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Memorandum to Clients

April 2014 News and Analysis of Recent Developments in Communications Law No. 14-04

Welcome to the Era of Non-cooperation (Part 1)

JSAs On the FCC's Hit List

By Dan Kirkpatrick
kirkpatrick@fhhlaw.com
703-812-0432

By now everybody knows that, back on March 31, the Commission significantly altered the playing field for television broadcasters. In two separate items adopted that day the FCC (a) barred non-commonly-owned Top 4 network affiliates in a given market from engaging in joint retransmission consent negotiations, and (b) changed its approach to ownership attribution of joint sales agreements (JSAs). The full text of the retrans consent decision was released the day of the meeting. (We describe it in the article on page 4.) It took a couple of extra weeks for the JSA order to see the light of day.

But on April 15, the Further Notice of Proposed Rulemaking and Report and Order (*JSA R&O*) laying out the new JSA rules and policies was finally released. (The *JSA R&O* also kicks off the Commission's statutorily mandated quadrennial review of its ownership rules.) Despite the delay in the document's release – and the fact that it runs to 236 pages (and 1,147 footnotes) – the *JSA R&O* doesn't add significant insight into how JSA attribution, and in particular the standards for waiver, will be implemented.

The new JSA rules and policies govern any arrangement which authorizes one TV station in a market to sell 15% or more of the advertising time of another station in the same market. Reversing a couple of decades of precedent, the *JSA R&O* provides that such JSAs will now be attributable to the owner of the station doing the selling. This means that, in many markets, longstanding arrangements that have been viewed as consistent with the multiple ownership rules will now have to be modified or unwound in order to assure compliance with those rules. Such modifications/unwinding must be done within two years of the effective date of the new rules. While the Commission will entertain requests for waivers of the rules, the prospects for getting a waiver are at this point far from clear.

The change will make the television ownership rules essentially the same as those currently applied to radio. The Commission is concerned that TV JSAs can give the selling station an undue degree of influence and control over the programming choices of the ostensibly independent station. This concern is particularly acute when the JSA is combined with other "entanglements", such as shared services agreements, option agreements, or other financing. (The Commission has concluded that a JSA involving sale of less than 15% of a station's time doesn't provide the opportunity to exercise excessive control over that station's operations.)

In the anticipatory run-up to the adoption and release of the *JSA R&O*, considerable speculation had been devoted to questions of possible grandfathering and waivers of the expected rule. The FCC's action on both those scores is not something broadcasters are likely to celebrate.

As to grandfathering, forget it: no automatic grandfathering will be available for any JSAs. Rather, if the terms of a JSA bring it within the reach of the rule, the JSA will be deemed to constitute an attributable interest, and if that attributable interest puts the selling station in question over the multiple ownership limits, the parties to the JSA will have two years to either restructure or terminate it.

Alternatively, the parties could ask for a waiver, although what exactly will be required to obtain a waiver is not yet entirely clear. It appears that the Media Bureau will enjoy significant discretion in determining which waivers (if any) will be approved. But in an apparent effort to create the impression that it's sensitive to concerns about uncertainty and possible delay, the Commission has directed the Bureau to either grant or deny each waiver request within 90 days of the "closing on the record" on that particular request. (The record is said to be "closed" as of the date of the final

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Forgotten but not gone

Annual Broadcast Employment Form 395-B Re-Surfaces

By Anne Goodwin Crump
crump@fhhlaw.com
703-812-0826

It's baaaack – maybe. The Commission's decade-dormant annual employment report form has stirred. In a Federal Register notice the FCC has advised that it is cranking up the process (mandated by the hilariously-named Paperwork Reduction Act) to secure the approval of the Office of Management and Budget (OMB) to continue to keep Form 395-B in the FCC's roster of forms.

There are multiple problems here.

As longtime Commission watchers may recall, Form 395-B calls for broadcast stations to provide information, annually, detailing the racial, ethnic and gender composition of their full-time and part-time staff according to job category. If you're a recent arrival to the broadcast industry – "recent" being within the last 15 years or so – you may not be familiar with Form 395-B. You can read about the history in this post on CommLawBlog.com from last year.

The short version: Form 395-B was for a couple of decades an obligatory part of the Commission's EEO rules. But those rules got tossed by the U.S. Court of Appeals for the D.C. Circuit in 1998, so the form went away, too. The Commission came up with another version of the form a couple of years later, but in 2001 the Circuit tossed that one, too. Not willing to take no for an answer, the Commission tried again in 2003. But by then Congress has passed the Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA), which imposes confidentiality limits on an agency's use of information collected for statistical purposes. Because CIPSEA at least arguably puts the kibosh on the likes of Form 395-B, the FCC ended up keeping the form on the shelf. Bottom line: While the form has been in its current form since 2003 (with some revisions in 2008), broadcasters have not been required to file it since 1998, 16 years ago.

(As we reported last year, in early 2013 a notice appeared in the Federal Register indicating that Section 73.3612 – which codifies the annual employment report filing requirement – had gone into effect. It requires each AM, FM, TV, Class A TV and International Broadcast station with five or more full-time employees to file Form 395-B by September 30 every year. But also as we reported, that notice appeared to have taken even the Commission by surprise, and we have heard nothing about Section 73.3612 or Form 395-B since.)

The latest Federal Register entry announces that the Commission is going to go back to OMB for renewed approval of the form. The last three-year OMB approval, issued in 2011, and the one before that (in 2008), were both subject to a condition that, before implementing the form, the FCC must resolve the question of whether confidentiality is required. While the FCC did not necessarily agree that Form 395-B data *has* to be treated as confidential because of CIPSEA, the Commission has at least acknowledged that possibility since at least 2004, and OMB has seemingly concurred. And to date the question of confidentiality has remained unresolved. All of which explains, sort of, why Form 395-B hasn't been required for more than a decade.

Now, fast forward to 2014. Once again, the FCC is asking OMB to renew its OK of Form 395-B. But the FCC's request seems to be caught in a time warp. For example, the most recent Federal Register notice makes no mention of the clear condition that OMB has twice imposed.

Even more peculiarly, according to the 2014 notice the FCC needs approval for the form because the form is "a data collection device used by the Commission to assess industry employment trends and provide reports to Congress." Hold on

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FLETCHER, HEALD & HILDRETH P.L.C.

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
Tel: (703) 812-0400
Fax: (703) 812-0486
E-Mail: Office@fhhlaw.com
Website: fhhlaw.com
Blog site: www.commlawblog.com

Co-Editors

Howard M. Weiss
Harry F. Cole

Assitant Editor

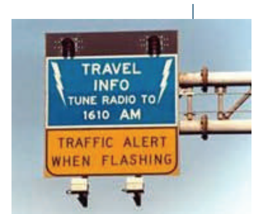
Steve Lovelady

Contributing Writers

Anne Goodwin Crump,
Kevin M. Goldberg,
Dan Kirkpatrick, Steve Lovelady
and Jon Markman

For Travelers' Information Stations

To Filter (above 5 kHz) or Not to Filter, THAT is the Question



By Jon Markman
markman@fhhlaw.com
703-812-0493

Last July we reported about changes the Commission had adopted to improve Travelers' Information Stations (TIS). At that time, the FCC proposed another fairly drastic change – the elimination of certain filtering requirements – that might potentially improve the service. The proposal went farther than some commenters thought advisable, which prompted them to propose a more moderate approach and, in response, the Public Safety and Homeland Security Bureau has now issued a Public Notice seeking further comment. (The Bureau probably could have skipped this step, but this writer thinks it's a good thing it didn't.)

TIS are low-power AM stations broadcasting information of interest to motorists, including traffic and road conditions, travel advisories, hazards, directions and the like. Each station covers only a small geographic area, most commonly along major highways and near tourist destinations.

AM service is notoriously interference-prone, with TIS as a potential source.

AM service is notoriously interference-prone, with TIS as a potential source. The interference occurs because of the "sideband" portion of the TIS-transmitted AM signal. Excessively wide sidebands can cross over into another station's channel, causing interference to that station. With AM stations – whose signals, particularly at night, can extend for hundreds of miles – this can cause big problems.

To reduce interference, the rules have historically required the filtering of TIS audio frequencies above 3 kHz. TIS are uniquely suited to filtering because they (theoretically) carry only voice transmissions, not music or other sounds. With the currently required filtering, music sounds awful, but voice is generally comprehensible (if not mellifluous) – roughly the same quality as wireline telephones. For TIS stations, on which non-voice transmissions are generally barred, that's all you really need: the goal is to have listeners understand the words, not be entertained.

