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Memorandum to Clients

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Renewal policy: Use it or lose some of it

Not-Quite-Operating Station Gets Not-Quite-Renewed

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If you've got a license to operate a radio station, you'd better have that station up and running and you'd better keep it that way. That's the none-too-subtle message in an Audio Division decision imposing a "short-term" renewal – *i.e.*, a two-year license term instead of the customary eight-year term – on a Texas FM licensee whose station was silent for much of its abbreviated four-year existence. The decision is a clear warning to licensees who fail to operate their stations for extended periods.

The station in question was initially licensed in mid-August, 2009. By March 1, 2011 it was off the air because (according to the licensee) of interference problems. It returned to operation 364 days later, but for only four weeks. Then it was off the air again – still more interference problems of some sort, plus something about tower availability. It came back on 358 days later, less than two weeks before its license renewal application was due. So of the 32 or so months during which the station had been licensed up to that point, it had been off-the-air for more than 19.

Of course, the station's failure to operate even for that much time was *not* illegal. To the contrary, the licensee had expressly requested – *and been granted* – authority to stay silent. And the Communications Act does not prohibit periods of non-operation of 11+ months. (The magic number under the Act? According to Section 312(g), the license of a station which fails to operate for a *consecutive 12-month period* automatically expires at the end of that period.)

So what's the Division's problem anyway?

In the Commission's view, a broadcast license carries with it an implicit obligation actually to broadcast. The FCC has long railed about the evils of "spectrum warehousing", *i.e.*, obtaining spectrum authorizations and then sitting on them, unused. A non-broadcasting broadcast licensee may be said to be engaging in that supposedly nefarious practice.

The Commission's interest in policing non-operation is no secret: when the license renewal application form (Form 303-S) was revised in 2010 in advance of the most recent renewal cycle, a new question was included requiring the applicant to list all periods of more than 30 days when its station was off-the-air. The goal, obviously, was to force non-operating licensees to narc on themselves. (For more on the 2011 revision of Form 303-S, check out this post.)

But if 11 months' worth of FCC-authorized silence is not illegal, how can the Division justify imposing any punishment at all?

Check out Section 309(k) of the Act, which requires the Commission to grant a renewal application if, among other things, "the station has served the public interest, convenience, and necessity". As the Audio Division sees it, if a station hasn't operated, the station provides the FCC no basis from which to conclude that the station has in fact served the public interest, so the FCC can't make the public interest determination required by the Act.

If the FCC can't make such a determination, it has limited options. It can designate the application for hearing to sort things out before an administrative law judge. Or it can "grant [the] application on terms and conditions as are appropriate, including renewal for a term less than the maximum otherwise permitted." In this case the Division took that second option – but it ominously warned that, "[h]ad the [station's] silence occurred for more than half of the license term, we would have designated this case for an evidentiary hearing." (By our calculation, the Texas FM station had been off-the-air for slightly more than half of the relevant license term, but the Division doesn't seem to think so.)

(Continued on page 6)

Inside this issue . . .

Safety is no accident

OSHA to Tower Industry: Protect Your Workers

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A great many communications operations – broadcasters, telecom, cable, public safety – utilize towers in some capacities. So it caught our attention when our friends at *Radio World* reported on an open letter released recently by David Michaels, Ph.D., MHP, addressed to "Dear Communication Tower Industry Employer". The letter highlights an important area of regulation for anybody responsible for a tower. (You may know Dr. Michaels better as the Head Honcho – technically correct title: Deputy Secretary for Occupational Safety and Health in the Department of Labor – at the Occupational Safety and Health Administration (OSHA).)

The gist of the letter: There has been a rash of fatal accidents involving tower workers. Thirteen deaths in 2013, four more reported already in 2014.

And, according to Michaels, ***all*** of those deaths were preventable.

Aggravating that already tragic report: OSHA's conclusion that a "high proportion" of the deaths occurred because of a "lack of fall protection" – either inadequate protection or failure to ensure that tower workers are using the available protection properly – for which the workers' employers are responsible.

So Michaels is using his open letter to remind employers, in no uncertain terms, of their "responsibility to prevent workers from being injured or killed while working on communication towers". Who is the target audience? Not only the company that hires the workers, but also tower owners and "other responsible parties in the contracting chain".

In particular, Michaels identifies the following important considerations (which we quote verbatim):

- Prior to their initial assignments, it is critical for newly hired workers to be adequately trained and monitored to ensure that safe work practices are learned and followed.

- As required under the OSH Act, when working on existing communication towers, employees must be provided with appropriate fall protection, trained to use this fall protection properly, and the use of fall protection must be consistently supervised and enforced by the employer. Fall hazards are obvious and well known, and OSHA will consider issuing willful citations, in appropriate cases, for a failure to provide and use fall protection. States with their own occupational safety and health plans may have additional requirements. A full list of State plans is available at this link.

- During inspections, OSHA will be paying particular attention to contract oversight issues, and will obtain contracts in order to identify not only the company performing work on the tower, but the tower owner, carrier, and other responsible parties in the contracting chain.

- Contractor selection should include safety criteria and close oversight of subcontracting, if allowed at all. Simple "check the box" contract language may not provide enough information to evaluate a contractor's ability to perform the work safely.

