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Memorandum to Clients

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Nearly a decade in the making

Regulatory Weed-Whacking: The FCC Cleans Up its Antenna Structure Regulations

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If you've got one or more tower structures, you may be in luck. The FCC has at long last taken a weed-whacker to Part 17 of its rules, a long-overgrown regulatory briar patch governing the construction, painting and lighting of antenna structures. While the substantive requirements remain largely intact, a number of procedural changes should make life at least a little easier for tower owners as well as the Commission's Staff. At a minimum, the changes should make the rules easier for real people to grasp.

The only real question here: What took so long?

Tower Inspections. The current rules require that tower lights be monitored at least once every 24 hours, either by observation of the tower itself or through an alarm system that takes care of the process automatically. In addition, any automatic or mechanical control devices, indicators, and alarm systems associated with a tower-lighting system must be inspected quarterly to confirm that the gear is working properly. Some major tower owners have set up Network Operations Centers (NOCs) which are staffed at all times, have highly sophisticated equipment that sounds an alarm at any tower lighting malfunction, and stores records of all alerts. An alert is sent not only if the lights fail at a tower but also if the monitoring system fails. Historically, the FCC has granted several waivers of the quarterly inspection requirement to companies that have demonstrated that their NOCs are adequately staffed and equipped.

Under the new rules, maintenance of an NOC will excuse a tower owner from quarterly inspections as long as the owner can certify (with appropriate documentation) that: its monitoring system has previously been approved by the FCC; the tower structures are in fact monitored as specified in the FCC's approval; and its gear is set up to receive notifications of any failure of the monitoring system. (If you've got a system that has not yet been approved by the Commission, you can still ask the Wireless Communications Bureau to bless it. The existing standards for such systems will apply.)

Note that the use of NOC monitoring is optional, not mandatory. A data field will be added to the FCC's online Antenna Structure Registration (ASR) system to allow registrants to report that they have chosen to monitor their tower lights through an approved NOC system. Those of you who do not use an NOC-based system will still be subject to the quarterly inspection requirement.

Changes in Tower Height/Location. The FCC has amended its rules to require modification of a tower's FCC Antenna Structure Registration (ASR) for any change or correction of one foot or more in tower height or one second in latitude or longitude. This conforms to the FAA-imposed triggers requiring the filing of a new notice and obtaining a new Determination of No Hazard. Practically speaking, you'll need to get the FAA's No-Hazard Determination first, as that will have to be submitted with the FCC Form 854 to update your previous ASR.

The text of the Commission's Report and Order says that prior FCC "approval" for such modifications is now required for this kind of change. The newly-adopted rules, however, require only that FAA approval be obtained and the existing ASR be modified. Such modification may generally be secured online automatically – that is, conventional notions of "prior approval" may not really be involved, at least on the FCC side of things, although you do get "approval" in the sense that if you don't fill out the ASR form correctly, your registration will be rejected by the online system.

Some FCC licensing rules allow changes involving larger variations (*i.e.*, more than one foot, more than one second)

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Inside this issue . . .

More a matter of "when" than "whether"?

Coming Soon: Online Public File Obligations for Cable, Satellite . . . AND Radio?

By Harry F. Cole
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Well, that didn't take long . . . on a couple of levels. The Media Bureau has requested comments on a proposal to impose online public file requirements on cable and satellite operators. And the Bureau has gone the proponents one big step further by suggesting that radio stations as well should be posting their public files online.

The notion of online public files is, of course, of relatively recent vintage. Since August, 2012, TV stations have been required to post most of their public files to the FCC-maintained online system. Political file information was initially required to be posted only by Top Four network licensees in the top 50 markets . . . until July 1 of this year (yes, just a little less than two months ago), at which time all commercial TV licensees joined the club. If you're at all fuzzy on the history of the online public file, click here and just keep scrolling – we followed the whole process pretty closely in a series of posts on CommLawBlog.com.

Given the long gestation of the TV online public file, some observers (well, us, at least) expected that the FCC might let things settle down for a minute or two.

Surprise, surprise.

On July 31, 2014, three public interest groups (those would be the Campaign Legal Center, Common Cause and the Sunlight Foundation) filed a petition for rulemaking asking the FCC to expand the requirement to post political and other public file materials to the FCC's online database to include cable and satellite systems. And a mere week later, the Media Bureau asked for comments on the proposal.

What's more, the Bureau expanded the scope to include a proposal to include online public file posting by radio licensees as well.

The cable/satellite proposal probably shouldn't come as much of a surprise. With the online reporting requirement extended to all commercial TV stations, reports had started to surface that a significant amount of political advertising was being directed to non-broadcast video media. The goal, it would appear, is to reach more or less the same viewing audience while avoiding the pesky online reporting that exposes to universal examination considerable detail about the amount of the buy and the identity of the buyer. By expanding the online requirement, the FCC would presumably disincentivize that work-around. (How radio broadcasters got invited to the party is unclear – they may just be innocent bystanders dragged into the action through no fault of their own.)

