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NEWS AND ANALYSIS OF RECENT DEVELOPMENTS IN COMMUNICATIONS LAW

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Clearing targets, spectrum impairments, oh my!

Incentive Auction Inquiry: Wide Range of Technical Questions Out for Comment

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While the schedule may have slipped some, the Incentive Auction is still on its way. And even if the Auction may not start until sometime in 2016 (at least according to the current thinking), the Commission is facing – now – the monumental task of working out the myriad details that will govern the auction process. To that end, last month the FCC invited comment on a mind-numbing array of highly technical questions about both the reverse and forward components of the Incentive Auction. We'll summarize a few of the highlights concerning the reverse auction. (And let's be clear, this is just a summary of about 80 pages – *i.e.*, half of the 160+-page request for comments – of densely-packed Commission-ese.) We plan to address forward auction highlights in a separate article.

Setting the Clearing Target

The principal goal of the reverse auction is to clear UHF spectrum of current TV broadcast licensees in order to make that spectrum available to wireless operators. A couple of years ago, the Commission was hoping to be able to clear a nationwide "clean swath" of spectrum amounting to as much as 126 MHz. The thought was that the reverse auction software could be set up to use that level as a starting point from which the on-going reverse auction calculations would be based. In other words, unless a set of particular reverse auction deals would clear that pre-identified amount of spectrum, those deals would be non-starters.

The FCC now seems to be accepting the reality that using a fixed 126 MHz starting point (or even some lower level, like 108 MHz) might be a tad ambitious because of various practical constraints (for example, border interference considerations). As a result, it is now proposing an approach that would rely on a dynamic, rather than static, clearing target concept. The target would be the highest clearing target possible from among the available options depending on broadcaster participation in the reverse auction. But the Commission makes clear that it would like to hear from commenters relative to the notion of omitting any initial clearing targets.

"Impairment" and the Definition of "Cleared" Spectrum

Regardless of the starting point, however, it will in any event be essential for the Commission to determine precisely how the notion of "cleared" spectrum will be defined. And that gives rise to additional problems.

In some markets, certain TV stations will need to be relocated somewhere within the reallocated 600 MHz band, meaning stations so relocated will find themselves in a band populated by wireless providers.

Such proximity threatens interference (both to wireless and to broadcast service), which will be calculated using the "inter-service interference" (ISIX) methodology.

Wireless licenses subject to such interference from a TV station would be considered "impaired". (Wireless licensees would not be permitted to cause interference to TV broadcasters, but they could agree to operate in areas where they might suffer interference from TV service.) But just how much potential interference will cause a wireless license to be deemed "impaired"? And should "impaired" spectrum be included in the calculation of cleared spectrum for clearing target purposes?

The Commission suggests that the interference threshold should be in the range of 10-20% of the downlink, and it's looking for comment on whether that range would be appropriate. Comments are sought as to whether a threshold

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Inside this issue . . .

New calendar entry: Pre-Auction Licensing Deadline

Looking for Protection in the Repack? Get Those Facilities Licensed by May 29, 2015

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If you're a full power or Class A TV licensee and you'd like your facilities to be eligible for protection in the channel repacking process, heads up. You've got until ***May 29, 2015*** to get those facilities licensed (or at least to get a license application for them on file). That's the latest word from the Media Bureau, which has officially designated May 29, 2015 as the Pre-Auction Licensing Deadline.

Earlier on in the development of the Incentive Auction (and related spectrum repacking) process, the Commission had concluded that all full power and Class A facilities that had been licensed by February 22, 2012 would get mandatory protection. But it also acknowledged that "discretionary protection" should be afforded to a separate subset of station facilities that had not obtained a digital license by that date. To qualify for discretionary protection, those facilities would have to be licensed by some "pre-auction licensing deadline" that would eventually be announced.

Now that deadline has been announced.

Facilities eligible for discretionary protection include:

- Full power facilities authorized in outstanding construction permits issued to effectuate a channel substitution for a licensed station. (This includes CPs for stations seeking to relocate from channel 51 pursuant to voluntary relocation agreements with Lower 700 MHz A Block licensees.)
- Modified facilities of full power and Class A stations that were authorized by construction permits granted on or before April 5, 2013, (the date of the Media Bureau's 2013 Freeze Public Notice), or that have been authorized by construction permits that were granted after April 5, 2013 and are in compliance with the Freeze Public Notice. (We reported on the Freeze Public Notice here, if you'd like to refresh your memory.)
- Class A stations' initial digital facilities that were not initially licensed until after February 22, 2012, including those that were not authorized until after the Freeze Public Notice.