But at night and in areas of difficult terrain, "generally comprehensible" sometimes isn't really. To improve the TIS, the FCC proposed eliminating the filtering requirement altogether.

That proposal got multiple positive responses, but not everyone was on board. The National Association of Broadcasters (NAB) and the Society of Broadcast Engineers (SBE), in particular, pushed back, proposing instead that the filter requirement be preserved but relaxed from 3 kHz to 5 kHz. A bump to 5 kHz would make the voice sound better, NAB/SBE argued, while still providing reasonable protection to nearby AM services. And since TIS are deemed a secondary service, preventing interference is supposed to be paramount.

It seems like a good solution: the (objectively) poor audio quality on TIS gets better, but it doesn't substantially increase the risk of interference. Win-win. Even the American Association of Information Radio Operators, whose petition initiated the original rulemaking to improve the TIS, supports the NAB/SBE proposal (although the AAIRO did propose a couple of additional tweaks to the NAB/SBE approach).

There is also the issue of the "steepness" of the filters. No filter is perfect: a 5 kHz filter will cull out only part of the signal below 5 kHz and leave some above it. The FCC proposed one profile, but it's possible that another might be better, or cheaper, since steeper filters tend to be more expensive to implement. We'll see what the comments say.

There are implementation questions on the table. Where exactly should the filters be installed in the TIS transmission system? If the filtering requirement is modified, or eliminated, would TIS licensees be required to recertify their transmitters? Since any relaxation of the 3 kHz rule would presumably be intended to benefit TIS, could a TIS licensee decline to make the change if the station were to determine, for example, that the change would be too expensive?

Since it has already solicited comments on changing the filtering, the Commission might have been able simply to issue an order straightaway adopting the NAB/SBE proposal. Instead, it has given the public another opportunity to comment on the possible new direction proposed by NAB/SBE.

Good for it. This is the way the system is supposed to work: the FCC should be sure to afford plenty of opportunity for input on what it's considering. Here, in response to a suggestion made by commenters in a rulemaking, the Commission tentatively embraced the suggestion and solicited comment on it, only to receive an

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RETRANSMISSION CONSENT NEGOTIATIONS UNDERWAY
MAXIMUM CAPACITY
One (and ONLY one) Top Four Station

Welcome to the Era of Non-cooperation (Part 2)

FCC to TV Licensees: You're On Your Own in Retrans Negotiations

By Dan Kirkpatrick
kirkpatrick@fhhlaw.com
703-812-0432

It's official. After several weeks of grim anticipation (marked by, among other things, an unusual, ominous public notice from the Media Bureau), the Commission significantly altered the playing field for television broadcasters, changing its approach to ownership attribution of joint sales agreements (JSAs) and barring non-commonly-owned Top Four ranked stations in a given market from engaging in joint retransmission consent negotiations. The following is an analysis of the retrans consent decision. (The JSA order is discussed in the article on Page 1.)

The short version: when the FCC's Report and Order and Further Notice of Proposed Rulemaking (*Retrans R&O*) takes effect, joint retransmission consent negotiations between two non-commonly owned "Top Four" stations in the same market will be prohibited. And before you get any ideas, the term "joint negotiations" as the FCC uses it is extraordinarily broad, as we will discuss below.

Just about any arrangement by which two same-market Top Four stations might share terms or prices is verboten.

The back story on retransmission consent is well known. For the last 20 years TV stations have been able to elect cable and satellite coverage either by "must carry" or "retransmission consent". When a broadcaster opts for the latter, it is required by statute to negotiate in "good faith" with cable and satellite providers (collectively, MVPDs). The Commission has the statutory authority to enforce this good faith negotiation requirement, but historically it has identified only a small handful of relatively obvious indicia of a lack of good faith – *e.g.*, refusing to negotiate at all, or failing to respond to the other party's offer.

The *Retrans R&O* adds one more indicium.

It is now a *per se* violation of the good faith negotiation requirement for two non-commonly-owned Top Four TV stations in the same market to coordinate their retransmission consent negotiations. (A "Top Four" station is defined in the same manner as in the Commission's multiple ownership rules: a station "ranked among the top four stations in a DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service". Note that network affiliation is *not* a factor in the definition of a "Top Four" station for these purposes.)

According to the Commission, Top Four stations in a local market are at least partial substitutes for each other, so coordinated negotiation among such stations raises retransmission rates above what the market would otherwise produce. Interestingly, the Commission makes clear that it is *not* relying on any increase in prices paid by consumers to their MVPDs, but rather only on an increase in the prices paid by those MVPDs to broadcasters. The Commission figures that joint negotiation by Top Four stations leads to higher prices paid by MVPDs due to (a) diminished competition between broadcast stations and (b) the ability of broadcasters acting in concert to extract higher rates by threatening to remove two Top Four stations from an MVPD at the same time.

What constitutes "joint negotiation"? Obviously, if two stations have a written agreement providing for coordinated retrans consent negotiations, that would be prohibited "joint negotiation". But the prohibition also extends to other, less formal, activities. One Top Four station can't informally delegate authority to another in the same market to negotiate on its behalf. Nor can two Top Four stations in a given market each delegate negotiation authority to a common third party. (Lawyers in particular should note that this appears to preclude an individual attorney – and probably even a single law firm – from representing two same-market Top Four station in retransmission consent deals.) In fact, *any* conduct at all that signals collusion is prohibited – so any arrangement by which two same-market Top Four stations might share terms or prices is *verboten* unless required or authorized by the Commission or a court.

The *Retrans R&O* does not address joint negotiations between a Top Four and a non-Top Four station, although the Commission remains open to lowering the boom there, too, if it receives evidence suggesting that such action is warranted. Also left unanswered for now: how changes in a station's rating position might affect the station's ability to coordinate carriage negotiations with another station in the market. For example, if joint negotiations are begun by a Number Two station and a Number Five station, will those negotiations need to stop if the Number Five station moves up to Top Four status before a deal is reached? Alternatively, if a Top Four station falls out of that status when its retransmission consent deal is expiring, may it then negotiate together with a remaining Top Four station?

Curiously (or not, depending on how you happen to view the Commission's attitude toward broadcasting gener-

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ally), the Commission did not feel the need to impose any reciprocal prohibition on MVPDs to prevent *them* from colluding in their negotiations with broadcasters. While the FCC conceded that in some circumstances, such joint negotiation could violate the good faith requirement under a "totality of the circumstances" test, it concluded that there was insufficient evidence that MVPDs in fact engage in widespread joint negotiations with broadcasters.

The prohibition against joint negotiation will take effect immediately after the effective date of the *Retrans R&O*, regardless of any terms included in any pre-existing agreements between broadcasters allowing or requiring such negotiations. (The effective date of the *Retrans R&O* has not yet been set. Check back with CommLawBlog.com for updates.) Existing retransmission consent agreements entered into as a result of joint negotiation will not be disturbed, but no new agreements based on joint negotiations will be allowed, even if negotiations have already begun.

Joint negotiations would probably be ill-advised even if an MVPD wants to negotiate in that manner.

Joint negotiations would probably also be ill-advised *even if* an MVPD wants to negotiate in that manner. The new rules don't provide any exemption for MVPD consent. As a result, it's at least conceivable that an MVPD initially willing to participate in joint negotiation might change its mind before the completion of negotiation, in which case it could file a complaint at that time. In that situation, the joint negotiation might be considered a *per se* violation of the rules notwithstanding the MVPD's willing participation at the outset.

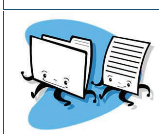
The *Retrans R&O* also includes a separate Further Notice of Proposed Rulemaking (*FNPRM*) portion in which the Commission requests comment on the possible elimination of the Commission's existing network nonduplication and syndicated exclusivity rules. Those rules allow broadcasters to ask the Commission to enforce exclusivity rights granted in network affiliation or syndication agreements. While not themselves establishing such rights, the FCC's rules do set out the maximum areas in which such rights may be granted, and provide a framework through which broadcasters can enforce those rights to prohibit MVPDs from importing distant signals.

The FCC tentatively concludes that it has the authority to repeal the network nonduplication and syndicated exclusivity rules, but it nonetheless requests comment on that conclusion. It also requests comment on a broad range of issues related to these rules, including:

- ? whether the rules remain necessary, including specifically on what effect their repeal would have on local broadcasters, MVPDs, and viewers;
- ? whether broadcasters would be able to enforce, and potentially expand, exclusivity rights as a contractual matter even if the Commission's rules were repealed;
- ? what impact repeal of the rules would have on retransmission consent negotiations; and
- ? what impact repeal of the rules would have on existing agreements (for example, the many affiliation and syndication agreements that defined the scope of protection by specific reference to the rules).