On the plus side, the Bureau's notice does ***not*** mean that the imposition of new online reporting requirements is imminent. The Commission will first have to undertake a formal rulemaking petition, with a Notice of Proposed Rulemaking, comments and reply comments, and a Report and Order. But on the negative side, the Bureau's notice clearly signals that some such changes are on the Commission's radar screen. The notice was issued barely a month after the political file uploading requirement expanded to include most of the TV industry. And even more startling, it was issued only a week after the petition for rulemaking was filed. (By way of contrast, as reported on page 9, the Commission only this month requested comments on a rulemaking petition that had been filed in January, 2013, 18 months earlier.) All of these factors strongly suggest that this is on the fast track.

We would love to comment on what the Bureau has in mind here, but there

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Tell it to the judge?

Are Deferred Radio Renewals Headed for Hearings?

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Last February my colleague Howard Weiss reported on a decision by the Audio Division that boded ill for radio stations that had been off the air (or operating with inadequate power) for too much of the preceding license term. Faced with a renewal application in which the station had been off the air for approximately one-half of the term, the Division granted the station only a two-year "short term" renewal, instead of the standard eight-year term.

That decision hinted that more stringent actions might be taken in some situations. And now we hear rumblings that the Division is indeed thinking seriously about putting license renewal applicants who were off the air for more than half their license terms into hearings to determine whether to renew or cancel their licenses.

Under the Communications Act (Section 309(k), to be precise) before it can grant a license renewal application, the Commission must find that the station has served the public interest during the preceding license term. The Division's staff is concerned that such a public interest finding cannot be made for stations that have been silent for extended periods: if they haven't operated, the theory goes, how could they have served the public interest? This concern was telegraphed several years ago: When the most recent license renewal cycle for radio began in mid-2011, the newly-revised renewal application form required applicants to certify that they had not been silent (or operating on a less-than-minimal schedule) for any period of more than 30 days. Anybody unable to make that certification was required to identify the periods of silence.

Of the thousands of renewal applications that have been filed on that new form, we understand that an estimated 70-100 disclosed that the subject stations had been silent for 50% or more of their eight-year license terms. Other stations admitted to silence of two or more years. In most of these cases, the licensees had been expressly authorized by the FCC to remain silent pending resolution of their problems. (Many involved AM stations which had been off the air due to economic problems caused in part by the "Great Recession.")

Action on the renewal applications of those silent stations has been "deferred". Even stations which have resumed operations after extended periods of silence are being held in regulatory limbo as the staff ponders their fate. These are the stations that, according to the informal rumblings we have picked up, may be destined for renewal hearings.

The Division's uber-aggressive saber-rattling is not without its problems.

The staff does not have a particularly wide range of options. In general, the Communications Act specifies that the Commission may only either grant or deny renewal – but before it can deny a renewal, it must first afford the applicant an opportunity to present evidence as to why renewal would serve the public interest. Traditionally, such hearings have been conducted (at least in part) in the licensee's community of license. Such a "field hearing" has been deemed consistent with the "overriding public interest consideration to conduct fair and impartial hearings and to compile full, complete, and accurate records" by affording local folks – *i.e.*, the public the station is supposed to be serving – an opportunity weigh in on whether the license should be renewed.

The Commission lacks the resources to follow through with a large number of hearings.

Faced with extinction of their licenses, it is likely that a significant percentage of licensees with deferred renewal applications will insist on such hearings, if for no other reason than to delay the inevitable. License renewal hearings and follow-up appeal procedures can take five or more years to complete.

But if hearings – and, particularly, field hearings held in the stations' various communities of license – were to be designated, practical problems would arise immediately.

That's because the Commission lacks the resources to follow through.

A hearing must be conducted before an administrative law judge (ALJ). The FCC currently employs only one ALJ (down from 10 or so back in the early 1990s). While that one ALJ has considerable ex-

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perience, having held that position for more than 25 years, it is unlikely a single individual could preside effectively over a large number of field hearings. Nor is it likely the FCC will hire more ALJs, thereby diverting resources from broadband deployment and incentive auctions, in order to accommodate renewal hearings for broadcasters.

In such hearings, the Bureau would have to be represented by trial counsel who would present the government's case against the incumbent renewal applicant. But, thanks mainly to the fact that broadcast-related hearings have been few and far between since the turn of the century, the Bureau faces a serious lack of experienced trial lawyers. Hiring and training inexperienced lawyers to handle such hearings would be an additional drain on resources that would not likely be acceptable to FCC policy makers.

The Bureau faces a serious lack of experienced trial lawyers.

And even if these cases got to hearing, the Bureau could have a difficult time making its case. As noted, many of the stations that were silent were granted specific authorization – *by the Bureau* – to remain silent, presumably based on appropriate public interest findings. The Commission could find itself in the uncomfortable position of trying to explain to an appeals court why licensees should lose their licenses for doing something that the Bureau itself had told them they could do.