To be clear about just what the Bureau has in mind here, we'll quote:

> [A]ll facilities in these discretionary protection categories … must be licensed or have an application for a license to cover the construction permit on file by May 29, 2015, in order for these facilities to be protected in the repacking process.

The only exception applies to stations affected by the destruction of the World Trade Center. Folks in that particularly narrow category have the option of electing to "protect either their licensed Empire State Building facility or a proposed new facility at One World Trade Center" ***so long as*** that new facility has been applied for and authorized in a construction permit granted by the Pre-Auction Licensing Deadline.

Class A licensees looking to protect their digital facilities should pay particular attention here. That's because, while the Commission has technically given them to September 1, 2015 to complete construction and licensing of their digital facilities, that particular deadline is irrelevant to spectrum repacking protection concerns. So Class A's that don't have their digital facilities licensed by May 29, 2015 will be given repacking protection ***only*** with respect to the coverage area and population served by their analog facilities.

One more point of interest for all full power and Class A stations looking for re-

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A new twist on an old question

Dear NFL: Would You Mind if We Registered "Scandal Bowl"?

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It's no secret that we here in the *Memo to Clients* bunker don't fully approve of the NFL's aggressive efforts to protect trademarks that the NFL doesn't happen to own. Who can forget the famous "Who Dat" contretemps in 2010? And how about the NFL's successful effort to squelch an average Joe's (actually, an average Roy's) attempt to register the term "Harbowl" in 2013. (Not that we're bitter or anything, but it was CommLaw-Blog, not ESPN, that unearthed that particular tidbit, although you wouldn't have known that from ESPN's reporting.) We didn't see a similar effort last year when somebody tried to register "Bong Bowl", but that may have been because the applicant pulled the plug on the application before it got on the NFL's radar.

This year, if anybody's looking for a catchy alternative name for this year's Super Bowl®, how about the "Scandal Bowl"? After all, it wasn't but a few hours after the Patriots beat the Colts that ESPN began reporting that the Pats were being investigated for doctoring the game balls. (We take no credit for uncovering that particular story; credit apparently goes to Station WTHR in Indianapolis, which the ESPN report acknowledged.) Of course, it's not like this is the first time the Pats have been charged with cheating during the Belichick era (cough, "Spygate", cough).

When can a broadcaster safely use any of the terms the NFL already has registered?

And on the other side of the field will be the Seahawks, whose head coach, Pete Carroll, high-tailed it out of Southern California just before penalties were levied against the program he coached at USC.

And how particularly appropriate would "Scandal Bowl" be this year, when the NFL has been awash with serious bad press. (Concussions, anyone? Or how about Messrs. Rice or Peterson or Hernandez, among others?)

So "Scandal Bowl" might make sense like "Bong Bowl" made sense last year (when the two teams happened to be from states that legalized marijuana use.)

I just checked the USPTO and, so far at least, it looks like no one has tried to register "Scandalbowl" or any other combination of "Scandal" and Bowl" as a trademark in conjunction with any goods and services. So, should you do it?

Depends on your tolerance for risk.

As we have reported every January for years now, the term "Super Bowl"® – and a surprising number of other "super" terms (think "Super Sunday"®, "Super Bowl Concert Series"®, "Super Bowl of Golf"® – oops, that last one is registered to the National Football League Alumni, Inc.) – have been registered as trademarks by the NFL. That means that, while those terms *can* be used in certain limited contexts, as a general rule they may ***not*** be used in ***any*** commercial promotions. No advertising of your own events, no advertising of client-conducted events, sales, promotions, no contests, no nothing. Nada. Zip. Zilch.

And while the NFL may not happen to own other trademarks, that hasn't stopped it from taking steps to, um, discourage anybody else from using them, as we learned via the "Who Dat" and "Harbowl" incidents. It appears that the NFL would like to lay claim to just about *any* expression which includes either "Super" or "Bowl" and which may be used in connection with some football-related event. Would the NFL go so far as to try to prevent registration of "Scandal Bowl"? Who knows? It would seem that the league wouldn't want to embrace a name that might suggest misbehavior by its two premier teams, but the league's seemingly fanatical concern about "[Fill in the blank] Bowl" terminology could override any reticence. In any event, it might be fun to see what the league would do if a "Scandal Bowl" trademark application were to be filed.