Whether the Commission ultimately modifies the nonduplication and exclusivity rules is still very much up in the air. Any parties with strong opinions on the matter should be sure to let the Commission know. The deadlines for comments and replies in response to the *FNPRM* have not yet been announced. (Again, check back with CommLawBlog.com for updates.)

Regardless of what happens with these rules, though, absent a court challenge, the issue of joint retransmission consent negotiations between same market Top Four stations has now been decided. Any broadcasters who have previously engaged in such negotiations, or have agreements to do so, should begin to consider alternative plans, particularly if they have retransmission consent deals expiring soon.



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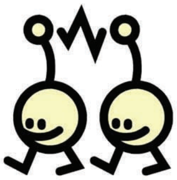
there. Since Form 395-B hasn't been required to be filed for more than 15 years, it's simply not accurate to say that the form is used for anything: the form hasn't been filed, so the Commission has obviously not been able to assess any trends, or provide any reports, based on Form 395-B.

There's more.

PRA notices require the FCC to state whether the proposed form involves any confidentiality issues. In response, the FCC now advises that "[t]here is no need for confidentiality with this collection of information." Oh really? The question of whether there is or is not a need for confidentiality is ***exactly*** what has kept Form 395-B in a state of suspended animation for over a decade.

It's hard to know what to make of this latest twist in the long-running saga of Form 395-B. In view of the form's extensive history, it seems unlikely that the FCC would seriously try to ignore that history. And the latest notice doesn't merely ignore the history: it misstates it. Let's give the FCC the benefit of the doubt here and assume that that notice is the result of some bureaucratic oversight.

Still, it's enough to cause us to alert our readers that they should be aware that Form 395-B (along with its associated annual filing requirement) is still lurking out there. If you'd care to lob in some comments in response to the latest Federal Register notice, you may do so until ***June 16, 2014***.



In the Era of Non-cooperation, some cooperation may be OK

TV Channel-Sharing Study: A Report on the Report

By Steve Lovelady
lovelady@fhhlaw.com
703-812-0517

At the recent NAB Show in Las Vegas, Chairman Wheeler came on like a cheerleader at a pep rally, touting the upcoming incentive auction program. (For readers who weren't there, it was something like Darth Vader trying to sell the Rebel Alliance on the obvious benefits available to Empire participants.) According to Wheeler, the auction presents "a terrific financial opportunity for broadcasters" – and that's because of the possibility of certain cooperative agreements between TV licensees. This is, of course, the same Chairman Wheeler who, just days earlier, had put the kibosh on cooperation between TV licensees in the shape of joint sales agreements (while also raising a critical eyebrow at shared services agreements and joint retransmission consent negotiations).

But those types of cooperation are different.

A close reading of the technical details reveals some interesting basic assumptions.

In Vegas, Wheeler was talking about channel-sharing arrangements in which two stations use common transmission facilities, arrangements which can provide "under-considered and under-appreciated" benefits. And how is he so sure about that? It turns out that a report has been prepared describing the first formal test of channel sharing and, to hear the Chairman tell it, the report makes a "compelling case" for that practice. He said that he hopes broadcasters "closely study" the report.

Trouble is, the report itself doesn't appear to have been widely circulated. So we figured we'd take a look at it and let our readers know what we found – and also give them a direct link to the report so they can read it themselves.

The subject of the report is the channel-sharing test my colleague Davina Sashkin wrote about in February. The test was initially proposed by two LA-area TV stations – KLCS and KJLA – in late January. (CTIA-The Wireless Association® was also involved.) Apparently fast-tracked from the get-go, the plan was approved by the FCC in less than a week. The test was initially expected to take up to six months to complete, but that was apparently an overestimate: the report was filed with the FCC less than two months after the proposal was approved by the Commission.

As Chairman Wheeler reported in Vegas, the report does indeed indicate that KLCS and KJLA were able to operate compatibly through the same transmission gear on the same RF channel. But a close reading of the technical details reveals that, to get to the Happy Ending, some interesting basic assumptions had to be made. So we fully agree with Wheeler when he encourages all concerned to read the report . . . carefully.

For example, all of the tests were conducted using the latest-and-greatest encoder hardware and software. The newer gear apparently made a difference in the efficiency of the compression process, thereby producing better results than the encoders currently used at most TV stations. Encoder gear represents a "substantial capital investment" for broadcasters, according to the report. Also according to the report, some stations' original encoders may now be reaching the end of their useful lives, so an upgrade in the near future might be expected, and it may not be unreasonable to rely on latest-and-greatest hardware for test purposes. Still, to the extent that a positive channel-sharing experience may hinge to some degree on upgrading pricey equipment, broadcasters should be aware of that.

Second, the testers decided to use a 720p HD format, as opposed to the more data intensive 1080i format. Currently, FOX and ABC use 720p, while CBS, NBC and PBS favor 1080i. Historically, the Commission has steered clear of identifying either 720p or 1080i as preferred in any way. Instead, as the move to DTV developed, the FCC relied on a definition of HDTV drawn from the private sector – a definition which expressly embraced *both* 720p and 1080i. So the report's suggestion that channel-sharing may favor one format over the other seems to run counter to the Commission's historical approach. Whether channel-sharing might ultimately impose any new burdens on broadcasters or broadcast networks already committed to 1080i is unclear – another factor to be borne in mind in any assessment of the report's conclusions.

Third, for audio streams, the testers followed advice from Dolby Labs that a bit rate of only 64 kilobits per second (kbps) per channel is necessary to reproduce sound "without any perceptible audio degradation".

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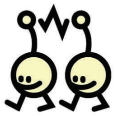

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That's a much lower rate than the 192 kbps (for stereo, or 96 kbps per channel) and up to 512 kbps (for surround sound) that broadcasters commonly run. The tests were run using the low-end 64 kbps rate.

The goal was to pick up some data capacity from the audio side in order to increase the capacity on the video side. Fewer kbps devoted to audio streams means more kbps for video data. The trade-off: at 64 kbps per channel, broadcasters should not expect to "exceed audiophile expectations" with their audio. According to the report, the tests were intended only to meet – not exceed – such expectations. Again, this seems to cut back some on the initial sales pitch for DTV, which touted a high-end audio experience.

Another consideration: The testers analyzed the quality of the resulting combined video channels using test equipment that calculated the Quality of Experience (QoE) based upon sophisticated algorithms. That calculation supposedly produces a subjective rating of those factors corresponding to the rating that would have been given by real live audience members. In other words, a machine judged whether the picture quality was acceptable, not a focus group of actual people. Yes, a few engineers also viewed combined streams side-by-side with the original input, but for the most part the conclusions reached in the report about the relative quality of the shared channels' signals are based on numerical scores produced by a machine. A very sophisticated machine, but a machine nonetheless. (The report acknowledges that this type of QoE testing equipment is not available to most TV stations.)

The audio tests were intended only to meet – not exceed – audiophile Expectations.

And then there's the question of channel selectivity: will Joe Public's TV set be able to correctly tune to each separate station when two stations' signals are combined in a single 6 MHz RF channel? A DTV signal is often transmitted on an RF channel that is different from the "virtual" channel reflected on a TV receiver. Thanks to the Program System Information Protocol (PSIP) component of the digital transmission, TV receivers know to determine a station's virtual channel because the PSIP stream contains, among other information, the station's virtual channel number. Regardless of the RF channel on which a TV set receives an incoming signal, the set's decoder reads the PSIP information and displays the incoming signal on the virtual channel indicated in the stream.

But what happens when a single RF transmission is shared by two different stations with two different virtual channels? According to the report, all of the TVs and tuners tested were able to receive and correctly interpret the paired TV signals. However, most of the TV sets had to be rescanned in order to find the newly combined station information. This suggests that stations will need to engage in considerable consumer education, possibly akin to what we all went through in connection with the 2009 DTV transition, when they're ready to begin channel-sharing operations. Otherwise, ordinary viewers might wonder why some of their favorite stations have suddenly disappeared.

In his remarks in Las Vegas, Wheeler also talked in optimistic terms about the potential of a new technical standard for TV modulation to replace the current ATSC-2 standard. This new standard is referred to as OFDM or ATSC-3. The channel-sharing report addresses in passing the future use of OFDM modulation.