Let's not forget the problem of due process – a term that generally refers to overall procedural fairness. Due process often requires that, before the government can penalize a party for doing something, that party must have been given some notice, in advance, that doing that something could result in a penalty. Here, the FCC had neither formally adopted nor otherwise announced any policy about the perils of silence prior to the beginning of the license terms during which the silence occurred. In fact, that remains the case to this date. If the Commission wishes to impose new requirements or alter its historical treatment of particular conduct, the Commission must undertake a formal rulemaking proceeding – or at least issue a formal policy statement – putting everyone on notice of the details of the new requirements and allowing possible appeals. No such rulemaking or policy statement covering the possible designation for hearing of silent stations has been issued.

Due process also normally requires that the relevant standards be clearly articulated so that the ALJ (and all the parties to the hearing) can know precisely what legal consequences will flow from what particular licensee conduct. Again, whatever the Audio Division's policy with respect to silent stations might be, that policy has not even been formally articulated, much less adopted by the full Commission. So any hearing would be a directionless exercise.

Due process also entails an element of equal treatment – similarly situated parties should be treated similarly. But the Audio Division staff has informally advised licensees with deferred renewals that stations which were silent for 50% or more of their license terms can expect to be put into hearing, while stations which were silent for two years but less than 50% of their license terms can count on receiving "short-term" (two-year) renewals. Nothing has been published that articulates the reasons for the different treatment of these two categories of renewal applications.

In sum, the Audio Division is frustrated – arguably with good reason – by licensees who do not operate the stations they are authorized to operate. But the remedy the Division appears to prefer is so fraught with drawbacks that it seems unlikely to yield any positive results. Even if the Commission were to provide the necessary resources – which is unlikely – the hearings that would ensue would merely embroil the Commission for years in a multi-front campaign against mostly small-town broadcasters with little to lose by fighting. And in the absence of any discernible legal standards underpinning its crusade, any decision by the Commission to deny a renewal would be subject to effective challenge in the court of appeals.

Whether – and if so, when – the Division will make good on its veiled threat to designate silent stations for hearing remains to be seen. But in view of the multiple hurdles such hearings would face, it seems pointless to start down that path as matters now stand. The better course would be to initiate a rulemaking proceeding through which reasonable and legally sustainable rules could be developed – and publicized – long before the next license renewal cycle begins. Fairness, and plain common sense, support that approach.

On the social media front

NLRB Panel Likes "Likes"

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I've written a few pieces about the National Labor Relations Board (NLRB) and social media. For readers with short memories, the NLRB has held that, under the National Labor Relations Act (NLRA), an employee can speak out on a personal Facebook, Twitter, LinkedIn or any other personal social media account *without fear of retaliatory discipline* if the posting is "concerted protected activity" that is "not opprobrious" in nature. The term "not opprobrious" in this context is just a fancy way of saying "be civil about it": don't break laws, don't harass others, don't defame – just be professional.

And "concerted protected activity"? To fit into that protected category, the employee's communications must be seeking to improve or otherwise affect the conditions of his or her employment. Also, they must be made with a clear intention to get others on board (as opposed to just venting, airing grievances, etc).

I have previously noted that the NLRB's policy accords employees rather broad freedom from disciplinary action while it imposes on employers wishing to impose some limits on their employees the obligation to write clear and somewhat narrow social media policies. But the cases we have looked at so far have involved fully articulated expressions by the employee.

Anytime you write something, you should assume someone you don't want to see it will eventually see it.

A new NLRB decision takes us into new territory: Can simply hitting "Like" be considered "concerted protected activity"?

The answer, as it turns out, is "YES" and the reasoning, in my mind, would also protect an employee who, with the proper intentions, retweets another's critical statements.

The case involved three one-time employees – we'll call them Vinnie, Jill and Jamie – of the Triple Play Sports Bar and Grille in Watertown, Connecticut. Thanks to an accounting error apparently made by the Triple Play with respect to employee withholding, Jill and Jamie learned, to their disappointment, that they owed more 2010 state income tax than they had already paid. Jamie (who had already left the Triple Play's employ) did not take the news gracefully. She posted to her Facebook account:

> Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money...Wtf!!!!

Several responsive comments similarly critical of the Triple Play and its owners were posted, some of them arguably defamatory. Jill (who then still working at the Triple Play) posted a comment to Jamie's original post – although she later testified that her Facebook settings were such that only her friends would have been able to see the comment. (Helpful Social Media Tip: Anytime you write something, you should assume someone you don't want to see it will eventually see it.) Jill's comment:

> I owe too. Such an asshole.

Vinnie, on the other hand, only "liked" Jamie's original post. He also was still on board at the Triple Play, but not for long.

The Triple Play promptly fired Jill and Vinnie for violating the Triple Play's "Internet/Blogging" policy. (Wait – A bar has a "blogging" policy? See below). Jill and Vinnie then filed a complaint with the NLRB.

An NLRB administrative law judge (ALJ) concluded that the overall Facebook discussion triggered by Jamie's original post was concerted activity: it was part of an ongoing discussion of the tax withholding issue and the participants were discussing plans to raise issues at a future staff meeting and maybe even file complaints with government authorities. The ALJ also held that the discussion was "protected" activity. This included Vinnie's "Like" of Jamie's initial post which, in the ALJ's view, expressed Vinnie's support for others and therefore "constituted participation in the discussion that was sufficiently meaningful as to rise to the level of protected, concerted activity."