(Continued on page 13)

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Moral of the story: Keep your stories straight

FCC Heavies Up on Fine for Multiple Sponsorship ID Violations

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Seven years ago the Enforcement Bureau sent out a flurry of inquiries suggesting that scores of TV stations might have violated the sponsorship identification rule by relying on "video news releases". The Commission followed up on this in 2008 with a combo Notice of Inquiry and Notice of Proposed Rulemaking suggesting that the sponsorship ID rule might warrant extensive (some might call it nonsensical) sponsor IDs to flag "embedded" advertisements. And now, after half a decade of relative inactivity on the sponsorship ID front, the Commission has imposed a $44,000 fine on a Chicago AM station for sponsorship ID violations.

There are several lessons to be learned here, even if the violations themselves were pretty obvious and equally avoidable.

The problem arose when the station aired a series of paid announcements – running from 90 seconds to two hours in length – on behalf of Workers Independent News (WIN), which bills itself as "the Nationwide Voice Of Working People And Their Unions". The spots were bought and paid for by WIN and were produced to sound like a newscast (or at least a routine news report inserted into a news program). Eleven of the 90-second spots, however, were not ID'd to reflect that they were paid announcements.

A complaint was filed, the Enforcement Bureau asked the station about the spots, and the station initially responded that ALL the spots were properly ID'd. The Bureau wasn't convinced, and issued a Notice of Apparent Liability (NAL) imposing a $44,000 fine for the 11 non-ID'd spots.

In response to the NAL, the licensee changed its tune, now admitting that the 11 spots weren't properly ID'd. The licensee questioned the calculation of the fine, though. The base forfeiture amount for a sponsorship ID violation is $4,000. Since the violation involved a single failure – albeit repeated 11 times – the licensee argued that the proper fine should be $4,000. The Bureau stuck to its guns, calculating the fine by multiplying the $4K base times 11 (*i.e.*, the number of separate violations) to come up with $44K.

The licensee challenged this approach and the full Commission has now spoken: when it comes to sponsorship ID violations, "forfeiture amounts proposed or assessed for violations of the sponsorship identification rules in any case reflect consideration of the unique facts of each case in accordance with the aggravating and mitigating factors." And where, as here, the Commission determines that multiple violations have occurred, the Commission will feel free to calculate the fine accordingly.

Lesson Number One: If you ignore the sponsorship ID aspects of programming you air, be prepared to pay for each separate broadcast, even if the mistake you make is essentially the same for each broadcast.

If you ignore the sponsorship ID aspects of programming you air, be prepared to pay for each separate broadcast.

Lesson Number Two: If you realize that you've violated the sponsorship ID rule, take steps to alert your audience to the problem. While the FCC doesn't say that corrective announcements will get you off the hook, the order includes at least a suggestion to that effect. So if you find yourself in that particular hole, such announcements may prove helpful.

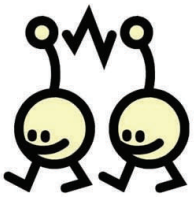
And Lesson Number Three? Pay attention to what you tell the FCC and be sure to keep your stories straight.

Why? Because in this case, in its response to the Bureau's initial inquiry, the licensee took the position that ***all*** of the WIN announcements had been properly ID'd. But in response to the NAL, it acknowledged that 11 of the 90-second announcements were *not* properly ID'd. And it went further. Seeking leniency, the licensee argued that it had taken steps to correct the problem even before the FCC started asking questions about the spots. In support of that argument, the licensee advised the FCC that, back in 2009 when the spots were aired, the station's General Sales Manager had sent the GM an email alerting him that the "WIN spots did not contain the required sponsor identification" and urging that they be corrected promptly.

But hold on there. If the licensee knew that the 90-second announcements didn't pass sponsorship ID muster *before* the Bureau first came calling, how could the licensee have claimed to the Bureau that there hadn't been any violations at all?

The licensee's problem here was complicated by the fact that the accuracy of the latter response (in which it admitted that the station's General Sales Manager had raised the problem back in 2009) was attested to by the station's current General Manager who, back in 2009, happened to be the station's "Director of Sales". The licensee apparently declined to identify by name the individual responsible for the 2009 email, and it

(Continued on page 5)



Station cohabitation experimentation

TV Channel Sharing: FCC Takes a First Data-Gathering Step

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An essential component of the FCC's long-discussed, still-in-development plan to free up TV spectrum for mobile broadband use is the concept of channel sharing by television stations. The idea, which the Commission has been officially studying for more than three years already, seems relatively straightforward. Thanks to the efficiency of digital operation, the standard 6 MHz channel allotted to each TV licensee can accommodate at least two separate stations. That being the case, in theory the Commission could re-take half of the spectrum currently occupied by TV operations simply by encouraging each station to move in with one other station on a shared channel.

Nearly two years ago the FCC took a preliminary step by announcing some initial minimal guidelines to govern such channel sharing. In the Incentive Auction Notice of Proposed Rulemaking, channel sharing was expressly identified as one option available to TV licensees in the spectrum re-packing effort. So the concept of channel sharing is more than just a glimmer in the FCC's eye.

Despite its obvious commitment to the channel-sharing notion, though, the Commission has little idea of the feasibility or practicality of sharing. That's mainly because no such arrangements have been authorized . . . until now.

Heeding the FCC's invitation for volunteers, two L.A.-area stations have stepped up to the plate with a proposal that will allow for testing of at least some of the assumptions underlying the Commission's Grand Plan. And knowing a good thing when it sees it, the FCC has approved the proposal.