OFDM could result in a significant increase (possibly up to 50% – from 19 Mbps to up to 28 Mbps) in the bit rate, and thus the data-carrying capacity, of each 6 MHz TV channel. An increase in bit rate would obviously increase the capacity of the channel to carry video and audio. That's the good news.

The bad news is that practically no TV sets currently on the market or currently in use in the U.S. can receive OFDM-formatted transmissions. In order for OFDM to become practically useable in the face of the lack of capable receivers, viewers would have to obtain and install separate TV converter boxes – a process many recall from the 2009 DTV transition. Over a billion dollars were spent on vouchers towards the cost of the DTV converter boxes back then. Presumably more money than that would be needed to upgrade everyone's TV to be OFDM compatibility. Not a very practical solution.

So you be the judge. The channel sharing report is relatively short (21 pages of actual text and 10 pages of technical appendices and glossary). It may be that some, many, even most broadcasters won't find the technical fine print and related testing assumptions and conditions objectionable. But it is important that everybody know both (a) that the fine print, assumptions and conditions are there and (b) how they might affect the channel-sharing experience.

We join the Chairman in encouraging all TV broadcasters to read the report, discuss it with their engineers, and form their own conclusions about whether it convincingly demonstrates that channel-sharing is ready for prime time. (Here's the link to the report again, in case you missed it earlier in this article.) We also encourage you to let us know your thoughts about it.

The time to start planning is NOW!

New gTLD's Are Knocking on the Door. Do You Know What to Do?

As we reported in the June, 2012 *Memo to Clients*, the Internet Corporation for Assigned Names and Numbers (ICANN) has for the past several years been busy readying a new batch of generic Top Level Domains (gTLDs) to unleash on the Internet community. In recent months, 175 new gTLDs – the cognoscenti just call them "the New G's" – have successfully negotiated ICANN's exhaustive review process. Soon we can expect to start seeing new domain names ending in ".SOLUTIONS", or ".PHOTOS", or ".FLORIST", among others.

The New G's hold considerable promise but we suspect that many readers may not be fully aware of what the future has in store. To take advantage of the opportunities the New G's present – and also to avoid potential problems – it's important to know what could be coming down the line and how best to deal with it when, or preferably *before*, it gets here.

Many readers may not be fully aware of what the future has in store.

Let's first look at the two Big Questions, and then delve into some of the underbrush to help you figure out how best to proceed.

The First Big Question: ***Why should I care about the New G's?***

That's easy. To take advantage of the opportunities the New G's afford, and to protect against potential intrusion on your existing trademarks (and related domain names) from similar-sounding new domain names.

The opportunities are obvious. Instead of the ubiquitous and generic ".COM", the New G's will include a universe of terms readily identifiable with particular interests, affinities, activities, etc. ".PHOTOGRAPHY" for example, is likely to appeal to professional and amateur photographers, photo processors, camera equipment dealers, photo galleries and others far more than the prosaic ".COM". As we reported in the August, 2012 *Memo to Clients*, ".RADIO", ".MUSIC" and ".VIDEO" are all under consideration. It's not hard to imagine desirable and distinctive domain names in each of those domains.

The potential downsides should be equally obvious. If you have established an identity through, say, a registered trademark which you have incorporated into your own domain name (easy example: "CommLawBlog.com"), it's at least conceivable that somebody else – possibly a competitor – might try to use the same mark in a domain name in one of the new domains. At a minimum that could lead to harmful confusion in the marketplace, if not significant devaluation of your own mark. Given that chilling prospect, you should be worried about what protective steps you can take to defend yourself.

And now the Second Big Question: ***How can I help myself formulate a domain name strategy?***

This, on the other hand, is not so easy.

If you're thinking about taking advantage of the new opportunities, use your imagination, but get started sooner rather than later. If you can come up with good ideas for one or more domain names *now*, *i.e.*, *before the relevant domains become available to the public*, you will be in a better position to register for your new domain name at the earliest possible date and thus have a greater chance of getting it. The longer you wait, the more likely it is that somebody else may get there ahead of you. Once you come up with good ideas, start monitoring the ICANN site (or arrange for somebody else to monitor on your behalf) to keep track of when particular domains are coming online. (More on monitoring below.)

If you're worried about fending off possible intruders whose use of your mark in their own domain name could be bad news for you, there are a number of steps you might take, all of which require forethought and some vigilance.

To understand the issues, you first need to understand the basics.

What's a "Domain Name"? Each device accessing the Internet – say, an office network or even an individual computer – has a unique address, just like a telephone number. It's called an Internet Protocol, or IP, address and, like a phone number, it consists of a string of numbers unique to the computer or network to which it is assigned. Domain names are mnemonic alternatives to numeric IP addresses. After all, what's easier to remember – www.CommLawBlog.com or something like 64.94.113.120?

Essentially, a domain name consists of two parts. First, a "top level domain", *i.e.*, the string to the right of the period (*e.g.*, ".COM", ".ORG", etc.). Second, a separate identifier string to the left of the period (in the example in the previous paragraph, "CommLawBlog").

How does the domain name system work? ICANN does not itself issue or authorize domain names. Rather, it manages the domain name system (DNS). For each generic top level domain (gTLD), *e.g.,* .COM, .ORG and .NET, ICANN by contract authorizes a company, known as a registry operator or, more colloquially, just a registry, to set up and maintain the authoritative master

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database of all domain names registered in that particular top level domain. For example, Verisign is the registry for the ".COM" and ".NET" top level domains.

The registries do not themselves issue or authorize domain names either. That job goes to "registrars", *i.e.*, companies accredited by ICANN which are permitted to add, delete or modify domain name information in the authoritative databases of one or more gTLDs. Registrars are the companies which interact with the public – if you want to sign up for a particular domain name, you contact a registrar, which checks the relevant database to confirm the availability of the domain name you want. (Obvious example: GoDaddy is the largest registrar in the world.) If that name is available, the registrar adds it to the authoritative gTLD database, and voilà, you've got a domain name.

New G's generally take considerable time to become available. Through a rigorous process that involves proposals from interested members of the public – and at times oppositions or competing proposals from others – ICANN authorizes New G's to be used in the domain name system. ICANN then formally "delegates" management of the database for each generic top level domain to a registry operator. Within reason, and subject to its contract with ICANN and rules created by the ICANN community, the registry can impose conditions, restrictions, conventions, fees, etc., on domain names within the gTLD(s) it controls. The types of conditions may vary from domain to domain. For example, companies seeking domain names in the ".BANK" domain are likely to be subject to credentialing requirements, while those seeking domain names in such domains as ".EMAIL" or ".GURU" will probably be open for registration.

Why do we need more domains? The New G's are new domains. Joining the ranks of ".COM", ".ORG", ".EDU" will now be hundreds of new domains with more specifically evocative terms, such as ".REPAIR", ".BIKE" and ".CODES". While some may mutter aloud about why we need to bother with all this – hey, aren't ".COM" and its colleagues enough? – the answer is simple. There is considerable demand for new and different domains to handle new and different domain names. Plus, the world got tired of typing in English. One of the big innovations of the New G's: top level domains will be available in international scripts. Think "شبكة" (".WEB" in Arabic), or "онлайн" (".ONLINE" in Cyrillic), or "世界"(".WORLD" in Chinese Han). The New G's cater to the ever-expanding global Internet community.

When will the New G's be available? The process for establishing New G's has been ongoing for a couple of years already. So far, 175 New G's have been delegated to registry operators. We will be seeing new domain names in those newly delegated domains shortly. Hundreds more are working their way through ICANN's processes. Each new domain must go through certain phases in which its availability may be limited to certain potential registrants.

How can I know what New G's are available and when can I sign up for them? A multi-phase process for making New G's available has been established. It works like this.

First comes the "***Sunrise Period***". In most instances, each of the New G's will be subject to its own initial "Sunrise Period". This is a mandatory time (no less than 30 days) during which each New G is publicized on the ICANN website. The idea is to provide anyone with a registered or protected trademark the opportunity to preregister its mark as a domain name associated with a New G. For example, Facebook could seek to register facebook.social in the new ".SOCIAL" gTLD. (Currently, ".SOCIAL", ".REVIEWS", ".BOUTIQUE", ".BARGAINS" and ".NINJA" are in their Sunrise Periods.) Trademark owners should also be aware of the Trademark Clearinghouse (TMCH), a new service provided under contract to ICANN. If you've got a nationally or regionally registered trademark (in any jurisdiction), a word mark protected by statute or treaty, or a word mark that has been validated through a court of law or other judicial proceeding, it can be registered with the TMCH. (If you have other forms of trademark, intellectual property or existing domain names you would like to protect, we advise you to contact your attorney for strategies and ideas.)