The Triple Play appealed the ALJ's decision, and a three-member NLRB panel, in a 2-1 ruling, has now affirmed the judgment for Vinnie and Jill.

The panel majority held that neither Vinnie nor Jill

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2014 Reg Fees Set, Payment Deadline Announced

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Apparently intent on re-defining the terms "last minute" and "eleventh hour", the Commission opted to wait until late on the afternoon of August 29 before it announced the final 2014 regulatory fees. For those of you anxious to cut to the chase, we've compiled the table on the next page setting out the new fees for broadcast-related services. (The table also provides, for TV-related services, comparisons of the 2014 fees against last year's fees).

Presumably because its adoption of the 2014 fees has come so late in the government's fiscal year, the Commission has also taken the unusual step of simultaneously announcing the deadline for reg fee payments. That would be ***11:59 p.m. (ET) on September 23, 2014***.

Failure to pay reg fees on time can have dire consequences.

The 2014 fees are, dollar-wise, identical to last year's for radio licensees and considerably lower (*i.e.*, 24% - 48%, depending on market) for VHF TV folks. UHF licensees, on the other hand, will notice a considerable uptick (14% - 29%, again depending on market). Thanks to the DTV transition, the Commission has decided that, unlike in past years, it's not right to assess different reg fees to UHF and VHF stations in same-sized markets. Accordingly, where different fees were previously assessed separately for VHF and UHF stations, this year all full-service TV licensees are classified merely as "Digital TV", which leads to the reduction for VHF licensees and corresponding increase for UHF. The tiering of fees based on market size remains the same.

As has always been the case, failure to pay reg fees on time can have dire consequences. Those include: a late payment penalty of 25 percent of the unpaid amount, starting immediately after the deadline; additional processing charges for collection of late fees; and administrative penalties, such as withholding of action on any applications from delinquent parties, eventual dismissal of such applications, and even possible revocation proceedings. And remember, the FCC will ***not*** be sending you a hard-copy reminder of your reg fee bill.

When you're ready to pay, don't bother reaching for your checkbook. Unlike past years, reg fee payments ***must now be made electronically***, *i.e.*, by online ACH payment, online credit card, or wire transfer. No checks, money orders, green stamps, or anything else on paper. If you aren't familiar with the Commission's online Fee Filer system, we recommend that you not wait until the last minute to try to figure it out. It's not especially user-friendly or intuitively obvious. (Of course, if you don't feel like doing it yourself, you can always ask your communications counsel to help out.)

Fee Filer is now up and running; you can get to it at this link. That's the first stop you'll have to make in paying your fees. Once you log into the system (using your FCC Registration Number (FRN) and password), you'll have to generate a Form 159-E, which you'll need to tender as part of the payment process. (If you're paying by wire transfer, you'll have to fax in your 159-E.)

While Fee Filer will ordinarily list fees associated with the FRN used to access the system, WATCH OUT: the list of fees shown in Fee Filer may not be complete. (The same is true for the broadcast reg fee "lookup" page provided by the Commission.) As a general rule, it's the payer's responsibility to confirm the fullest extent of the payer's regulatory fee obligation.

Double- and triple-checking other FCC databases, as well as your own records, is prudent, since failure to file any required reg fee, even if inadvertent and even if only for a very small amount – like, say, a $10 auxiliary license fee – can lead to the dire consequences noted above. We mention auxiliary license fees in particular because, historically, the FCC's fee calculator has ***NOT*** included fees for any auxiliary licenses that may be associated with the main license. (We've told you about this in the past.) Since separate fees are due for those auxiliaries over and above the main license reg fee, it's *very important* to be sure that your payment includes the necessary fees for ***all*** applicable authorizations.

Along with the 2014 reg fee schedule, the Commission tweaked its rules in a number of relatively minor ways. Those tweaks (which we plan to review and, if warranted, report on) do not affect this year's fees.

FINAL 2014 REGULATORY FEES

(FCC 14-129, released 8/29/14)

FEE CATEGORY	Final 2013 Fees (USD)	Final 2014 Fees (USD)	Differential (USD)
TV VHF Commercial Stations			
Markets 1-10	86,075	44,650 (VHF/UHF)	-48%
Markets 11-25	78,975	42,100 (VHF/UHF)	-47%
Markets 26-50	42,775	26,975 (VHF/UHF)	-37%
Markets 51-100	22,475	15,600 (VHF/UHF)	-30%
Remaining Markets	6,250	4,750 (VHF/UHF)	-24%
Construction Permits	6,250	4,750 (VHF/UHF)	-24%
TV UHF Commercial Stations			
Markets 1-10	38,000	44,650 (VHF/UHF)	+17%
Markets 11-25	35,050	42,100 (VHF/UHF)	+20%
Markets 26-50	23,550	26,975 (VHF/UHF)	+14%
Markets 51-100	13,700	15,600 (VHF/UHF)	+14%
Remaining Markets	3,675	4,750 (VHF/UHF)	+29%
Construction Permits	3,675	4,750 (VHF/UHF)	+29%
Low Power TV, TV/FM Translators/Boosters	410	410	NC
Other			
Broadcast Auxiliary	10	10	NC
Earth Stations	275	295	+7%
Satellite Television Stations			
All Markets	1,525	1,550	+2%
Construction Permits	960	1,300	+35%