But that's all hypothetical. More importantly, when *can* a broadcaster safely use any of the terms the NFL already *has* registered?

In bona fide news stories before and after the game. But you can't use them in any way that might suggest an official connection between you and either the No Fun League or any of the teams involved. And you can't use them in any way which creates the impression that any of those entities endorses your station (unless, of course, you have cut a deal with the NFL or one of its teams that expressly permits you to do so).

You ***can*** use the term "the Big Game" because the NFL doesn't happen to own that mark (although it did indeed try to tie it down once).

[Let's take a quick break from trademark niceties so that I can assume my role as the Swami and give my annual prediction for the game. Please remember this is for entertainment purposes only and should not be relied upon any way or connote my endorsement of gambling. I understand that there is something called "the spread" which indicates that the game is basically a "pick

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TCBs will be TCB

FCC Updates Equipment Certification Rules

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The FCC lab is finally getting out of the equipment certification business. After nearly two years of deliberation, the FCC has adopted new rules modifying its equipment certification procedures. Most notably, it is handing over responsibility for all equipment certification grants to Telecommunications Certification Bodies (TCBs), which currently process more than 98% of grants anyway. Otherwise the FCC's overall equipment authorization process, of which certification is a component, will continue largely as it has in the past, albeit with some important changes.

Most devices that radiate radiofrequency energy, either intentionally or unintentionally, must be tested for compliance prior to marketing in the United States. (Important distinction: the equipment authorization process relates only to the performance of the equipment itself. The goal is to assure that RF devices used in the U.S. comply with applicable FCC-imposed standards – typically power, bandwidth, modulation, out-of-band emissions, RF human exposure limits and, for wireless handsets, hearing aid compatibility. The equipment authorization process does ***not*** entail spectrum licensing that may be necessary for the operation of transmitters.)

Under the FCC's rules, there are three types of equipment authorization. The authorization type required for a particular piece of equipment is set in the FCC rules, determined by (a) the likelihood that that equipment will cause harmful interference and (b) the "significance of the effects of such interference". The three types of authorization are:

> ***Certification*** – This, the most rigorous process for authorization, requires extensive testing of subject equipment. The new rules require testing by an accredited laboratory. (A list of accredited test labs may be found at this link.) If the test results demonstrate compliance, the "responsible party" – usually the manufacturer or importer – forwards the underlying information, along with an application, to a TCB or (until now) the FCC, which reviews the information and, if everything is in order, grants a formal certification. A TCB issuing a certification will also post the application and related materials to an FCC website;
>
> ***Declaration of Conformity*** – This type of authorization also requires testing of the equipment by an "accredited test lab" to confirm its compliance. The results of the testing are not filed with the FCC, and the equipment is not listed in any FCC database; and
>
> ***Verification*** – This is the most streamlined of the authorization processes. Tests may be performed by the manufacturer itself or by any test facility of the manufacturer's choosing. The test results must then be retained by the manufacturer in its internal records; they need be produced only on request from the FCC.

Under the new rules, the FCC will no longer be issuing certifications. Instead, all applications for certification will have to be submitted to TCBs. The FCC's Office of Engineering and Technology (OET) will retain oversight of TCBs, and TCBs will have to consult with OET with respect to applications involving certain novel or complex technologies.

The FCC will no longer be issuing certifications.

Many of the new rules modify how TCBs and test labs operate. The Commission has:

- codified current OET guidance to TCBs;
- tightened accreditation requirements (requiring accreditation for not only all certification test labs and TCBs but also any subcontractors they may use);
- codified criteria for the laboratory accreditation bodies;
- adopted procedures for the validation of test sites; and
- provided for remedial action when TCBs fail to perform properly.

Manufacturers and importers should take note of some key changes:

TCB Dismissal of Applications: TCBs will have authority to dismiss applications for equipment certification, either because the equipment fails to meet FCC rules, the applicant doesn't comply with requests for additional information or test samples, or the applicant requests dismissal.

Post-Market Surveillance: TCBs must be accredited. Accreditation requires that TCBs follow up on their certifications by performing "post-market surveillance", which entails retesting marketed de-

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vices to ensure that they comply in the same way the testing samples did. Under the new rules, a TCB must sample, post-market, at least 5% of the device models it certifies. (That's consistent with current TCB practice.) To avoid the possibility of excess zeal by competitors, only the TCB that issued the initial certification may call in a product for post-approval re-testing. The new rules also provide that TCBs may obtain samples in several ways. TCBs can send someone to the grantee's factory or warehouse to pick units, at random, for testing. They can require a grantee to supply a voucher that the TCB can use to buy a random equipment sample at retail at no cost to the TCB. And the FCC also plans to tweak its processes to permit a TCB to request samples through the FCC's equipment authorization system. That last approach puts the FCC's clout behind the request and is expected to "improve the responsiveness" of the equipment manufacturer. In any event, the FCC will retain authority to request post-market testing.