One of the big innovations of the New G's: top level domains will be available in international scripts.

Then, when new gTLDs are rolled out, parties with marks registered in the TMCH receive access to Sunrise registrations *and* they are notified of any registrations that happen to match their registered mark. (New G Sunrise Period information is also available at the TMCH website.) Registration with the TMCH is done through licensed agents – trademark holders cannot register their marks directly. A list of licensed agents is available at the TMCH website.

But beware, each New G registry handles conflicts differently, so read the fine print carefully before paying the Sunrise fee. Delta Faucets, Delta Air Lines, Delta Wind Turbines and Delta Clothing may find themselves competing in an auction to resolve Sunrise conflicts, being chosen on a first-come, first-served basis, or selection based on another registry-chosen process. Plus, Sunrise registrations can be expensive, so pick your domain names carefully and target those important to your industry and geographic area.

Next comes a "***Limited Registration Period***" – sometimes also called a "***Landrush Period***" – offered by many New G registry operators. This period, which starts after the Sunrise Period closes, generally makes domain names in a new top level domain available to all,

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Drone even go there

On Newsgathering, Drones and the FAA

By Kevin M. Goldberg
goldberg@fhhlaw.com
703-812-0462

They say that tragedy plus time equals comedy. Sometimes that may be true. But when the tragedy is severe enough, tragedy plus time equals tragedy – leading, at best, to reflection.

Reflection on a recent tragedy has led to this article.

In March, a KOMO-TV News helicopter crashed in Seattle, killing two people. This kind of tragedy can be avoided in the future, at least in part through the use of Unmanned Aircraft Systems (UAS) – more commonly referred to as "drones". But I fear that the current Federal Aviation Administration (FAA) stance on the use of drones will prevent news operations from employing this more nimble, informative and safer option in the future.

Note that I referred to the FAA's "stance" on drones, rather than its "rules". That's because the FAA does not now have (and apparently has never had) any actual "rules" governing drone use. But that's not stopping the FAA from engaging in bluff and bluster – along with at least one threat of a five-figure fine – in an effort to discourage drone use by, among others, news gatherers.

What's especially striking about the FAA anti-drone campaign is that it appears to be, simply put, illegal.

The good news – at least from my admittedly-biased-in-favor-of-journalists perspective – is that courts may not stand for the FAA's shenanigans.

Let's be clear up front. Since its establishment in 1958, the FAA plainly has had the authority to regulate civilian air traffic, primarily to ensure the safety of air travel. There's no question about that. But the FAA's recent threats of prosecution directed against drone users do not rationally seek to achieve that goal. Moreover, such governmental restrictions, when directed to the newsgathering process, raise serious First Amendment issues by threatening the news media's right to gather news and inform the public.

What's especially striking about the FAA anti-drone campaign is that it appears to be, simply put, illegal: the FAA policy underlying that campaign was announced without regard to procedural safeguards required by the Administrative Procedure Act.

Don't believe me? Would you believe a judge at the National Transportation Safety Board? While the FAA has made a lot of noise about its supposed restrictions on the use of UAS – mainly by sending out cease-and-desist letters and posting FAQs on its website – the FAA has thus far sought to enforce those restrictions only once, as far as I can tell. And when that case went to trial, the judge tossed it. (The FAA has since appealed; that appeal is pending.)

We'll get to that case in a minute. First, let's get the basic history down.

Drones, or UAS, are unmanned aircraft – they carry no pilot or passengers. They include what have been historically referred to as "model aircraft", a genre which predates the FAA itself by several decades. "Drone" and "UAS" are simply 21st Century terms for a range of craft that are essentially model aircraft – perhaps more sophisticated, larger, more innovative than classic "model aircraft", but model aircraft just the same.

Even though the term "model aircraft" is not defined in any statute or FAA rule or regulation, the FAA has expressly declined to subject model aircraft to any particular requirements. The closest the FAA has come to regulating such aircraft: in 1981 it "outline[d], and encourage[d] **VOLUNTARY** compliance with" a number of common-sense safety standards for model aircraft. (The emphasis there is mine.) Examples: keep the craft under 400 feet; if you're operating within three miles of an airport, notify the control tower. Note that even these limits were simply "voluntary".

Model aircraft use has expanded dramatically, leading the FAA to re-think this hands-off approach. In 2005 it issued – to its own personnel – internal guidance for determining whether UAS would be "allowed to conduct flight operations" in U.S. airspace. That internal guidance claimed that UAS were subject to multiple limitations – but it expressly exempted "model aircraft" from certification or other regulations, even though it acknowledged that model aircraft are indeed UAS. Again, the notice did not include any means of distinguishing between (a) a UAS subject to regulation and (b) a model aircraft free from regulation. And in any event, as an internal FAA document, the 2005 notice was technically not binding on the public.

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In 2007 the FAA issued a "Notice of Policy" in which it purported to impose limitations on some, but not all, "unmanned aircraft". It divided the universe of UAS into three sub-types, one of those being "model aircraft". And while the Notice expressly said that "no person may operate a UAS in the National Airspace System without specific authority", it again expressly exempted model aircraft from that prohibition and from any other rules or regulations for that matter (other than the 1981 voluntarily guidelines).

While the term "model aircraft" was not defined, the Notice indicated that the model aircraft exemption would *not* be available to "persons or companies for business purposes". So I could, for example, fly my own camera-equipped drone to my heart's content without, apparently, creating a threat to air traffic – but as soon as I try to sell any of the photos/video I take, I'm a big threat. The FAA has not explained exactly how a commercial transaction on the ground renders otherwise unthreatening activity threatening.

More recently the FAA has established some webpages (here and here and here) and issued some cease-and-desist letters in which it reiterates, still with no explanation, that commercial use of drones is not permitted without express FAA approval. (One of the FAA's webpages warns that there is "no gray area" about commercial drone operation – apparently in response to a photographer from the Spokane Spokesman-Review who asserted that use of a UAS to capture a minute long video of a local New Year's Day Polar Bear Plunge was "not illegal, but currently in a gray area".)

Two journalism programs (the Drone Journalism Lab at the University of Nebraska at Lincoln's College of Journalism and Mass Communications, and Scott Pham, of the Missouri Drone Journalism Program at the University of Missouri's School of Journalism) involving drones have been told to "cease and desist" by the FAA. Both are in the process of applying for an experimental type permit to allow their use.

But the FAA's restrictive 2007 policy lying at the core of its current anti-drone posture was not adopted pursuant to a formal notice-and-comment rulemaking, as required by the Administrative Procedure Act. Compliance with such requirements is important: failure to comply undermines an agency's ability to implement policies it might like to.

And that's what happened when the FAA's effort to restrict drone use ran into a judge at the NTSB.

In the case of *Huerta v. Pirker*, one Raphael Pirker made a video from a model airplane he piloted. He confirmed that he was paid for video and photos taken during the flight. The FAA fined him $10,000 penalty for operating a UAS in a careless or reckless manner. Among his transgressions: operating without an FAA-issued pilot certificate in supposed violation of the 2007 policy against commercial drone use.

The case came before Patrick Geraghty, an NTSB administrative law judge. Pirker asked Geraghty to dismiss the FAA complaint, arguing, in effect, that he had violated no rules.

Judge Geraghty agreed with Pirker. According to Geraghty:

> [A]t the time of [Pirker's] model aircraft operation, . . ., there was no enforceable FAA rule or FAR regulation applicable to model aircraft or for classifying model aircraft as a UAS.

So while the FAA may talk a good game when it comes to drone regulation, all that talk appears to be unenforceable bluster.

While the FAA may talk a good game when it comes to drone regulation, all that talk appears to be unenforceable bluster.

For now, at least.

Congress has directed the FAA to develop regulations regarding the use of drones. (Side observation: If the FAA already had drone regs, why would Congress be ordering it to develop them?) But any such regulations are probably at least a year or two away: the first procedural step would be a Notice of Proposed Rulemaking — a step the FAA should have taken in 2007 if it had wanted its 2007 policy to be enforceable – but that isn't expected until later this year. . . and that's just the very start of the process.

Meanwhile, the FAA isn't alone in looking at the issue. According to the National Conference of State Legislatures, 40 states considered drone legislation last year; 13 of them passed laws.

Plainly, there is considerable legislative pressure for drone regulation. Concerns range from air safety to personal privacy.

