of us refer to as the "Spectrum Act"). There Congress established a $1.75 billion "TV Broadcaster Relocation Fund" for reimbursement of certain expenses incurred by broadcasters in connection with the various channel shuffles necessary to make the incentive auction work. Congress left to the FCC the nitty-gritty chore of figuring out just what expenses would be subject to reimbursement.

The Commission has now started on that process, and it's looking for industry input.

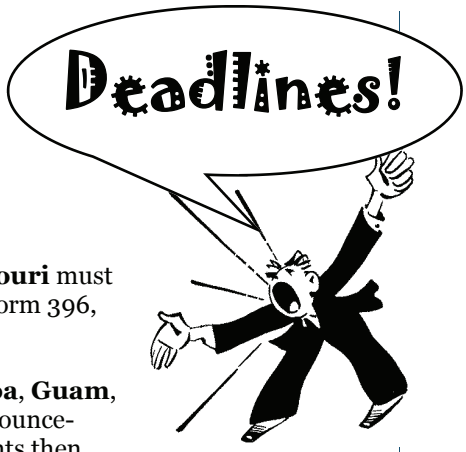
The FCC first hired an outside consulting group – Widelity, Inc. – to ask around among "industry stakeholders" and formulate a "catalog" setting out the types of expenses broadcasters and MVPDs are "likely to incur as a result of broadcaster channel reassignments". The resulting catalog spreads over 12 pages of fine print; not surprisingly, it includes a wide range of "hard" (*i.e.*, equipment) and "soft" (*e.g.*, consulting fees) items. Anyone who figures to be lining up at the post-auction Reimbursement Window would be well-advised to take a careful look at the catalog to get a sense of what the FCC expects to be paying for. If you happen to notice that the FCC has overlooked any likely expenses, now would be a good time to clue the FCC in.

Perhaps not surprisingly, the public notice seems clearly geared to a fair amount of nickel-and-diming by the Commission. For example, it asks whether broadcasters normally pay list price, or whether instead they get discounts for bulk orders or for group owners. The Bureau is also curious about whether equipment might be usefully "repurposed" in the channel reassignment process – which suggests some kind of Craigslist-type of used gear swap to cut costs. Another Bureau suggestion: encourage equipment suppliers to provide "built-in discounts" reflecting "the volume of business that channel reassignments will generate".

The Bureau also wonders whether, if the U.S. General Services Administration already includes certain expenses – such as HVAC systems – on the official GSA Schedule used for government supplies, broadcasters claiming such expenses should be limited to the GSA-sanctioned limits. And it suggests that mandatory competitive bidding might be warranted for some expenses over a certain limit – although even the Bureau acknowledges that such a requirement would be problematic for some licensees, including particularly non-commercial stations licensed to state governments subject to purchasing rules.

The public notice doesn't say anything about requiring licensees to patronize equipment suppliers who offer Green Stamps, but we're guessing the Bureau might be open to that if somebody were to suggest it.

In any event, the Media Bureau is clearly trying to figure out how to stretch the $1.75 billion limit on reimbursements as far as possible. That could result in additional burdens on the TV folks who will eventually be looking to get repaid by the guv'mint. Right now is when those additional burdens are starting to take shape. Because of that, it would be a very good idea for any and all TV licensees likely to be affected by the incentive auction to take a close look at this public notice and be prepared to let the Bureau know what you think. You've got until ***October 31, 2013*** to file comments and ***November 14*** to file reply comments.



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.

October 10, 2013

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the third quarter reports on FCC Form 398 must be filed electronically with the Commission. These reports then should be automatically included in the online public inspection file, but we would recommend checking. Please note that the FCC requires the use of FRN's and passwords in order to file the reports. We suggest that you have that information handy before you start the process.

Commercial Compliance Certifications – For all *commercial television* and *Class A television* stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to sub-

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stantiate compliance with those limits, must be uploaded to the public inspection file.

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

Issues/Programs Lists – For all *commercial and noncommercial radio, television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues during the past quarter must be placed in the station's public inspection file. Radio stations will continue to place hard copies in the file, while television and Class A television stations must upload them to the online file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

December 1, 2013

Radio Post-Filing Announcements – Radio stations located in **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** must begin their post-filing announcements with regard to their license renewal applications on December 1. These announcements then must continue on December 16, January 1, January 16, February 1 and February 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 **Colorado**, **Minnesota**, **Montana**, **North Dakota** and **South Dakota** must begin their post-filing announcements with regard to their license renewal applications on December 1. These announcements then must continue on December 16, January 1, January 16, February 1 and February 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 **New Jersey** and **New York** must begin their pre-filing announcements with regard to their applications for renewal of licenses on December 1. These announcements then must be continued on December 16, January 1, and January 16.