Commercial Radio Stations Final 2014 Regulatory Fees						
Population Served	AM Class A	AM Class B	AM Class C	AM Class D	FM Classes A, B1 & C3	FM Classes B, C, C0, C1 & C2
< 25,000	775	645	590	670	750	925
25,001-75,000	1,550	1,300	900	1,000	1,500	1,625
75,001-150,000	2,325	1,625	1,200	1,675	2,050	3,000
150,001-500,000	3,475	2,750	1,800	2,025	3,175	3,925
500,001-1,200,000	5,025	4,225	3,000	3,375	5,050	5,775
1,200,001-3,000,000	7,750	6,500	4,500	5,400	8,250	9,250
> 3,000,000	9,300	7,800	5,700	6,750	10,500	12,025
AM Radio Construction Permits	590					
FM Radio Construction Permits	750					

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had – by "Liking" and commenting on, respectively, Jamie's initial post – adopted any of the allegedly defamatory comments made by Jamie or others commenting on her post. This is an important holding because, had Vinnie or Jill been found to have adopted any defamatory statements, they might have lost the protections of the NLRA altogether.

Equally important here is the holding that, because Vinnie "Liked" only Jamie's original post and did not separately "Like" any of the ensuing comments, his "Like" was an endorsement only of the original post and not the entire thread.

In other words, Vinnie's "Like", without anything more, was an expression of agreement with Jamie's original, clearly non-defamatory, complaint. So a "Like" is clearly expression, at least in the eyes of this NLRB panel. And that interpretation can in turn be read to say that purely mechanical acts (*e.g.*, clicking on the "Like" button) are "expression" under the NLRA. Based on that reasoning, I'd assume that, if you retweet something in a similar attempt to be part of a conversation or garner support for protected activity, you'd be protected as well.

A "Like" is clearly expression in the eyes of this NLRB panel.

The panel went even further. It held that a literal application of the Triple Play's Internet/Blogging policy would violate the NLRA. Yes, I'm as surprised as you are that a bar has such a policy, but here's how it read in relevant part:

> The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or effect.

Yes, it seems reasonable on its face. You might even have come up with something similar … if you had never read this post.

But then you, like the Triple Play, would find that you'd gone too far. According to the panel, Triple Play employees would reasonably interpret the Internet/Blogging Policy as prohibiting them from engaging in protected, concerted activity – an interpretation that proved all too true when Vinnie and Jill got canned. So the panel declared the Triple Play's policy unlawful.

Bottom line: the firings of Vinnie and Jill violated the NLRA, so the Triple Play had to reinstate them (or, if their old jobs weren't available, give them equivalent positions); Vinnie and Jill were entitled to back pay; and, completing the sweep, the Triple Play has to rewrite its Internet/Blogging Policy to conform to the NLRA *and* provide inserts in its employee handbook to make sure employees are aware of the rewritten policy.

Pretty hefty stuff. A good reminder that companies really need to take care with regard to social media policies and maybe just try to look the other way when critical things are said – or, now, even clicked.

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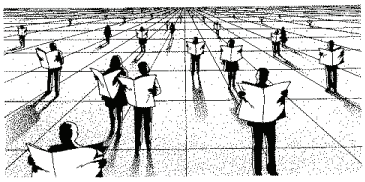
just isn't much in the public notice to chew on. It simply asks for comments on the proposal to expand the online public file requirement to cable, satellite and radio. (In fairness, it does acknowledge – in a footnote – that it may not currently be either feasible or desirable to include radio licensees in the online public file club.) It's probably safe to assume that the FCC figures that it can and should simply set up its online database to include the additional groups, who would then presumably be subject to the same general upload processes . . . but we can't say that for sure.

In any event, interested parties have until ***September 8, 2014*** to file reply comments. (Initial comments were due by August 28.)

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

Updates On The News

Spectrum auction effectiveness, appeal deadlines set — Exactly three months after its adoption, the FCC's Report and Order (*R&O*) setting the preliminary ground rules to cover the ambitious incentive auction and repacking of the TV band finally got published in the Federal Register. While this does not mean that the auction is imminent – the FCC is still hoping that it will happen next year – the Federal Register publication does set the effective date of some (but not all) of the rules adopted in the *R&O*. Perhaps more importantly, it starts the clock on a number of important deadlines.



First and foremost, the effective date of some of the new rules is ***October 14, 2014***. But heads up, because that does *not* apply to a bunch of sections that involve "information collections" that must be run past the Office of Management and Budget (thanks to the Paperwork Reduction Act) before they can take effect. Irrespective of the effective date, the *R&O*'s appearance in the Register establishes the dates for seeking reconsideration or judicial review.

Anyone who wants the FCC to reconsider any aspect of the *R&O* has until Monday, ***September 15, 2014*** to get a petition for reconsideration on file.