As to privacy, in an interview on CBS's "60 Minutes", Senator Dianne Feinstein (D-CA), a prominent proponent of drone regulation, described an incident in which, during a protest outside her home, she looked out a window and found a toy helicopter staring her in the face. Her response: there needs to be "regulation – perhaps regulation of size and type for private use. Some certification of the person that's going to operate it . . . some specific regulation on the

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kinds of uses it can be put to."

But she's wrong.

We don't need specialized regulation of drones to protect personal privacy. There's already a huge body of law addressing invasion of privacy in the newsgathering context. Reporters and others aren't allowed to harass the subjects of their stories; they can't use electronic enhancement devices to get into private places where they wouldn't otherwise be allowed. Existing laws and court precedent can easily be applied to drones.

The safety and security of the airspace are obviously valid concerns. Regulations can permissibly protect those interests, but to the extent that newsgathering is involved, the First Amendment requires that any such restrictions be narrowly tailored to achieve those goals and only those goals. The sky must remain free to the greatest extent possible.

In my view, we don't need extensive regulations that will inhibit the use of this new and useful – and, frankly, really cool – technology. Quite the opposite. Properly focused regulation may actually make us safer, more secure and better informed in the long run.

How? Contrast my opening example from Seattle with another sadly tragic example: last month there was an explosion in Harlem. It was too dangerous to send reporters close to the blast scene. But the public – local and national – was given first-hand information when an individual flew his drone right up to the blast site.

No planes fell from the sky. No investigations were disrupted. No privacy was breached. No one was hurt. Importantly, the public was informed.

This is the future of reporting. Not just for breaking news but for documentary coverage, environmental analyses, sports, pretty much everything.

There are implications for entertainment, travel and other businesses as well. Real estate agents in the United Kingdom use them to provide better views of high-end properties to prospective buyers. Movie and video production studios use them to shoot creative angles and sequences. Innovative and interesting uses regularly occur – without incident – outside the continental United States.

Mind you, I'm not advocating that every news station in the country forego the traditional traffic helicopter. But some might want to take advantage of a readily available alternative by using drones to capture images that reporters can't otherwise safely access; that should be their choice. Yes, there should be restrictions in the name of safety and privacy, but they should be viewed in the traditional First Amendment context and, therefore, applied only in very limited circumstances.

It's not that hard. It's not unsafe. We should take this opportunity to reflect on these tragedies and understand how to avoid them in the future.

Either way, I'm now intrigued enough by this issue to continue following future developments. So please feel free to check with CommLawBlog.com to see if any occur.

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e.g., opening ".BIKE" registrations not only to existing bike shops, but to new ones as well. If you meet whatever conditions are set and are willing, perhaps, to pay a premium fee, you should be able to register a domain name on a first-come, first-served basis. These Limited Registration Periods are short, so if you are interested, watch closely. Limited Registration Periods can be monitored on ICANN's website (look in the column headed "Other Periods").

Then, "***General Availability***" starts! In this phase, a new top level domain is wide open for registration by all qualifying members of the public! We say "qualifying" here because registries may still impose conditions on would-be registrants for names in some domains. For example, to register a domain name in the ".LAWYER" domain, you may need to demonstrate that you are, in fact, a lawyer. For regional domains (*e.g.*, ".NYC" or ".LONDON"), you may need to demonstrate that you are directly associated with the region. But many top level domains – including, *e.g.*, ".MEDIA", ".TECHNOLOGY" and ".ENTERPRISES" – are expected to be wide open for registration with few, if any, conditions. Each case will depend on the registry's policies, so be sure to check those out in advance.

Registration prices are set by the registry (so registrations in some domains – think ".CPA" or ".DOCTOR" – may be more expensive than in others, in part for the credentialing process). Also, additional eligibility practices may be imposed in conjunction with ICANN (*e.g.*, ".BANK," ".CREDITCARD" and ".INSURANCE" will involve strict certifications still under negotiation).

In shopping for a domain name, be aware that not all

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FHH - On the Job, On the Go

What happened in Vegas – During the recent NAB confab, our own **Peter Tannenwald** was presented with the Hall of Fame Award by the Advanced Television Broadcasting Alliance for his lifelong achievements in, and significant and lasting contributions to, the LPTV/Broadcast Industry. Kudos to PT. And not surprisingly, **Peter** is scheduled to be speaking on panels at the National Translator Association annual meeting in Park City, Utah from May 16-18.

On his return from Las Vegas, **Frank Montero** appeared on a panel at the American University College of Law in Washington, D.C., where he spoke about practicing before the federal government. In June he'll be off to Atlantic City to attend the New Jersey Broadcasters Annual Conference and Gala. Meanwhile, **Frank** has settled comfortably into his role as Commentator for TVBR-RBR, where he has been quoted on a variety of subjects from Aereo to STELA. He also popped up in *Multichannel News* where he was featured among the top Cable TV "deal" attorneys.

Mitchell Lazarus will address the National Spectrum Management Association on May 13 on developments in radar and the issues they raise for spectrum management.

Frank Jazzo will be attending the Spring Meeting of the Rockefeller College Advisory Board and the Rockefeller College Alumni Dinner and Awards Ceremony in Albany, New York, on May 16. He'll then head south for the 2014 Annual Convention and Engineering Conference of the Louisiana Association of Broadcasters and the Mississippi Association of Broadcasters at the Hilton New Orleans Riverside from May 28-29. On May 29, **Frank** and the NAB's **Ann Bobeck** will be providing an FCC Legal Update.

Kevin Goldberg will be speaking at the Media Financial Managers Conference in Miami on May 21 on the Aereo case. **Kevin** was also featured in a video interview about Aereo on the LXBN TV, a site produced by LexBlog.

Kevin also appeared with **Harry Cole** in two Aereo-related webinars including one, presented the afternoon of the Supreme Court argument, in which **Kevin** and **Harry** described and analyzed the back-and-forth between the Court and counsel. (That latter show was the premiere of CommLawBlog Live!, an online opportunity for you to listen in on less formal conversations among FHH attorneys and others about issues of interest to the communications industries. You can hear the recording of that show here.)

And speaking of **Harry**, in addition to the two webinars, he was quoted about Aereo in the *Boston Globe* and the Consumer Eagle (a "consumer-empowerment" website) and in Comm Daily (on the expected expansion of TV online public file requirements). Plus, he appeared on NPR's Weekend All Things Considered, chatting amiably (and, it seemed, knowledgably) about marijuana advertising. (But seriously, Harry, did you have to mention "the munchies"?) **Kevin**'s LXBN video shot is nice, and **Frank M**'s frequent ink in the trades is impressive, but when you talk "media", the national stage is usually what you want – and how much more national can you get than, um, ***National*** Public Radio? Plus, the *Globe* gets right up there, too. So in a tight three-way race that came down to the final lap, at the checkered flag it was **Harry** heading to Victory Lane as our *Media Darling of the Month*.

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domains will be offered by all registrars. Registrars in Asia, for example, are more likely to offer the Chinese and Cyrillic New G's, while those in the U.S. will likely pick and choose what to offer based on the needs of their communities and audiences. If your favorite registrar does not list a New G that you want, check the website of the registry managing the New G you're interested in. Each registry lists all of the "accredited registrars" who have contracted to offer its New G domain names.

So there you go: Opportunities abound, but dangers lurk. Before it's too late, trademark holders should carefully consider their options. TMCH registration may be a logical first step. Also, give thought to possibly branching out into other domains – ".RADIO" may be appropriate, or maybe ".CHURCH" or ".TALK" or even ".NYC". The broad range of New G's opens up an equally broad range of potential domain names. Once you have identified some possible domains of interest, keep an eye out for their delegations, Sunrise Periods, Landrush Periods and General Availability.

And above all, if you need help, ask for it! The New G world is a complicated place. Information can be found on the ICANN website, with your registrar, and of course with your attorneys. But don't delay. With 175 New Gs already delegated and hundreds more on the horizon, it is important to map a strategy – to protect existing trademarks and find some new and exciting possibilities in the opening of this new electronic frontier.

TV online public file update

Political File Exemption Set to Expire as of July 1

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

If you're a TV licensee who doesn't happen to be either (a) in any of the top 50 DMAs or (b) affiliated with one of the top four commercial networks (ABC, CBS, FOX and NBC), we've got some news for you: it looks like you'll be having to upload all your new (but none of your old) political file data to your online public inspection file starting ***July 1, 2014***.

That, at least, is the unmistakable take-away message from a public notice issued by the Media Bureau.