Television License Renewal Pre-filing Announcements – Television and *Class A television* stations located in **Kansas**, **Nebraska** and **Oklahoma** must begin their pre-filing announcements with regard to their applications for renewal of license on December 1. These announcements then must be continued on December 16, January 1, and January16. 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.

December 2, 2013

Biennial Ownership Reports – All *licensees* and *entities holding an attributable interest* in a licensee of one or more *AM, FM, TV, Class A television*, and *LPTV stations* must file a biennial ownership report on the FCC Form 323. Please recall that sole proprietorships and partnerships composed entirely of natural persons (as opposed to a legal person, such as a corporation) must file reports, as well as other licensee entities. All reports must be filed electronically. The Ownership Report must reflect information as of October 1, 2013.

DTV Ancillary Services Statements – All *DTV licensees and permittees* must file a report on FCC Form 317 stating whether they have offered any ancillary or supplementary services together with its broadcast service during the previous fiscal year. *Please note that the group required to file includes Class A TV, LPTV, and TV translator stations that are offering digital broadcasts*. If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report on Form 317 specifically asks for a list of any ancillary services, whether a fee was charged, and the gross amount of revenue derived from those services. Ancillary services do not include broadcasts on multicast channels of free, over-the-air programming for reception by the public.

Radio License Renewal Applications – Radio stations located in **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** 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.

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Wilkommen, bienvenu, welcome!

Introducing Brad Ham, Legal Fellow

You may have noticed that an article elsewhere in this issue written by a new name: Bradford Ham. We'd like to introduce him now.

Brad is our new Legal Fellow who will be working with us during the next year as part of The George Washington University Law School's fellowship program. He comes to us with a significant amount of media-related – legal and otherwise – experience. After obtaining his undergraduate degree from Tulane University, Brad spent a few couple of years working as a Research Analyst for Ion Networks, where he did research on network and competitor ratings, broadcast distribution and viewer demographics to assist the network in deciding which programs to purchase.

Brad took this business knowledge of the television industry with him to law school at George Washington University where he continued to focus on communications and media law issues. During his time in law school, Brad worked for (among others) both NBC Universal and then-Commissioner, now Acting Chairman Mignon Clyburn. Though his interest mainly resides in First Amendment and Intellectual Property issues, he has experience working on more regulatory stuff like media cross-ownership, legal and technological issues facing the broadcast, cable and telecommunications industries and the FCC's jurisdiction to regulate payphone rates for inmates in federal and state prisons.

We hope you have a chance to work with – or even meet – Brad over the next year.

(Continued from page 2)

parently didn't get to make *any* arguments.

Instead, the Division tossed their application summarily, without (as far as we can tell) giving the parties an opportunity to make their case. (Indeed, the idea of tossing the application was apparently the Division's own – no written oppositions to the application were filed.) Normally, before the FCC can take any action based on a factual determination as to which there is some dispute, the Commission has to conduct a hearing. Here, we're guessing, there is likely considerable disagreement between the Audio Division and the parties to the application, at least with respect to the implications of the contractual terms. (There was, of course, no dispute about those terms themselves.) But, obviously, no hearing was held.

Where this goes from here is most likely up to Cumulus. It has already filed for reconsideration of the decision, so the matter is back in the Division's hands. It's impossible to predict with any certainty when we might see a follow-up decision from the Division on this, or what that decision will ultimate be (although, from the short shrift the Division gave the proposal the first time around, we'd be surprised if the Division were to reverse itself).

But regardless of how it proceeds, we can all now be sure that the Audio Division is not shy about (a) reading the fine print of agreements that are submitted to it and (b) drawing its own conclusions about what that fine print means.

And if the Division doesn't like what it sees, it apparently isn't shy about acting accordingly.

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Television License Renewal Applications – Television stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** 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.