Accordingly, Station KJLA (Channel 49, Ventura) will soon be moving in with noncommercial Station KLCS (Channel *41, Los Angeles) for the next six months (or less, if either or both stations decide to bail sooner). They'll be testing:

- The technical feasibility for multiplexing of signals on a single bitstream off-air, including a variety of content combinations (*e.g.*, multiple HD streams, HD/SD stream mixes, etc.); transmission in the H.264 video compression format in addition to the standard MPEG-2 format;
- Ways to minimize problems with, and ensure accuracy in, the Program and System Information Protocol (PSIP) system during shared operation;
- A variety of sharing configurations "with replication during off-peak hours". (According to the stations' proposal, "KJLA will provide content to KLCS and KLCS will transmit the shared bitstream to determine the level of reception of the shared channel streams. During these tests, KLCS will continue to transmit its unaltered signal with all of its broadcast streams pursuant to its licensed operating parameters.")
- Implementation of full-time channel sharing (*i.e.*, with KJLA remaining on-air, while KLCS transmits a shared bitstream with content from both stations using different virtual channels).

During the test, Channel 41 – the cozy channel that's going to be shared – will be deemed to be "separately licensed" to *both* stations; both will be subject to all the usual rules and policies, although KLCS, as a noncommercial station, will be subject to NCE constraints while KJLA will not. (Not surprisingly, both stations have committed to complying with all applicable FCC's rules.) They'll also monitor their respective signals for any possible degradation.

TV broadcasters should pay close attention to the test as it plays out.

Interestingly, according to the FCC, KJLA will continue operate "at its present location and under its current operation parameters" during the test.

Within six months of the end of the test (which the FCC refers to as the "Channel Sharing Pilot"), the stations will have to submit a report on the positives and negatives of the experiment.

Credit for coming up with the test goes not only to KLCS and KJLA, but also to CTIA – The Wireless Association®, which is providing "equipment and consulting services to facilitate the project". CTIA's members, of course, stand to benefit from quick and successful completion of the spectrum repacking process, so they clearly have an incentive to get the FCC, and broadcasters, comfortable with the channel sharing notion. While CTIA is technically not subject to any of the conditions imposed by the FCC's test authorization, the letter setting out those conditions includes CTIA as an addressee. And the test proposal was transmitted to the FCC under a cover letter on CTIA stationery, following a meeting of representatives of the FCC, KJLA, KLCS and, yes, CTIA.

TV broadcasters should pay close attention to the test as it plays out. The test will provide an initial real world check on the desirability – indeed, the threshold viability – of signing onto a sharing arrangement. When the incentive auction and repacking process actually happen – and at this point there's no reason to think that they are anything but inevitable – the knowledge gained from this initial toe-dip into the channel sharing experience could prove crucial.

Next up: Comsearch

White Space Database Update: Another System Ready for Testing

After a three-month period of inactivity, there's been a sign of life on the white space database administrator front. Finally breaking out of the starting blocks, Comsearch's TV Band Database System is now ready for public testing. According to a public notice from the Office of Engineering and Technology, that system will get a 45-day test run beginning on ***February 24, 2014***, followed by the well-established drill: Comsearch will have to file a report on the test, public comment on the report will be invited and, if everything works out Comsearch's way, the FCC will eventually approve it as a coordinator. If and when that happens, Comsearch will join the four others already approved. (For readers who may have lost track, those would be Google, Inc., Key Bridge Global LLC, Spectrum Bridge Inc. and Telcordia Technologies.)

Four other candidates have still not reached the testing phase, so check back here for updates.

In keeping with our white space database SOP, we have updated our handy-dandy table charting the progress of each of the would-be administrators:

(Fuzzy on the whole white space database administrator question? Take a look at this post on CommLaw-Blog.com for some background.)

Coordinator	Test Started	Test Finished; Comments Sought	Coordinator Approved
Comsearch	Feb. 24, 2014		
Frequency Finder Inc.			
Google Inc.	Feb. 27, 2013	May 29, 2013	June 28, 2013
LS telecom AG	June 18, 2013	Nov. 14, 2013	
Key Bridge Global LLC	March 4, 2013	May 29, 2013	Nov. 19, 2013
Microsoft Corp.			
Neustar Inc.			
Spectrum Bridge Inc.	Sept. 14, 2011	Nov. 10, 2011	Dec. 22, 2011
Telcordia Technologies	Dec. 2, 2011	Feb. 1, 2012	March 26, 2012
WSdb LLC			

(Continued from page 3)

also declined to submit the email – so we are all left to guess exactly who was involved. But it's clear (to us, at least) that the FCC was highly suspicious about the seemingly conflicting representations and was, accordingly, not inclined to cut the licensee any slack at all.

Which leads us to the final take-away point: licensees should always follow the FCC's rules, but if they slip up – which, let's face it, is bound to happen sooner or later – they should not dig themselves in even deeper by denying facts that they know to be true. As history has repeatedly taught us, the cover-up is always worse than the crime.

(Continued from page 1)

The Division went a bit farther. In a footnote (watch out for those lurking footnotes!) it lumped under-power operation in the same category as non-operation: "If the power level is too low to provide the minimum signal level required under the Rules for service to a station's community of license, this type of operation is the functional equivalent of silence."