The notice reminds one and all of a wrinkle the Commission included when it imposed the online public file requirement for TV licensees back in 2012. At that time, the obligation to upload the political file component of each station's public file was limited to Top Four affiliates in the top 50 DMAs. All other stations were still required to maintain a political public file, but only on paper, as they had done for years.

Of course, the full FCC has not yet addressed the question on which it told the Bureau to request comments.

In 2012, the Commission said the exemption would be good only until July 1, 2014. BUT the FCC held out at least a glimmer of hope that the exemption might be extended: in 2013 the Media Bureau was to invite comments on whether "any changes [to the online political file rule] should be made before it takes effect for the other stations." The Bureau dutifully solicited comments in June, 2013 and, as we reported last year, the response was less than overwhelming.

Of course, the full Commission has not yet addressed the question on which it told the Bureau to request comments, but so what? The way the exemption sunset was worded in 2012, the exemption seems to go away automatically unless the FCC changes its mind. And, as the Bureau's latest public notice acknowledges, there's been no indication of any change of mind on the Eighth Floor.

So, presumably to give everybody plenty of time to get ready for the Big Day, the Bureau has "remind[ed]" TV licensees of the upcoming July 1 "deadline".

Truth be told, though, it's not really a "deadline" in the classic sense. July 1 merely marks the date as of which TV stations must start to upload any ***new*** political materials to their online public files. That is, until July 1, no uploading need occur, and after July 1, only new materials must be uploaded. So it's not like TV licensees have any specific chores to complete by the July 1 "deadline" – other than to be ready to start uploading political materials once July 1 arrives.

The two-year exemption has been nice, but it appears to be coming to an abrupt end. All TV licensees who have been enjoying the exemption so far should probably take this opportunity to review the online public file requirements and the political file rules to be sure that they will, in fact, be ready when the time comes.

Aereo in the Supremes: A Post Mortem Post

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

Image obtained from www.aereo.com

So the storm that had been brewing for some months – the long-impending Aereo argument in the Supreme Court – has now come and gone, and we are left to sift through what remains to try to figure out what's next.

We are pleased to report that, as planned, our intrepid reporters on the Aereo beat, Kevin Goldberg and I, attended the argument (nearly front-row seats, thank you very much) and were able to provide an overview of the festivities on CommLawBlog Live! less than three hours after the gavel came down in the courtroom. (That's just a metaphor – Chief Justice Roberts did not appear to wield an actual gavel.) For those of you who missed it, you can catch a recording of the audio portion here, although you'll miss the video of Kevin and me – which is, of course, the price you pay for not signing up for the live presentation.

> *We figure that the Court's decision will be narrow and designed to avoid, to the extent possible, any untoward effects on cloud computing.*

Several highlights, in no apparent order:

- The Supreme Court's head was in the clouds . . . literally. Many of the Justices' questions centered on how cloud computing might be affected by any decision in this case.
- At least four justices observed that Aereo looks just like a cable system, and at least a couple reflected an awareness that Aereo's design was intended to allow it to avoid copyright obligations – but it's not clear that that alone will convince them to find for the broadcasters.
- The argument did not dwell as much as we had expected on the specific statutory language at issue here (*i.e.*, the Transmit Clause of the Copyright Act).
- Aereo's counsel repeatedly characterized Aereo as being purely an equipment rental service. But he also acknowledged that, while some of its dime-sized antennas are "static", *i.e.*, devoted to a particular user, others are dynamic. In a dynamic system, an Aereo subscriber logging in to the service will be assigned whatever antenna is available, as opposed to any specific antenna.
- The Court did not appear troubled at all by the procedural posture of the case. That is, what's on appeal is the denial of a preliminary injunction, a decision based on a relatively thin factual record. Despite that, the Court appears to be psychologically ready to resolve this case without having to remand it for further evidentiary proceedings.

Bottom line: We figure that the Court's decision will be a narrow one designed to avoid, to the extent possible, any untoward effects on cloud computing. While the Justices kept their cards close to their robes – as is their custom – our guess is that the Court will come down on the broadcasters' side, possibly with a unanimous decision.

In addition, Kevin was interviewed on the LexBlog Network about the argument. You can hear – and see! – him here.

If you want to read the transcript of the Supreme Court argument, you can find it here. If you want to *hear* the argument, the recording has been posted on the Supreme Court's website.

And now we all just sit back and wait for late June, when we expect to see the Court's decision. Check back here for updates.

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submission relative to the request.) But even that 90-day "shot clock" is subject to uncertainty, because the *JSA R&O* provides that the time limit will apply only "provided there are no circumstances requiring additional time for review."

Unlike the days when Chairman Martin helmed the Commission – when the actual orders adopted by the FCC often weren't released until months after they were adopted – the Genachowski and Wheeler Commissions have demonstrated an admirable ability to get their decisions released within no more than a day or two of adoption. Because of that, many industry members scratched their heads as days and then weeks passed without the release of the *JSA R&O*. Many harbored the hope that release of the text of the decision was delayed to permit the inclusion of detailed waiver standards.

Anyone harboring such hopes will be deeply disappointed.

As it turns out, barely one paragraph of the *JSA R&O* discusses the standards that will apply to JSA attribution waivers, and even that minimal discussion is disturbingly vague. Here's what we know: the Bureau's assessment of waiver requests will be guided in the first instance mainly by concern about whether the proposed JSA gives the selling station inappropriate influence over the other station's programming. Otherwise prohibited JSAs might qualify for a waiver if they can be shown to result in significant benefits to localism, diversity and competition. As with any case-by-case process, we can expect to see some flesh put on those bones over the course of time. For now, however, the Commission has provided no more guidance than that.

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In a presentation made at the March 31 Commission meeting, Media Bureau Chief William Lake provided far more detail than the *JSA R&O* itself. According to Lake, the staff currently contemplates that waiver requests will fall into one of three "groups" or categories, each of which will be subject to somewhat different processing.

First would be proposed JSAs between two existing owners where no sale transaction is proposed and where no facts suggest that the station providing advertising services would have any other means to influence the subject station. Waivers in such situations would receive the quickest processing and, presumably, would be more likely to be granted.

The second group would be JSAs arising as part of a sale transaction, but without any additional "entanglements" suggesting influence, such as financing or options agreements. These types of proposals would receive a closer look.

Finally, the third group of proposed JSAs would be those where, over and above the JSA, additional relationships between the two stations – such as financing, options, or shared services agreements – indicate that the station providing services may have the ability to exert control over the programming, personnel, and finances of the subject station. Lake indicated that such waiver requests would receive the closest scrutiny, and that a very strong public interest showing would be required to obtain a waiver in such a situation.

In terms of the potential public interest benefits that could be shown to help justify a waiver, few details have been officially identified. Possible factors include: time limitations on the JSA; a demonstration of how the JSA would help a local educational institution or "community support organization" to launch a broadcast operation; a showing that the JSA would lead to increased production of news or other locally-focused efforts.

The *JSA R&O* does contain some (very minimal) good news for a small universe of broadcasters: the new limits will not apply to national sales representatives. Even if a national sales rep firm owns stations in a market, it will still be allowed to sell time for other stations in that market without attribution.

The requirement that JSAs, both old and new, be filed with and approved by the Commission must first be run past the Office of Management and Budget for its approval (thanks to our old friend, the Paperwork Reduction Act). Once OMB has approved the new rules – which is likely to take at least three-four months, possibly more – the FCC will issue a notice advising everybody when the rules will become effective. Parties to existing JSAs will then have 30 days to file their documents with the Commission. Any parties entering into JSAs after the effective date of the *JSA R&O*, will also need to file those agreements with the Commission within 30 days of signing or as part of an assignment or transfer of control application, if applicable.

The *JSA R&O* also includes a Further Notice of Proposed Rulemaking (*FNPRM*) component in which the Commission has initiated the 2014 Quadrennial Review of the Commission's ownership rules while also continuing the still-unresolved 2010 Quadrennial Review and addressing the Commission's 2008

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order on encouraging diversity in ownership. (That last order was [remanded to the FCC by the U.S. Court of Appeals for the Third Circuit]() in 2011.)

In the *FNPRM* the Commission proposes retaining the existing local television ownership rule (although the term “Grade B contour” for overlap purposes would be replaced by “digital Noise-limited service contour” (NLSC), the equivalent of the “Grade B Contour" for DTV purposes). The FCC also proposes to retain:

- the failed and failing station waiver regime (although it requests comment on whether any changes should be made on that front);
- the newspaper/broadcast cross-ownership rule with respect to television (although it requests comment on potentially repealing the rule for *radio*/newspaper cross-ownership). The TV element of this rule would also be updated to refer to digital Principal Community Contour rather than “Grade A Contour”);
- the Commission’s local radio ownership rule and dual network rules without change (although it does request comments on whether the radio/television cross-ownership rule remains necessary).