EEO Public File Reports – All *radio and television* stations with *five (5) or more full-time employees* located in **Alabama**, **Colorado**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **Minnesota**, **Montana**, **New Hampshire**, **North Dakota**, **Rhode Island**, **South Dakota** and **Vermont** 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 **Colorado**, **Minnesota**, **Montana**, **North Dakota** and **South Dakota** 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 **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

Online TV public inspection file update

New Political Reporting Approach Proposed

By Harry F. Cole
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In the June *Memo to Clients* we reported that the FCC had asked for comments on whether or not to extend the political file component of the online public inspection file requirement to ***all*** TV stations. You will doubtless recall that, when the online public file system was first put into place in 2012, only Big Four network affiliates in the Top 50 markets were required to upload their political file materials. Everybody else simply has had to continue to maintain those materials in their respective local public files. The FCC originally targeted July 1, 2014, as the date by which the online requirement would be made universal; the recent request for comments is designed to help the Commission decide whether that target date is still a good idea.

The initial response to the FCC request for comments was less than overwhelming: a total of three comments filed. Of those, two (filed by the NAB and Gray Television, Inc.) advocated that the FCC hold off beyond July 1, 2014 on imposing the online political file burden on smaller stations in smaller markets. No big surprise there: based on their obvious familiarity with the operation of such stations in such markets, both NAB and Gray argued that forcing all TV stations, regardless of their size, to move their political files online would result in serious, unnecessary burdens.

The third set of comments came from an entirely different angle.

Submitted by a collection of three public interest groups – the Public Interest Airwaves Coalition (PIPAC), the Sunlight Foundation, and the Center for Effective Government (for now, let's call them, collectively, the Public Interest Commenters) – these comments urge the FCC not only to extend the requirement to all commercial TV stations, but also to institute an entirely new online filing format for political materials. In their view, the FCC should design and implement a filing process akin to the one used by the Federal Election Commission. (Of course, the FEC collects different information from different sources for different purposes than does the FCC, but what the heck – once you've seen one government agency, you've seen them all.)

The Public Interest Commenters don't appear to have extensive experience with operating TV stations in small and mid-sized markets, but that hasn't stopped them from telling the FCC how to regulate such stations. (Back in 2007 PIPAC designed and championed the dreaded Form 355 which, although initially adopted, mercifully never saw the light of day.) In response, a number of broadcasters (the NAB, several state associations, and several smaller market TV licensees) told the Commission in no uncertain terms that the approach suggested by PIPAC is ill-advised. PIPAC and LUC Media Group, Inc, (which describes itself as "specializ[ing] in buying time for Democratic candidates for public office"), on the other hand, ringingly endorsed the PIPAC proposal.

If you're a TV licensee and you've got some time to spare, you might want to go to PIPAC's demonstration site, kick the tires a bit, and let the FCC know what you think. The deadline for comments in reply to PIPAC's comments has already passed, but we would hope that the FCC should still be interested in any first-hand assessments of the proposal. If the proposed online filing system really would make everybody's life easier, it would be good for the FCC to know that. But if the proposed system would impose considerable additional burdens – and, frankly, we suspect it would, but again, we don't have a lot of first-hand experience here – the Commission should know that, too.

FHH - On the Job, On the Go

Frank Jazzo will be attending the Annual Convention of the Alaska Broadcasters Association at the Sheraton Anchorage Hotel on October 17-18. He'll participate in the "FCC Regulatory Update" session, with an opening statement from the NAB's Senator Gordon Smith, and he'also be conducting an "EEO Refresher" session on October 17.

Frank Montero 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/.

FCC Stays the Course on Digital Transition for LPTV/Class A Stations

By Peter Tannenwald
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The FCC has nixed requests submitted by a number of LPTV and Class A stations looking for relief from spectrum-clearing measures put in place two years ago.

In 2011, the FCC announced the end of the transition to digital broadcasting for Class A and Low Power Television stations (to make life simple, we'll call them both "LPTV" for now). In so doing, it set a number of deadlines. In response to a handful of petitions of reconsideration, the FCC has now reaffirmed those deadlines. It has also addressed complaints from noncommercial (NCE) FM broadcasters that increased power levels for LPTV stations operating on Channel 6 could cause interference to NCE FM stations.

Under the deadlines set in 2011, all TV operation of any kind, analog or digital, on Channels 52 and above had to end by ***December 31, 2011***, and all analog LPTV broadcasting on ***any*** channel must end by ***September 1, 2015***.

The FCC does dangle the vague possibility of some relief for those who find can't build their digital facilities by 2015.

The December, 2011 deadline put a particular squeeze on out-of-core LPTV licensees. Some had a hard time finding an in-core channel by the deadline. Others who did find such a channel still had to go dark on December 31, 2011 if they had not received a permit for, or completed construction of, their in-core facilities. Going dark, of course, poses its own major problem: Section 312(g) of the Communications Act says that a broadcast station that fails to operate for 12 consecutive months automatically loses its license.