Don't say we didn't warn you that the Division might be moving in this direction. Back in September, 2010 – at the very beginning of the current radio license renewal cycle – we blogged about the Commission's distaste for warehousing, suggesting that the Division would be on the lookout for non-operating stations. At the time the number of such stations was thought by some in the Commission to be at an all-time high. The staff seemed particularly annoyed by licensees who make a habit of staying silent for 11 months and a couple of weeks, turning on for a brief interlude just in time to avoid the automatic license expiration provision of Section 312(g).

The only real surprise here is that it took the Division more than three years – and nearly the entire radio renewal cycle – to act.

What message is the Division sending to smaller broadcasters?

The Division's hard-nosed approach here is to some degree understandable: when it issues licenses to operate so that the public will be served, it expects that operation will occur and the public will be served. We get that.

But consider the licensee's perspective. Other than the Section 312(g) 12-consecutive-month requirement, the Communications Act imposes no minimum amount of operation. And the FCC itself has held that operation of just 24 hours is sufficient to reset the 312(g) clock, meaning that a licensee can avoid 312(g) automatic expiration simply by operating one day per year. (Check out Footnote 21 to this 2003 FCC decision.)

And let's not forget that, in order to stay silent for more than 30 days, a licensee has got to obtain special temporary authority (STA) from the Commission. In order to grant such an STA, the Commission's staff must make a public interest determination that silence is in the public interest. But if an STA-blessed silence is in the public interest, how then can that same silence later be held *not* to have been in the public interest?

As for the Division's dire threat to designate for hearing any station that's off the air for more than half of its license term, would that treatment apply even if the licensee could demonstrate that its non-operation was caused by circumstances beyond the licensee's fault? In the case of the Texas FM station, the licensee asserted, albeit somewhat inartfully, that interference considerations and tower availability problems contributed to its non-operation. The Division's order doesn't address those factors. It seems to us that, if the Division is trying to discourage warehousing, its draconian policy should not be applied to folks who are clearly *not* voluntarily "warehousing".

And in the same vein, if a licensee is *trying* to operate, albeit at low power, how is that objectionable, or punishable, warehousing? Bear in mind, we are only now beginning to emerge from a brutal recession that has been hard on everybody, and particlarly smaller broadcasters in smaller communities. What message is the Division sending to them? They're struggling to stay on the air – as the Division wants them to – but often find themselves impossibly squeezed by limits on both their finances and their technical facilities. The Division's insistence on operation *uber alles* is jarringly inconsistent with the urgent problems about which it is or should be aware. (The AM Revitalization proceeding, for one example, illustrates some, but by no mean not all, of those problems.) Many radio operators are finding it difficult enough to serve their audiences. The Division's approach unnecessarily aggravates their unfortunate situations.

As we explained in 2010, the Division feels that the full Commission essentially gave it the go-ahead to whack non-performing licensees back in the 2001 *Birach Broadcasting* decision. The Division apparently feels that that relatively obscure decision should also have put everybody else on notice of the impending crackdown.

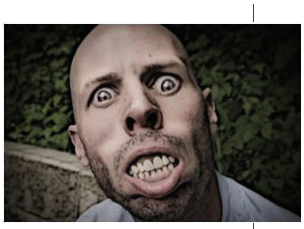
But hold on there. In *Birach*, the station had been off the air for the licensee's entire tenure, and its license was *still* renewed. Sure, in its seven-page opinion the Commission stuck in one sentence cautioning that "a licensee will face a very heavy burden in demonstrating that it has served the public interest where it has remained silent for most or all of the prior license term". But as Judge Randolph (a member of the D.C. Circuit panel that reviewed the case) observed, the *Birach* renewal was based at least in part on "the FCC's repeated assurances that the station could remain silent as it sought to relocate." That suggests that, having expressly authorized the licensee to stay silent for years, the FCC might not be in a position to beat up on the licensee for its non-operation.

Also, *Birach* was issued more than a decade ago. Since then the FCC has had plenty of opportunity to impose the "very heavy burden" it threatened there – but it hasn't done so, even through an entire radio renewal cycle (2003-2006) and nearly a *second* entire cycle (2011-present). That being the case, licensees might legitimately argue that any notice the *Birach* decision may have initially provided has been completely diluted by the FCC's own failure to implement the *Birach* threat in the 12+ years since.

Regardless of these points, the Audio Division appears determined now to haul out the Big Gun that it thinks the Commission put in the Division's hands in the *Birach* decision. It will likely be a risky and expensive problem for anyone that that Big Gun gets aimed at. Our suggestion: avoid the problem entirely by getting your station on the air and keeping it there.

[*Editor's Note: Howard Weiss asked that we acknowledge Anne Crump's assistance in the preparation of this article. Consider her acknowledged.*]

Tales from the Capitol crypt!



Zombie Alert Redux

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One of the endearing qualities about zombies is their resilience: knock them down and they'll get back up again, and again, and again. They're also quite the attention-grabbers.

It's not surprising, then, that government concern about zombies surfaces and re-surfaces from time to time to jar the sleepy citizenry out of its complacency. Example: A recent staff report out of a Congressional committee (about the "Federal Government's Track Record on Cybersecurity and Critical Infrastructure") which revisits a zombie incident from last February to make a point.

As with most zombie tales, however, the report is not entirely accurate.

The report is critical of the government's performance overall. It tells of "significant breaches in cybersecurity", "confidential cybersecurity plans . . . left unprotected", sensitive data "stolen by a malicious intruder". It's enough to send one screaming to one's fall-out shelter for the duration.