Buried in the *FNPRM* is also a proposal that would prohibit two television stations in a local market from swapping affiliations such that a single owner controlled two Top-Four affiliates. Previously, this type of contractual arrangement had been allowed as long as common ownership of any two stations in the market was permitted. In those circumstances a subsequent change in affiliations would not have required Commission approval or review. Under the proposal in the *FNPRM*, any party gaining control over two Top-Four network affiliations in a market in such a manner would be subject to enforcement action.

The FCC also proposes rules designed to “increase transparency” by requiring that all sharing arrangements between stations – including shared services agreements, news sharing arrangements, news gathering arrangements, and agreements for joint retransmission consent negotiation (even where such negotiation is still allowed) – be disclosed. The *FNPRM* makes clear that the Commission intends to define “sharing arrangements” as broadly as possible, to encompass *any* agreement, written or oral, by which one station (or its parent or affiliate companies) provides “administrative, technical, sales, and/or programming” services to another station.

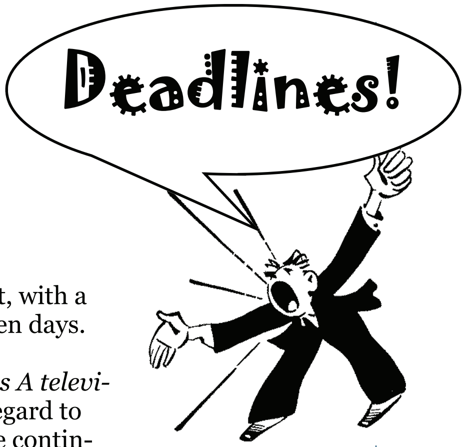
The FNPRM makes clear that the Commission intends to define “sharing arrangements” as broadly as possible

Finally, there’s the matter of the Third Circuit’s 2011 remand of the Commission’s 2008 Order designed to increase diversity in broadcast ownership. The Court overturned much of that order because the FCC had supposedly failed to establish a sufficient “nexus” between (a) the “eligible entity” program adopted there and (b) the goal of furthering racial diversity in ownership. The Commission is now looking to reinstate the “eligible entity” standards on the separate theory that increasing ownership and entry into broadcasting by small businesses would itself be beneficial. While the FCC still appears interested in adopting a gender- and race-conscious standard to encourage female and minority ownership, it has apparently concluded such a standard could not withstand the strict constitutional scrutiny to which it would likely be subjected in the courts, although it seeks comment on this conclusion.

The *JSA R&O* drew strong dissents from Commissioners Pai and O’Rielly. Pai, in particular, delivered a lengthy response in which he characterized the *JSA R&O* the most problematic he has voted on at the Commission and invited court challenges to it. Procedurally, Commissioner Pai disagreed with the Commission’s decision to adopt new JSA rules when the 2010 Quadrennial Ownership Review remains unresolved. In particular, he expressed great concern that the Media Bureau would not even be scheduled to deliver recommendations on the full ownership review until June, 2016, ***after*** the two-year period for the unwinding of JSAs has closed. On this front, Commissioner Pai’s views jibe with those of Congressional Republicans, who continue to attempt to insert language into a revision of satellite carriage laws that would require the Commission to resolve the 2010 Quadrennial Review before taking any action on JSAs. It remains to be seen what will come of those attempts.

Pai and O’Rielly also both expressed disagreement with the substance of the Commission’s decision to attribute JSAs, asserting that regulation isn’t warranted because there isn’t enough evidence that JSAs lead to influence over programming decisions. Both also argued that eliminating JSAs, particularly in small markets, will harm localism and diversity by forcing smaller stations to decrease or eliminate local news coverage or fold entirely. Pai also noted that the Media Bureau has repeatedly approved JSAs in recent years; given that, he fears that the Commission’s refusal to grandfather such arrangements could undermine any confidence that broadcasters, and investors, might otherwise have that the FCC can be counted on to stand by its decisions.

Comments on the *JSA R&O* and the *FNPRM* will be due 45 days after Federal Register publication, with replies due another 30 days after that. (Check CommLawBlog.com for updates as to the specific due dates.)



June 1, 2014

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

June 2, 2014

Television License Renewal Applications – *Television* stations located in **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah** and **Wyoming** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Nevada**, **New Mexico**, **Ohio**, **Utah**, **Virginia**, **West Virginia** and **Wyoming** must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Noncommercial Television Ownership Reports – All *noncommercial television* stations located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia** and **Wyoming** 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 **Michigan** and **Ohio** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

July 10, 2014

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the second 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 television* stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to substantiate compliance with those limits, must be uploaded to the public inspection file.

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

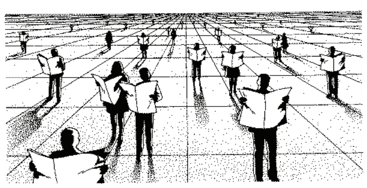
Issues/Programs Lists – For all *radio*, *television* and *Class A television* stations, a listing of each station's most significant treatment of community issues during the past quarter must be placed in the station's public inspection file. Radio stations will continue to place hard copies in the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

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

Updates On The News

Class action? Not at the FCC! – About a year and a half ago a petition for rulemaking rolled into the FCC proposing that the Commission allow lawyers to file class actions on behalf of complainants. Rather than summarily toss the petition, the Commission invited public comments on it. And now, 19 months down the line, the Commission has summarily tossed the petition.

Not surprisingly, the FCC sees no need to set up a new class action process when the federal courts are already highly experienced in handling such cases. Further, there's the question of resources: the Commission recognizes that implementation of a class action process would suck up "considerable resources" and would entail various litigation-related activities with which the Commission has no experience. Why bother, when the existing complaint procedures already emphasize "streamlined and expeditious dispute resolution"? And anyway, there's no evidence that folks who complain to the FCC would prefer to be shunted off into Class Action Land, that the Commission could force them to go that route in any event, or that their various complaints would necessarily raise the common issues of law and fact necessary for class action treatment.



So if you're thinking of filing a class action, don't waste time going to the FCC – just head to court straightaway.

More time to comment on non-English EAS proposal – Last month we reported that the Public Safety and Homeland Security Bureau has invited comments about the long-pending proposal to establish a "designated hitter" approach to assure that EAS announcements are broadcast in foreign languages when the audience includes a significant number of non-English speaking folks. If you're thinking about filing comments in that proceeding, get out your calendar: the Bureau, which has originally called for a relatively abbreviated comment period, has pushed the deadlines back a month. It was happy to do so particularly because the original proponent, the Minority Media and Telecommunications Council, was the one asking for more time. Comments in response to the Bureau's request for comments are now due by ***May 28, 2014*** and replies are due by ***June 12***.

Give it up for CommLawBlog Live! – We are pleased to announce the debut of a new feature on CommLawBlog.com: CommLawBlog Live!, a chance for you to hear directly from CommLawBlog contributors and friends**.**

From time to time, we'll be presenting our bloggers, and maybe even some outside guests, discussing communications law issues in a live online format. The kick-off show was presented on April 22**,** featuring Kevin "The Swami" Goldberg and Harry "Blogmeister" Cole sharing their observations about the Aereo oral argument in the Supreme Court (which both had attended earlier that day). If you missed it, you can still catch a recording here.

CommLawBlog Live! uses our usual webinar process, but it includes live video of the presenters. Don't expect these shows to be like other webinars you may have attended. PowerPoints? Probably not. Off-the-cuff comments, casual banter, the occasional pointed critique? Count on it. Fun? We sure hope so. Keen insight? You'll have to be the judge.

We here at the *Memo to Clients* strongly recommend that our readers keep an eye out on CommLawBlog for upcoming shows. When the next one is announced, be there or be square.

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alternate suggestion on which it has now sought further comments. It's difficult to imagine anyone accusing the FCC of making some backroom deal with one or another established player in a way that might undermine a public safety service: the FCC has given the users and operators of the TIS a chance to weigh in on this new 5 kHz proposal, and if it turns out the 5 kHz Great Compromise isn't so Great, ideally that determination will keep the Commission from taking an ill-advised turn. Sure, it might delay things by a few months, but in this case, doing it right is worth the delay.

Comments in response to the Bureau's public notice are due by ***May 16, 2014***; reply comments are due by ***June 2***. Comments may be uploaded through the FCC's ECFS online filing system here; enter them in Proceeding Number 09-19.