While a number of LPTV representatives asked the Commission to re-think the December 31, 2011 deadline, the Commission has now concluded that no such re-think is necessary. Looking back on what actually happened post-December 31, 2011, the FCC is satisfied that it gave everybody plenty of time to get the job done and that its staff bent over backwards to help out where possible. While it acknowledges that 275 LPTV stations were eventually canceled post-December, 2011, the FCC observes that 150 of those had received in-core permits but had never built them out. That leads the Commission to conclude that those 150 "appear[ ] to have chosen not to transition." That's a bit disingenuous, since the FCC doesn't mention that some of those stations did not receive in-core authority until almost the end of the 12-month Section 312(g) period and may not have had time to build before the axe fell.

With respect to the September 1, 2015 deadline for ceasing all analog operation on *any* channel, one LPTV licensee suggested that that hard-and-fast deadline be softened to permit LPTV stations to continue to operate in analog mode until some later time tied to the roll-out of the National Broadband Plan.

The FCC's response in a nutshell? Enough is enough. Analog is inefficient, and it's time to put an end to it. Yes, the Commission recognizes that incentive-auction-induced spectrum repacking is in the offing, but the agency seems oblivious to the practical reality that some stations will find it difficult to justify investing in digital facilities until they know whether they will survive the repack. Instead, the FCC suggests that LPTV licensees should have seen the repack coming – even though they filed their applications for new stations in 2009, long before the Notice of Proposed Rulemaking proposing the repack.

The FCC does dangle the vague possibility of some relief for those who find that they can't build their digital facilities by 2015. Extension applications can be filed, but action on such applications will be based on the standards set out in Section 74.788. That section doesn't mention the spectrum repack as a possible justification. It does offer as sample justifications:

- the inability to build a tower because of zoning or FAA approval problems (better add environmental approval, which has kicked into high gear since the extension rule was adopted);
- the lack of equipment necessary to obtain a digital TV signal; and
- circumstances in which the cost of construction exceeds the station's financial resources.

Anyone thinking about asking for an extension might not want to rely too heavily on economic factors: the FCC observes that it set the 2015 deadline in the belief that it would "be further removed from the prolonged economic downturn that began in late 2007." Oh, is the downturn over, including for small businesses? We didn't know that.

But all is not lost, because the FCC notes that the Media

(Continued on page 15)

The Swami . . . Online Again!

Kevin Goldberg discusses the Free Flow of Information Act.

Now available on a small screen near you – the Swami. That's right, Kevin Goldberg, nearly live and in person, expounding on the Free Flow of Information Act for more than seven minutes. He explains the basics of the law, discusses whether this is the federal shield law we've all been looking for, and in full Swami mode prognosticates about its prospects for success. This is a follow-up to Kevin's recent post about the Senate Judiciary Committee's passage of the bill. The interview was produced for LXBN TV, a cool service from our friends at LexBlog, the blogging platform that hosts CommLawBlog. Just go to this link and on the video.

(Continued from page 14)

Bureau has already granted some extensions based at least in part on the repack. While that affords some cautious optimism, right now it's impossible to know for sure how the FCC will deal with extensions of the 2015 deadline. We do know, however, that extension applications must be filed by ***May 1, 2015***. We suspect that the FCC is just as happy to tackle this issue some other time.

Back in 2011, the Commission distinguished between construction permits for new digital stations, on the one hand, and, on the other, permits for flash cuts (*i.e.*, on-channel conversion to digital) or digital companion channels for existing analog stations. Flash cuts and companion channel permits were extended to September 1, 2015. By contrast, permittees for new digital stations are stuck with the three-year deadline.

The deadline poses a vexing problem for many people holding non-extendable permits for new digital stations.

That poses a vexing problem for many people holding non-extendable permits for new digital stations. Building a new station can be pretty risky if you don't know whether you are going to survive the repack. It seemed to make sense to set the deadline at the later of three years or September 1, 2015, so that the lay of the land after the repack would be known. Sorry, the FCC has now said, three years is enough time. If you don't want to take a risk, then don't build.

The end result is that holders of construction permits granted before September 1, 2012, have to build or file for extensions within their initial three-year period specified on their permits. CP's granted after that date will not expire until after September 1, 2015. We note that many permittees have already filed for extensions and have been able to obtain two six-month extensions for good cause. The Media Bureau does not have the authority to grant more than two extensions and must refer further requests for a vote of the Commissioners themselves.