Let's be fair to the FCC: If anybody was asleep at the switch last year, it was not the FCC.

One paragraph in the 19-page report stood out to some of us here in the *Memo to Clients* bunker (to which, of course, we had immediately repaired).

According to the report, the numerous security failures it describes "aren't due to poor practices by the private sector". Rather, they were "real lapses by the federal government", including this one, which we quote verbatim from the report as it originally appeared:

> Last February, hackers reportedly broke into the national **Emergency Broadcast System**, operated by the **FCC** as the federal government's tool to address Americans in case of a national emergency. The hackers caused television stations in Michigan, Montana and North Dakota to broadcast zombie attack warnings. "Civil authorities in your area have reported that the bodies of the dead are rising from their graves and attacking the living," an authoritative voice stated in the hacked broadcast message, while the familiar warning beep sounded. "Do not attempt to approach or apprehend these bodies as they are considered extremely dangerous."

There are several problems with this treatment of the zombie incident in question.

First, of course, the "Emergency Broadcast System" (a term which the report puts in bold face type) technically hasn't existed since 1997, when it was replaced by the "Emergency Alert System" (EAS).

Second, while the EAS and its infrastructure are mandated and regulated by FCC rules, it's not accurate to say that the EAS is "operated by the FCC". The EAS consists of a vast network of private communications facilities interconnected through EAS equipment privately owned and maintained at each such facility. The system can be activated by the President or various state or local officials in times of emergency. (The authority to activate the system at the national level has been delegated *not* to the FCC, but to FEMA.The National Weather Service is involved as well.) Once the system is activated, it's up to the non-governmental participants in the system to make it work.

Third, and most important, the zombie attack alert referenced in the report was *not* the result of hackers breaking into any emergency system operated by the FCC. Rather, the alerts appear to have been the result of separate hacks into the privately-maintained EAS equipment at three separate TV stations. According to one theory, those stations hadn't bothered to reset the passwords to their Internet-accessible EAS gear from the factory-issued settings, making it relatively easy for hackers to gain access to the gear and work their little prank. The day following the hack, the FCC reminded all EAS participants of the need to secure their equipment from this kind of attack.

It's true that many, possibly most, of the cybersecurity problems noted in the report may properly be laid at the feet of government officials or agencies. We can't say for sure. But we are confident that the zombie hack was not one of those. So let's be fair to the FCC: If anybody was asleep at the switch last year, it was *not* the FCC but rather the EAS participants who apparently hadn't exercised rudimentary Internet safety protocols.

We take this opportunity to remind all EAS participants of the importance of securing their equipment against this kind of hack. Appropriate use of passwords, firewalls and similar conventional protections should keep hackers and their faux zombie alerts at bay. We make no such promises, however, when it comes to real zombies.

Big cash crop or just seeds and stems?

Grass Getting Greener for Marijuana Advertising?

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As legalized marijuana sale and use spreads across the country, there may be some good news for broadcasters. Two recent announcements by federal agencies suggest possible relaxation of the federal government's previously stern attitude toward pot. That could encourage some broadcasters who have thus far sat on the sidelines, declining weed-related advertising, to reconsider.

But heads up – the recent announcements do not directly address the issue of marijuana advertising, and they stop short of giving it the green light.

The legal status of marijuana in American society is actively evolving. While the Feds continue to treat it as a Schedule I drug under the Controlled Substances Act – and, therefore, among the worst of the worst drugs – nearly half the states have permitted the sale of marijuana for medical uses. And more recently, Colorado and Washington have legalized it for recreational use.

*The FinCEN memo does **not** expressly say that dealing with dealers is okay with the feds.*

The potential dollar value of the burgeoning marijuana industry is huge. Colorado is reportedly projecting more than $578 million in combined wholesale and retail grass sales just this year, and some have projected nationwide sales of pot to reach $2.3 billion in the same time period (with combined recreational and medical sales). With those kinds of numbers, the advertising dollars likely to be thrown off should be equally impressive.

But as we have previously reported (before the Colorado and Washington legalizations), the divergent governmental views on the legality of pot generally have cast a haze over things, effectively nipping the weed-advertising market in the bud. That's particularly so for broadcasters because the feds are in charge of issuing broadcast licenses.

Back in 2009 the Department of Justice announced an enforcement policy relative to marijuana that hinted at possible relaxation. But within two years the tide seemed to have turned, as a number of U.S. Attorneys made threatening noises emphasizing the narrowness of any perceived relaxation. (One U.S. Attorney was quoted as saying that "[n]ot only is [marijuana advertising] not appropriate . . . it's against the law." Talk about a buzzkill.) With increased legalization, though, things now seem to be rolling in the other direction.

Specifically, an office of the Department of the Treasury has released a memo giving guidance to banks that want to provide services to marijuana-related businesses. It appears that the Treasury Department (through its Financial Crimes Enforcement Network (FinCEN)) recognizes that, as the marijuana market achieves legitimacy, the market will need access to the same basic financial services available to others. Federal policies that discourage the provision of such services could frustrate the growth of a legitimate market.

So FinCEN has advised financial institutions that if they do decide to deal with marijuana-related businesses, they should exercise due diligence. Examples of such diligence include:

1. verifying with the appropriate state authorities whether the business is duly licensed and registered;
2. reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business;
3. requesting from state licensing and enforcement authorities available information about the business and related parties;
4. developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (*e.g.*, medical versus recreational customers);
5. ongoing monitoring of publicly available sources for adverse information about the business and related parties;
6. ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and
7. refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk.