Anyone who plans to head straight to court has until ***October 14, 2014*** to file a petition for review with a federal court of appeals. But if you're planning on seeking judicial review ***and*** you have your heart set on having the case heard by a particular circuit, your deadline was far sooner than that.

That's because anyone preferring a particular circuit will have to comply with the rules governing the judicial lottery procedures. Those rules kick in when petitions for review of a single order are filed in multiple circuits. In that event, the determination of which circuit gets to hear the appeal is made by lottery conducted by the Judicial Panel on Multidistrict Litigation. In order to get your preferred circuit into the drum from which the lucky circuit will ultimately be drawn, you had to file your petition for review within 10 days of August 15 (*i.e.*, ***by August 25***) ***and***, also by August 25, you had to have a paper copy of the petition bearing the "received" stamp of the court delivered ***to the General Counsel's office*** at the FCC. (Here's a helpful guide about all this prepared by the FCC's Office of General Counsel.) At this point, it's too late to get your circuit of choice into the lottery, so just sit back and relax for the time being.

Drone even go there (reprise) — Last May we reported on an appeal that had been filed with the U.S. Court of Appeals for the D.C. Circuit with respect to the FAA's efforts to regulate the use of drones. We noted that there were some likely problems with the appeal, not the least of which was the fact that the FAA order being appealed wasn't really an order. Rather, it was just an email – and a pretty informal email at that – from an FAA representative describing the FAA's policy. As we noted back then, it didn't look much like an official agency action.

And that's what the Court thought, too. It concluded that the challenged email wasn't a formal decision, it didn't reflect any final FAA decision-making, and it didn't really have any legal consequences (notwithstanding the email's ominous and threatening tone). In a terse two-page order, the Court shot the appeal down.

While the usual flight paths are available for reconsideration or appeal to the Supremes, we think it unlikely that we'll see the case winging in that direction: the probability that this decision might get flipped would appear to be somewhere between zero and nil. So this appeal has crashed and burned. But you never know. If the case takes back off, we'll let you know.

C-4 blowing up? — Last month we reported that the Commission had formally acknowledged the petition for rulemaking filed by SSR Communications proposing the creation of a new class of FM channel – Class C4 – to be shoe-horned in between current Class A and Class C3. Comments on the proposal were invited. The Media Bureau has now announced that the comment period has been extended a month, to ***September 18, 2014***. Additionally, the deadline for replies to any incoming

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without an FCC construction permit, but those rules do not override the ASR requirements. Thus, if the changes would result in modification of the overall structure by one foot and/or one second or more, prior approval from the FAA and modification of the ASR are now required.

The FCC decided *not* to dictate a uniform method of determining geographic coordinates. In any event, though, the coordinates submitted to the FCC in an ASR will still have to match those submitted to the FAA. (Remember that while the FAA and all non-broadcast FCC services use NAD83 coordinates, broadcast licenses are still based on NAD27 coordinates, so an appropriate conversion may need to be made, depending on what you are applying for and to whom.)

Another amendment intended to harmonize overlapping FCC and FAA rules: when a tower under construction reaches its maximum height, or when the height of an existing structure is changed or the structure dismantled, the owner must now notify the FCC (as well as the FAA) within five days. Previously the Commission's rules required notifications either within 24 hours (in the case of construction or dismantlement) or immediately (in the case of height changes).

Tower owners must keep the FAA apprised of the anticipated repair timetable at the time each NOTAM expires.

Voluntary Registrations. Not all antenna structures require FCC tower registration. Rather, only towers more than 200 feet in height (regardless of location), and some shorter towers located close to airports, are required to obtain FAA no-hazard determinations and FCC ASRs. But owners of some towers that don't require registration nevertheless register voluntarily for various private business reasons – maybe to make it easier to show compliance with environmental requirements, to get their towers listed in directories that may be consulted by prospective tenants, etc. The FCC will continue to allow voluntary registration. In fact, it's going to add a data field to its ASR system for owners to specify that their registration is voluntary. Registrants who have already signed up voluntarily will *not* have to modify their registrations to report them as voluntary. The FCC will not require painting and lighting of voluntarily registered towers, and voluntary registrants are free to cancel their registrations at any time.

ASR Displays and Notifications. Tower owners with ASRs are required to display their ASR number, but confusion has occasionally arisen about just what that requirement entails. The simple statement of the rule is that the required information must be displayed on a permanent sign "in a conspicuous place readily visible near the base of the antenna structure." But some towers are enclosed by perimeter fences, and a sign at the base of the tower is too far away for someone outside the fence to read. The Commission has now clarified that the ASR and contact information must be posted at the place, nearest the tower, which is accessible by persons seeking to find out the ASR number. If a perimeter fence has two or more locked entrance gates, the ASR information must be posted at each gate. If one perimeter fence surrounds more than one tower (such as in an AM broadcast directional array), ASR information for each tower must still be posted at the base of that tower, with information for all of them at the fence entry points. (Multiple towers in an array are each supposed to be separately registered in the FCC's ASR system.)