The final topic addressed in the Commission's recent order is the potential of Channel 6 LPTV stations to interfere with NCE FM radio stations. Channel 6 stations operate on 82-88 MHz, and the FM radio band starts at 88.1 MHz. In effect, the aural carrier of TV6 is on a first- or second-adjacent channel to an FM station on 88.1 MHz, depending on how the TV station tunes its aural carrier.

As a result, the potential for interference is substantial. And to make matters worse, in 2011 the FCC provided an increase in the power limit for VHF LPTV stations, which aggravated the potential for interference. If the TV6 station were a radio station, the FCC's FM separation rules for adjacent-channel stations would come into play and require a certain distance between the two stations. But even though FM stations have to protect full power TV6 stations, there is no rule on the books dictating separations between TV6 LPTV stations and adjacent-channel FM stations.

Concerned about the increased possibility of interference from beefed-up Channel 6 stations, a couple of parties objected to the power increase.

The FCC's answer is that LPTV stations are secondary and so are required to protect FM radio stations – which enjoy primary status – from interference. LPTV stations on Channel 6 that take advantage of the new power limit thus had better watch their step, because if they do interfere with FM stations, they will have to fix the problem or reduce power or shut down.

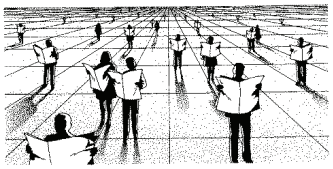
While somewhat comforting for NCE FM licenses, though, that's not quite a full answer because it doesn't address Class A Channel 6 stations. Unlike low power stations, Class A stations are not secondary spectrum users. If Class A stations and FM stations are both primary, who wins? Does the FCC's general first-come, first-served rule apply? The Commission's recent decision is silent on that point.

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

Updates On The News

CALM Act waiver extension deadline fast approaching – Attention, any TV licensee with a CALM Act waiver still in effect. You've got until ***October 14, 2013*** to file for extension of that waiver. Failure to do so could mean that you will have to be in compliance with the CALM Act requirements when December 13 rolls around.

The 2010 CALM Act, designed to stifle "loud commercials", technically took effect in December 2012. But, in its infinite legislative wisdom, Congress 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 to have the initial one-year waiver pretty much 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 from last year on CommLawBlog.com for more information on those requirements.)



As we reported back in July, 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. Requests for the extension of the waiver must be filed at least 60 days prior to the expiration of the currently outstanding waiver, which gets us to the upcoming ***October 14, 2013*** deadline. (Last year the Commission extended the deadline after the fact; we can't say whether the Commission will do the same again, but 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 that 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. (Again, for a summary of the filing requirements as originally laid out by the FCC, see our 2012 post on CommLawBlog.com.) In any event, if you will be needing an additional one-year waiver, you're running out of time to request it.

We can assist in the preparation and filing of extension requests – let us know if we can help.

2013 biennial Form 323 filing window opens October 1 – The FCC has announced that, as of October 1, commercial broadcasters will be able to file their 2013 biennial Ownership Reports (FCC Form 323). These reports are technically not due until December 2. Still, we should all bear in mind that (a) ***ALL*** attributable interest holders in ***ALL*** commercial licensees must file biennial reports, which means that the load on CDBS will increase substantially (yes, you *have* to use CDBS; no paper filings will be accepted); (b) December 2 happens to fall shortly after the Thanksgiving holiday and shortly before the big and often distracting year end holidays (Christmas, Hanukkah, Kwanzaa, New Year's); and (c) a number of licensees will also be having to file renewal applications on or before December 2. All of those are pretty good reasons to get ahead of the curve and file your 323's sooner rather than later.

The information to be reported must reflect things ***as of October 1, 2013***. In other words, even if a station changes hands or new officers, directors, shareholders or other attributable interest holders are brought into the mix between October 1 and when you end up filing the Ownership Report, your biennial report must show the station's ownership as it was as of October 1.

This year reporting parties will still be able to use Special Use FRNs (SUFRN). (If you're fuzzy on the whole SUFRN thing, check out this earlier post on the topic.) While the instructions on current version of Form 323 are surprisingly silent about that option – in fact, the instructions say nothing at all about SUFRNs – the Commission *has* updated its online Form 323 FAQs to provide information on their use.