FinCEN assures financial institutions that they may reasonably rely on information obtained from state authorities.

The memo does ***not*** expressly say that dealing with dealers is okay with the feds – but by laying out what amount to best practices, it seems to be suggesting that the federal government is prepared to live with such dealings as long as appropriate precautions are exercised.

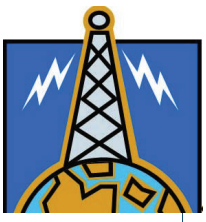
The memo also does ***not*** address advertising-related issues. But if federally-regulated financial institutions are getting a nearly-green light as far as marijuana-related transactions are concerned, it's difficult to see why the same should not apply to broadcast advertising as long as the same precautions are taken.

The FinCEN memo was released simultaneously with a

(Continued on page 9)

Leniency for HARK, Eagle, similar systems?

Complete Waiver of Tower Inspection Requirement Sought



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Section 17.47 of the FCC's tower lighting and marking rules has two straight-forward requirements. One of those two provides that tower owners must inspect their tower(s) once every three months.

That's a lot of work, especially if you own a whole bunch of towers. Because of that, back in 2007, two big-time tower owners – American Tower and Global Signal – asked for, and got, a break. As we reported back on our blog then, the Commission agreed to waive the inspection-every-three-months requirements. The FCC was particularly swayed by the fact that both companies had state-of-the-art remote tower monitoring systems: American Tower was using the Eagle Monitoring System, Global Signal the HARK Tower System. As a result, the FCC agreed to waive the quarterly inspection requirement to a once-a-year event for tower owners using the Eagle, HARK or similar systems. (The Commission eventually adopted an expedited process for waiver requests based on the use of such systems.)

Reducing the inspection chore by 75% provided considerable relief. But over the six-plus years since its waiver was first granted, American Tower still rang up nearly $10 million in costs conducting some 39,000 annual inspections. So now it has come back to the FCC for a further waiver: it wants to be relieved of any inspection requirement; the computer-based monitoring system can handle everything that needs to be handled.

Obviously, the cost of complying with the inspection requirement is a boatload more for American Tower, which owns a gazillion towers, than for most folks. And the cost of installing and maintaining an adequate monitoring system is not inconsiderable. But all tower owners should give some thought to whether the requested waiver might make sense for them. If it would, then it might be a good idea to throw in some comments in support of American Tower's request.

Comments on the American Tower proposal were due in February, but it's reasonable to assume that comments submitted soon thereafter may still be considered.

(Continued from page 8)

memo from the Deputy Attorney General of the U.S. providing all U.S. Attorneys "Guidance Regarding Marijuana Related Financial Crimes". According to the Deputy AG, "the Department is committed to using its limited investigative and prosecutorial resources to address the most significant marijuana related-cases." Translation: DoJ doesn't have the money or time to go after every single pot-related transaction, so it's going to focus only on the most serious offenses.

The DoJ memo sticks to the established script about how marijuana is still a "dangerous drug" illegal under federal law. It reiterates the eight priorities that are the focus of the Department's efforts to enforce the Controlled Substances Act. Those priorities are prevention of:

- The distribution of marijuana to minors;
- Revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
- The diversion of marijuana from states where it is legal under state law in some form to other states;
- State-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Violence and the use of firearms in the cultivation and distribution of marijuana;
- Drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- The growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Marijuana possession or use on federal property.

Before a broadcaster decides to sell spots to pot-related businesses, it would be a good idea to double- and triple-check that there is no chance that such sales could be seen to undermine any of those prevention priorities.

Anyone contemplating selling time for marijuana-related advertisements should also be alert to any local laws relative to such ads. Under Colorado law, for example, recreational marijuana shops can't advertise on television and radio unless they can establish that no more than 30 percent of the targeted audience is under the age of 21.

The bottom line? Broadcasters should continue to use caution before running radio or TV ads for marijuana dispensaries. The DoJ is still bound by federal law that provides that the sale of pot is very much illegal, so strict enforcement remains a possibility. But the FinCEN memo provides at least a suggestion that strict enforcement is on its way out the door, if it hasn't already left the building. And, assuming that FinCEN isn't just blowing smoke, the due diligence measures spelled out in its memo provide a convenient guide for minimizing, if not eliminating, risk of federal prosecution.

Image obtained from www.aereo.com

Thumbs down in the Beehive State

Utah Judge to Aereo: Not in this Circuit!

By Harry F. Cole
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As we reported last month, the Supreme Court will be considering the Aereo case later this spring (with a decision anticipated before the end of June). In the meantime, the other Aereo- (or FilmOn X-) related cases in the First, Ninth and D.C. Circuits have been stayed pending a decision from the Supremes. But that still left one infringement action against Aereo still outstanding: in Utah, broadcasters sued Aereo in federal District Court last fall.

As has been standard operating procedure in such cases, the broadcaster-plaintiffs asked the judge to enjoin Aereo from operating until their case had been tried. When the Supreme Court agreed to review the Second Circuit case, everybody expected the Utah judge to do what all the other courts had done, *i.e.*, freeze the case in its tracks, leaving the injunction motion undecided and Aereo still in operation until mid-summer, at the earlier.

The real impact of this turn of events is primarily psychological.