New Measurements Procedures: To determine compliance with the relevant criteria, the FCC relies on measurement standards developed by the American National Standards Institute (ANSI). The FCC's rules historically referenced ANSI C63.4-2003, a 2003-vintage standard devised by ANSI's Accredited Standards Committee C63®. But in the intervening decade, ANSI has refined ANSI C63.4 to address unintentional radiators (such as digital devices), and has adopted (with input from the Commission) a new ANSI C63.10, for use in measuring intentional radiators (transmitters) in a wide range of frequency bands. The FCC has now taken this opportunity to revise its rules to refer to the latest and greatest versions of both ANSI C63.4 (adopted in 2014) and ANSI C63.10 (adopted in 2013). This is a big issue for manufacturers because the manner in which emissions are measured can make the difference between grant or rejection. From the Commission's perspective, reliance on the most up-to-date standards should be particularly helpful in its efforts to ensure compliance by the increasingly numerous and complex universe of Part 15 devices available in the marketplace.

The rules now refer to the latest and greatest versions of ANSI C63.4 and ANSI C63.10 — a big issue for manufacturers.

A potentially interesting sidenote. ANSI C63.4 includes a so-called "2 dB rule", described by the Commission as "a method used to limit the amount of testing needed by determining the worst-case configuration (*e.g.*, number of cables required to be attached) for equipment with multiple ports of the same type." As noted above, the current FCC rule refers to the 2003 version of ANSI C63.4. But the 2 dB rule was revised in 2009, and again in 2014, in ways that some parties felt might impose considerable burdens on test labs currently using the 2003 approach. Sensitive to that concern, the FCC will continue to accept, for the time being, the use of the 2003 method to determine compliance with Section 15.31(i) of the FCC's rules.

New OET Authority to Modify Adopted Standards: Perhaps the most controversial aspect of the FCC's action – and you can check out Commissioner O'Rielly's partial dissent if you doubt that – involves the Commission's decision to delegate new authority to OET. With few exceptions, when an FCC rule is to be revised, the revision must be adopted by the full Commission, not one of its subordinate bureaus or offices. But the FCC has now authorized OET to undertake its own rulemaking proceedings to change the rules to incorporate updates to standards already referenced in the rules (including standards that reference other undated standards). OET is *not*, however, authorized to use this authority to incorporate new standards into the rules. Nor can OET adopt modified technical standards that "raise major compliance issues". The Commission's thinking is that this new authority will permit updates at a faster pace than the FCC itself has historically been capable of. In exercising this new authority, however, OET will still be subject to the dictates of the Administrative Procedure Act, which normally requires notice-and-comment rulemaking proceedings. Precisely how much time this may save is not clear, at least according to O'Rielly, who is also troubled by the "subjective and vague" nature of the "no-major-compliance-issues" standard.

Submission of Test Photographs and Diagrams: Under the new rules, applications for equipment certification will have to include photos or diagrams of the test set-up, showing "enough detail to confirm other information contained in the test report". (Photos must also clearly show the test configuration used.) These, in addition to product photos already required, will bring the certification process into conformity with the Verification and Declaration of Conformity processes.

Our advice to manufacturers: Stay in touch with your test lab and TCB. Keep an eye on updates to the OET Knowledge Database (KDB) as well as activities of relevant standards setting committees. Be sure to retain factory production sample devices in order to comply with any requests for samples for surveillance purposes (if a product is taken off the market, unopened samples must be retained for at least one year afterwards). And pick your TCB carefully, because it can be problematic if equipment passes initially and then subsequently fails during post-market surveillance.

What's in a name?

Proposed MVPD Redefinition Out for Comment

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It looks like the universe of multichannel video programming distributors (MVPDs) is going to be expanding considerably. Previously populated by the likes of cable, MMDS and broadcast satellite operators, the MVPD universe is set to be redefined to include services "untethered" from any infrastructure-based definition … if, that is, a proposal laid out in a Notice of Proposed Rulemaking (*NPRM*) last month (and just published in the Federal Register) takes hold. The result should expand consumer options for video program service, and might even revivify whatever may be left of Aereo once Aereo exits the bankruptcy process. And even if Aereo doesn't survive, we can look for new Aereo-like services.