One quirk of the Form 323 which is *not* mentioned on the FAQ page does happen to pop up on a different FCC webpage titled "Most Common Form 323 Filing Errors". As has been the case in the past, the form is set up to recognize only whole numbers when it comes to voting interests. While the form itself does not appear to provide any instructions on this point, the FCC's "Most Common Errors" webpage helpfully instructs that the "Biennial form will not accept decimal placements. Please round to the nearest whole number." That page then refers the reader to the FAQ page for more information on how to report voting interests, but we were unable (at least as of September 28) to find any guidance there about how the rounding process is supposed to be done.

The issue of rounding is not inconsequential. Some licensees are structured so that one owner holds less – sometimes *barely* less – than 50% of the licensee precisely so that that owner does not wield "control" as it is

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conventionally measured (*i.e.*, 50% or greater voting ownership). If that non-controlling owner happens to own a 49.9% interest, ordinary rounding would take that interest up to 50%, thereby ostensibly reflecting a controlling interest that she or he presumably does not in fact hold. Perhaps the Commission will update its FAQs (and the Form 323 itself) to clarify how it expects licensees to address this problem.

104 FM translator singletons invited to the Land of Long Forms – If you've got a singleton FM translator application still pending but you weren't among the 1,200+ applicants who got invited to file long form Form 349 applications last July, take heart! This past month the Media Bureau issued another invitation, this time to 104 more translator applicants. You can see a PDF of the invite list here, or you can find a more sliceable and diceable Excel version here. If you're on the list, you don't have much time to act.

The same drill that applied to the July invitees applies this time around.

First and foremost, the deadline: this latest window will be open only through **Wednesday, October 9, 2013**. Mark your calendars.

FM Translator applicants changing their technical proposals **MUST INCLUDE** *a Preclusion Showing.*

And heads up – if you're planning on amending your technical proposal, be aware that the long-form application (and amendments) will be entitled to protection from all subsequently-filed FM translator applications (and their amendments). So the sooner you file, the better.

Applicants will need to include a filing fee and Form 159 with their long-forms, but since the long-forms must be filed electronically through CDBS, you'll be reminded of that when you file. CDBS may not alert you, however, to the fact that your application will be subject to a number of limitations.

For example, modifications to the last-filed tech proposal may be proposed in the long-forms, but any modifications must be limited to "minor" changes and, as noted above, facilities proposed in long-form applications will be accorded protection from other FM translator applications on a first-come, first-served basis. If you propose new facilities that amount to a "major" change, you can expect to be summarily shown the door. Ditto if your amended proposal conflicts with any pending Auction 83 tech box proposal.

Also, applicants looking to change their technical proposals from the specs that were on file as of June 16, 2013 **MUST INCLUDE** a Preclusion Showing relative to LPFM filing opportunities. (You can find background about such Preclusion Showings, and some useful links, in our posts on the subject on CommLawBlog.com.)

And the public notice makes explicit what we had previously predicted:

[A]ny Form 349, to the extent it differs from the underlying tech box proposal (as pending on June 16, 2013), is not protected from applications submitted during the October 2013 (LPFM) filing window.

As we reported in last month's Memo to Clients, the Bureau has included conditions to that effect on a number of recent FM translator construction permits.

There are various other considerations to bear in mind. Anyone with an application listed among the 104 listed singletons should read the Bureau's public notice super-carefully. It would be a shame to have waited more than a decade, only to stumble on one or another minor detail at this very last minute.

Update: OET Releases the Latest and Greatest* Version of TVStudy . . . Again (* for maybe another couple of weeks, probably) – And the target continues to move as the Commission works to sharpen its analytical pencils. Less than a month after Version 1.2.7 of *TVStudy* was released, lookee here – there's a new and improved version. The Office of Engineering and Technology has announced Version 1.2.8, hot off the presses and ready for test drives. (At the risk of stating the obvious, *TVStudy* is the software that will be used in the modeling and analysis necessary to repack the TV spectrum.)

With the new version, we should all be able to "apply mechanical beam tilt only to stations having real antenna elevation patterns (either licensee-supplied elevation patterns in CDBS or user-entered patterns)". According to OET, Version 1.2.8 also "adds logic to choose the higher of the radio horizon or maximum values for effective radiated power for low-power stations (including Class A)". Plus, let's not overlook the fact that the new version "improves compatibility with Oracle's Java Runtime Environment (JRE) version 7" and "corrects an issue with scenario template exportation". And those are just the highlights – check out the "Upgrade Guide and Change Log" for the full scoop.