So many, if not most, observers were surprising when U.S. District Judge Dale Kimball granted the broadcasters' motion for a preliminary injunction! This marks the first time that Aereo has been on the wrong end of an injunction ruling; it should send a clear signal to one and all that Aereo may be in for some rough sledding ahead.

Judge Kimball's decision reads like it was written by the broadcasters. Some sample bits and pieces:

> "The plain language of the 1976 Copyright Act support[s] Plaintiffs' position."
>
> "Aereo's retransmission of Plaintiffs' copyrighted programs is indistinguishable from a cable company and falls squarely within the language of the Transmit Clause."
>
> There is "no basis in the language of the Transmit Clause or the relevant legislative history suggesting that technical details take precedence over functionality. In fact, such a focus runs contrary to the clear legislative history."

And the bottom line?

> "Based on the plain language of the 1976 Copyright Act and the clear intent of Congress, this court concludes that Aereo is engaging in copyright infringement of Plaintiffs' programs."

To reach his decision, Kimball reviewed not only the Copyright Act itself, but also the legislative history underlying that Act and the decisions of the other Aereo, and FilmOn X, courts. He didn't think much of the Second Circuit's *Aereo* decision or the *Cablevision* decision on which it was based.

In his view, the Second Circuit "proceeded to spin the language of [the Copyright Act], the legislative history, and prior case law into a complicated web". Ouch. The Second Circuit "changed the wording" of the Act in a crucial respect. Double ouch. And contrary to the Second Circuit, Kimball found "no basis in the language of the Transmit Clause or the relevant legislative history suggesting that technical details take precedence over functionality. In fact, such a focus runs contrary to the clear legislative history."

Further demonstrating how unimpressed he was with the Second Circuit, Kimball quoted extensively from Judge Denny Chin's dissents in the Second Circuit and, presumably so we all couldn't miss the point, expressly observed that "Judge Chin's dissenting opinion [is] more persuasive than the majority opinion."

And so Judge Kimball enjoined Aereo, but only in the Tenth Circuit. Of course, the Tenth sprawls across Utah, Colorado, Kansas, New Mexico, Oklahoma and Wyoming, so the injunction isn't small potatoes by any means.

But the real impact of this turn of events is primarily psychological: Aereo's strategy appeared to be working like a charm, what with resounding victories in the Second Circuit and a follow-on decision in the District Court in Boston. Sure, a couple of district courts went the other way, but those cases involved FilmOn X, not Aereo. Now, however, Aereo itself has ended up on the short end of a judicial decision.

(Continued on page 11)

Thumbs up at OMB

New Protections for AM Signals Now In Effect

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Last August we reported on a decision by the Commission requiring ***ALL*** FCC-regulated services – broadcast and non-broadcast alike – to protect AM stations from signal distortion arising from construction or modification of nearby towers. (Reminder: The term "towers" in this context is broad and includes buildings or other structures on which a new or modified antenna or antenna-supporting structures are being installed.)

Because the new rules include "information collections", their effectiveness had been deferred pending review by the Office of Management Budget (OMB) pursuant to the hilariously-named Paperwork Reduction Act.

The wait is now over. According to a notice in the Federal Register, OMB approved the rules on February 10, and as of ***February 20, 2014***, they have become effective.

As we outlined in our post on CommLawBlog last August, the phase-in of the rules is somewhat complex, with some potential effects stretching over a year or two. AM stations and anyone building a structure near an AM station should take a close look at the rules to determine their potential impact on any particular situation.

And the Commission is trying to make it easy (well, at least somewhat easier) to check on the possible need to notify nearby AM stations. The Wireless Telecommunications Bureau, in coordination with the Media Bureau, has developed a cool tool to facilitate compliance. If you're planning to construct or modify a tower – and remember, the working definition of "tower" in this context is extremely broad – all you do is go to http://fcc.gov/am-tower-tool, enter the location of your proposed construction and hit the button. Voilà, the tool tells you of all AM facilities – both operating and authorized-but-not-yet-operating – within the coordination area specified in Section 1.30002. That should make the new notification procedure considerably easier on all concerned.

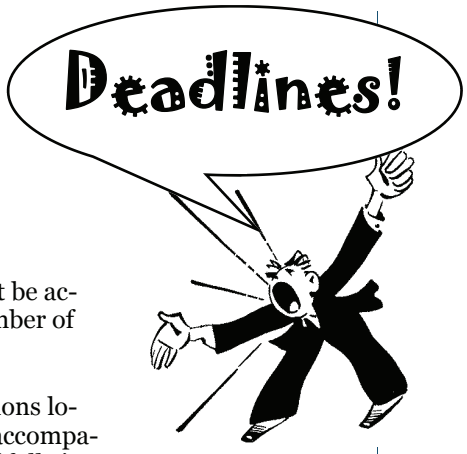
Thanks, and kudos, to the helpful folks in the Wireless and Media Bureaus for recognizing the likely utility of such a tool and then making it happen.

(Continued from page 10)

This is likely to be the last court decision in the Aereo saga until the Supreme Court weighs in in a couple of months. The Aereo litigation in the First Circuit and the FilmOn X cases in the Ninth and D.C. Circuits have been stayed pending the Supremes' decision. And even Judge Kimball, having enjoined Aereo, went ahead and stayed further proceedings in that case, too, also pending the Supreme Court's decision.