While the ASR display requirement may just have gotten a bit tougher, there is a bit of compensating good news. The rule requiring owners to provide each tenant with a paper copy of the tower ASR has been dragged into the 21st Century: in lieu of a paper copy, owners may now provide their tenants with a link to the ASR's location in the FCC's database.

When the Lights Go Out. When tower lights fail, it's not time for romance; rather, it's time for immediate notice to the FAA, so that the FAA can in turn issue a Notice to Airmen (NOTAM) of the unlit hazard to air navigation. Ditto for when failed lights are repaired (so the FAA can cancel the NOTAM). But NOTAMs have expiration dates, so the FCC has now clarified that, in addition to those notifications, tower owners must also keep the FAA apprised of the anticipated repair timetable at the time each NOTAM expires. Thus, when you notify the FAA of a light failure, you should (a) be sure to find out when the ensuing NOTAM will expire and then (b) enter that date into a calendar or tickler file so you'll be sure to get back to the FAA with the required progress reports.

How long do you have to fix a lighting outage? The FCC's rules have historically been a bit inconsistent, with different language in different rules. But now a uniform (but still less than precise) requirement has been imposed: repairs must be completed "as soon as practicable" (the FCC has not specified any exact deadline). Owners must retain records of extinguished or improperly functioning lights, and of their repair, for two years.

When Colors Fade. Lighting failures aren't the only occasion for corrective action. Those towers which are required to be painted with aviation orange and white stripes must keep the orange paint in good condition, so that it is readily visible. The FAA publishes an "In-Service Aviation Orange Tolerance Chart" which

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shows degrees of fading and specifies the point when repainting is required. This chart must be compared to orange bands on the top half of the tower, because the top half usually weathers faster. The FCC requires use of the FAA's chart but hasn't specified how close to (or far away from) the tower one must stand when comparing tower color to the chart.

Odds and Ends. While digging through the overgrowth that had thrived in Part 17, the Commission also noticed that its rules made repeated references to various FAA Advisory Circulars that were ever so slightly out of date. Bring out the regulatory weed whacker! The FCC has now removed references to specific outdated FAA Advisory Circulars and, going forward, will simply require adherence to FAA rules and publications as adopted from time to time. Towers must be painted and lighted according to the terms of the FAA's Determination of No Hazard, although the FCC reserves the right to impose additional or different requirements on a specific tower. When the FAA adopts new requirements, the FCC will *not* require existing towers to comply with those requirements, absent modification or reconstruction of the tower, unless the FAA makes its own changes retroactive. The FCC has also made clear that it claims jurisdiction over any tower intended to support antennas that will transmit and/or receive radio energy. That jurisdiction runs from the start of construction to dismantlement, regardless of when radio transmission actually starts from the tower.

Loose Ends Still Loose. One longstanding question that the FCC has not answered involves the FAA's proposal to take interference between FM radio broadcast signals (in the 88-108 MHz band) and aircraft communications (in the 118-136 MHz band) into account when issuing Determinations of Hazard or No Hazard. The extent to which the FAA might regulate RF-related matters has been a bone of contention between the FCC and the FAA for decades: the FCC tends to view itself as the final word with respect to regulating spectrum use, and the FAA's repeated efforts to impose its own interference standards through its tower regulation program have led to some tension between the two agencies. Most recently – that would be four years ago – the Commission got the FAA to back down, at least for the time being; but the issue remained open while the FAA pondered the question some more. The pondering has apparently not yet been completed, as the FAA has not yet resolved its own rulemaking on this issue. Accordingly, the FCC's rules for now will specify that notice to the FAA is required only with respect to possible physical obstruction. When and if the FAA revises its rules to include RF interference considerations, the FCC will decide whether or not to change its own rules to conform.

None of the changes is particularly complicated or particularly controversial.

While the changes adopted by the Commission spread across a wide range of tower regulations, the fact is that none of the changes is particularly complicated or particularly controversial. And yet, it's taken nearly a decade for the FCC to get the job done. As Commissioner O'Rielly bemoaned, "why did it take nine years to get this item before the Commission for a vote?" (Noting that one of the rules being amended called for notification of lighting outages "by telephone or telegraph", Commissioner Pai deadpanned that "our modernization effort is long overdue.") As with many questions, O'Rielly's can't really be answered.

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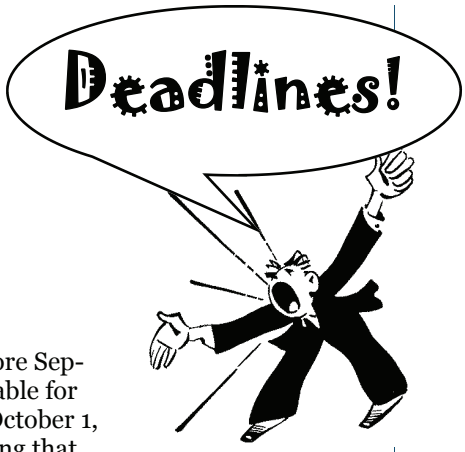
comments has been extended to ***October 3***.