Post-script: The Supreme Court has announced that it will hear oral argument in the Aereo case on April 22, 2014. From the calendar released by the Court, it looks like the argument will be the second of two on the card – but that's subject to change. If you're planning on attending the argument, expect to get to the Court early in the morning, stand in line for a long time, and probably sit through a case you know nothing about.

Or you could just make a point of checking in on CommLawBlog.com for our post-argument take on things. While predicting the final result in a case based on oral argument is an unreliable (at best) exercise, the exchanges between the Justices and counsel for the various parties invariably lend themselves to beaucoup speculation. And we plan to be speculating with the rest of the crowd. The difference between us and them? We'll have Swami Kevin Goldberg – no stranger to this kind of this – and his pal the Blogmeister (Harry Cole) doing the heavy lifting for us on CommLawBlog.com. Kevin and Harry are planning to attend the argument and to share their observations with our readers promptly thereafter. Stay tuned.



March 20, 2014

AM Revitalization – Reply Comments are due with regard to the Commission's Notice of Proposed Rule Making aimed at revitalizing the AM radio service.

April 1, 2014

Radio License Renewal Applications – *Radio* stations located in **Delaware** and **Pennsylvania** 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* and *Class A television* stations located in **Texas** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Radio Post-Filing Announcements – *Radio* stations located in **Delaware** and **Pennsylvania** must begin their post-filing announcements with regard to their license renewal applications on April 1. These announcements then must continue on April 16, May 1, May 16, June 1 and June 16. Once 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 **Texas** must begin their post-filing announcements with regard to their license renewal applications on April 1. These announcements then must continue on April 16, May 1, May 16, June 1 and June 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly from that used in prior renewal cycles. 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.

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

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee** and **Texas** must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Noncommercial Television Ownership Reports – All *noncommercial television* stations located in **Texas** 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 **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania** and **Tennessee** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

April 10, 2014

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the first quarter 2014 reports on FCC Form 398 must be filed electronically with the Commission. These reports then should be automatically included in the online public inspection file, but we would recommend checking. Please note that the FCC requires the use of FRN's and passwords in either the preparation or filing of the reports. We suggest that you have that information at hand before you start the process.

Commercial Compliance Certifications – For all *commercial television* and *Class A televisio*n stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to substantiate compliance with those limits, must be uploaded to the public inspection file.

(Continued on page 13)

FHH - On the Job, On the Go

In mid-February, **Kathy Kleiman** attended the First MAKERS Conference in Los Angeles. MAKERS is a one-year-old AOL/PBS initiative that features a documentary and web-based video platform showcasing stories "from trailblazing women of today and tomorrow". (**Kathy**, of course, is the founder of the ENIAC Programmers Project, whose goal is to capture the oral histories of the six women who programmed the world's first modern computer.)

Kathy will be keeping her traveling shoes on (and her passport handy) in March, when she jets to Singapore from March 23-27 to attend an ICANN meeting. On the agenda: new generic top level domains (gTLDs), new ideas for handling domain name registration data and work with new registries.

If you're in sunny San Diego March 10-11, look for **Frank Montero**. He'll be there to moderate a panel ("Investment Strategy: The View from Wall Street and Main Street") at the Hispanic Radio Conference going down at the Hyatt Regency Mission Bay. While he's there, he'll also be making a pit stop at the Sports Radio Conference (same place, same dates). Be sure to ask him for some CommLawBlog sunglasses.

On the other hand, if you're stuck back in the D.C. area from March 10-13, you can catch up with **Frank Jazzo** and **Michelle McClure**, both of whom will be styling and profiling at the Satellite 2014 Exhibition (including, particularly, the SSPI Gala on March 11).

On March 22 **Scott Johnson** will be in Birmingham participating in the Eighth Annual Abby Awards dinner at which Alabama's Best in Broadcasting will be recognized by the Alabama Broadcasters Association.

And hey, if March is just about here, can the NAB be far behind? Of course not! The annual shindig is set for April 5-10 in Las Vegas and, as always, Fletcher Heald will be represented in fine style. A preliminary head count shows both **Franks**, **Kevin Goldberg**, **Dan Kirkpatrick**, **Michelle McClure**, **Davina Sashkin**, **Peter Tannenwald** and **Kathleen Victory** scheduled to be there. Featured speakers: **Kevin**, who will appear on a panel entitled "Copyright & the Internet: What's Going On" at the Representing Your Local Broadcaster confab on Sunday afternoon; **Davina**, who will be on a BEA panel titled "Spectrum Auction – Dollars, Decisions and Dilemmas" on Tuesday; and **Dan**, who is slated (also on Tuesday) to appear on a panel titled "Following the Rules: The Essentials of Coloring Within the FCC Regulatory Lines".

Michelle will probably be resting her voice in Vegas because immediately after (April 11, to be precise), she's scheduled to be the keynote speaker at the Spring Awards Banquet for the University of Central Michigan's School of Broadcast & Cinematic Arts.

(Continued from page 2)

Over and above those steps, Michaels also urges one and all to "do everything you can to prevent these needless injuries and deaths before anyone else is hurt". That, of course, should go without saying. But in case that message is lost on some callous folks, Michaels also warns that OSHA is prepared to issue "financial penalties" if circumstances warrant.

If you own or are responsible for a tower, this is a wake-up call. In addition to Michaels's letter, OSHA has prepared a website with a wealth of information about safety considerations when it comes to communication towers. Standards, compliance assistance, other useful resources – they're all there. It's a must-read, must-bookmark site.

(Continued from page 12)

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

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