While a one-month extension isn't necessarily the end of the world – particularly since the SSR petition was filed in January, 2013, some 18 months before the Commission deigned to acknowledge it, indicating that, as far as the FCC is concerned, time isn't of the essence here – this particular extension could signal trouble for the proposal.

The extension was requested by REC Networks. REC is an advocacy group that focuses on community radio; it has been particularly active in promoting the cause of LPFM service. Consistent with that interest, REC's extension request (as paraphrased in the Bureau's announcement of the extension) noted that the Class C4 proposal would "substantially impact many of the LPFM and community-based noncommercial FM radio service stakeholders". While REC may ultimately support the Class C4 proposal, it's at least possible that it could view the proposal as contrary to the interests of the LPFM universe. After all, the creation of a new, intermediate FM class could permit the squeezing of service from full-power stations into areas that don't already receive such service – and that, in turn, could reduce the space available for new LPFM service. Since the LPFM industry has enjoyed considerable success at the Commission in recent years, the possibility that its advocates might be gearing up to oppose the SSR proposal could be bad news for the proposal.

In any event, supporters and opponents of the SSR proposal now have until September 18 to prepare their comments.



September 18, 2014

New Class C-4/Reclassification of Sub-Maximum Facilities – Comments are due in response to the petition for rule making filed by SSR Communications Incorporated to seek the establishment of a new FM Class C-4 and a method for reclassification of stations with less than maximum facilities as contour protection stations.

Late September ?

Regulatory Fees – At some point, likely in late September and certainly before September 30, 2014, annual regulatory fees will be due. These will be due and payable for Fiscal Year 2014, and will be based upon a licensee's/permittee's holdings on October 1, 2013, plus anything that might have been purchased since then and less anything that might have been sold since then. This year, for the first time, the FCC will not accept checks as payment of the fees but will require some form of electronic payment.

October 1, 2014

Television License Renewal Applications – *Television* and *Class A television* stations located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon** and **Washington** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees. LPTV and TV translator stations also must file license renewal applications.

Television License Renewal Post-Filing Announcements – *Television* and *Class A television* stations located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon** and **Washington** must begin their post-filing announcements with regard to their license renewal applications on October 1. These announcements then must continue on October 16, November 1, November 16, December 1, and December 16. 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 **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** must begin their pre-filing announcements with regard to their applications for renewal of license on October 1. These announcements then must be continued on October 16, November 1 and November 16. Please note that, with the advent of the online public file, the prescribed text of the announcement has been changed slightly from that of previous renewal cycles.

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Puerto Rico**, **Oregon**, the **Virgin Islands** and **Washington** must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

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

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October 3, 2014

New Class C-4/Reclassification of Sub-Maximum Facilities – Reply Comments are due in response to the petition for rule making filed by SSR Communications Incorporated to seek the establishment of a new FM Class C-4 and a method for reclassification of stations with less than maximum facilities as contour protection stations.

October 10, 2014

Children's Television Programming Reports –For all *commercial television* and *Class A television* stations, the third 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, as the FCC bases its initial judgments of filing compliance on the contents and dates shown in the online public file. Please note that the FCC's filing system now requires the use of FRN's prior to preparation of the reports; therefore, you should 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.

FHH - On the Job, On the Go

Don Evans, **Tony Lee, Cheng Liu** and **Jamie Troup** are Vegas bound. They'll all be attending the Competitive Carriers Association Annual Convention, which will be held along with the CTIA Super Mobility Week (One Badge, Two Shows!) from September 7-10. The team is set to arrive on September 8. And be sure to stick around an extra day: on the evening of September 11, **Don** will make a presentation at a press conference to announce the launch of a new charitable fund to support tower workers injured on the job.

Indiana, here we come. The NAB Radio Show is scheduled for September 10-12 in beautiful downtown Indianapolis, and you can count on FHH to be represented. Both **Franks** (those would be **Jazzo** and **Montero**) will be there, along with **Scott Johnson**, **Steve Lovelady**, **Matt McCormick** and **Davina Sashkin**. **Davina** is slated to appear on a legal and regulatory panel (with the FCC's **Peter Doyle**) on September 10. You can also look for **Frank M** at the NASBA Reception. He will also be attending the RAIN Internet Radio Summit on September 9.

Speaking of **Frank M**, yes, that was he quoted in an article on contract issues for journalists that ran on the PR Newswire recently. The PR Newswire describes itself as "the premier global provider of multimedia platforms", and we have no reason to doubt that.

And speaking of **Frank J**, he has been named Chair of the Continuing Legal Education Committee of the Federal Communications Bar Association.

On September 9, **Dan Kirkpatrick** and **Paul Feldman** will be presenting a webinar on the ins and outs of must-carry and retransmission consent, the election deadline for which is rapidly approaching. And the next day, **Kevin Goldberg** and **Harry Cole** will present a webinar on developments on the Aereo front since last June's Supreme Court decision. Both webinars are free and open to anybody who's interested. Check CommLawBlog.com for details.

On September 15, **Tom Dougherty** will be attending the fifth annual UTC and DOE Critical Infrastructure Communications Policy Summit in Washington, D.C.