The proposed redefinition of what it means to be an MVPD is part of the Commission's overall effort to encourage innovation and serve the "pro-consumer values embodied in MVPD regulation". It's also one more reflection of the FCC's embrace of the technology transition – from old-fashioned, relatively inefficient analog service to digital, Internet protocol (IP) delivery – that is sweeping virtually all aspects of U.S. communications.

*On the table: a definition of MVPD that does **not** require control of any particular transmission path.*

The Communications Act defines MVPD as a person (or entity) who "makes available for purchase, by subscribers or customers, multiple channels of video programming." The Act cites some examples – "cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor" – but makes clear that those are not the only possible MVPDs. So the FCC appears to have some latitude when it comes to filling in the blanks Congress left.

And that's what it's now trying to do.

Historically, the Commission has been less than consistent in its interpretation of what Congress meant, particularly with respect to whether a program distributor must control its own transmission path to qualify as an MVPD. A "transmission path" could include direct, wired connections between distributor and consumer, as in a cable TV system, or spectrum-based delivery, such as direct satellite broadcasters use.

Requiring MVPD's to control their own transmission path would not be an unreasonable reading of the Act – and there's at least some passing reference to "facilities-based competition" in the legislative history of the 1992 Cable Act that could support that approach. Consistent with that, back in the 1990s the Commission stated with seeming clarity that entities need not "operate the vehicle for distribution" or be "facilities-based" in order to be an MVPD.

But within the last few years, the Media Bureau has taken a different tack. In 2010 a company called Sky Angel U.S., LLC, asserted that it was an MVPD because it distributed multiple different video programs through a national subscription-based service delivered over broadband connections. In other words, Sky Angel used the public Internet – and no specific facilities of its own – as its transmission path, a factor which, the Bureau figured, disqualified Sky Angel from MVPD status. Under that rationale, other Internet-delivered services that have been springing up in recent years – Aereo and FilmOn, for two – were similarly on the outside looking in as far as being FCC-defined MVPDs.

In the *NPRM*, the Commission appears set to adopt a definition of MVPD that does ***not*** require control of any particular transmission path. While the *NPRM* does invite comments on the Bureau's "transmission path interpretation", the Commission makes abundantly clear that it's not inclined to embrace that interpretation. Rather, the Commission is leaning toward a "linear programming interpretation" under which the statutory term "multiple channels of video programming" would be read to mean "prescheduled streams of video programming". (The FCC uses the shorthand term "linear" to refer to such prescheduled streams.) In other words, an entity providing multiple channels of "linear" programming could be deemed an MVPD without regard to whether it happens itself to be using its own the transmission path.

While formal adoption of the linear programming interpretation would clear up at least some uncertainty, it would still raise additional questions. For example, should the definition of "MVPD" also include a minimum number of channels, or a minimum daily or weekly operating schedule? Should the telecast of events that are prescheduled but which occur

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only sporadically – think sports, for example – count as "linear"? If so, the subscription packages marketed by various professional sports (MLB, NBA, NHL, Major League Soccer) could become MVPDs – is that a good idea? (As to that latter question, the Commission is thinking that it should exclude from the definition of MVPDs entities that make available only programming that they themselves own – a tweak that would remove the sports leagues, among others, from MVPD-dom.) The FCC is seeking input on these and related questions.

Those with MVPD status enjoy certain privileges and are subject to certain regulatory obligations. The privileges provide MVPDs (a) some protection in their ability to license cable-affiliated programming and (b) assurance that broadcasters will negotiate in good faith for carriage of broadcast programming (and also that broadcasters will not enter into any exclusive carriage deals with other MVPDs). The obligations cover a variety of areas, ranging from relatively broad concerns of program carriage and retransmission consent to nitty-gritty day-to-day chores like closed captioning, video description, accessibility of emergency information to persons with disabilities, EEO and CALM Act compliance and the like.

A redefinition of MVPD that significantly expands the universe of MVPDs could expose to new regulatory oversight a wide range of folks previously free of those rights and obligations. The FCC isn't sure that that's necessarily a good idea, so it has also requested comments on the extent to which Internet-based programming distributors could or should be exempted from regulatory constraints.

Redefinition of MVPD could also affect program suppliers and cable/satellite providers who already provide Internet-delivered video services. The *NPRM* solicits input on those questions as well.

Among other points, in a brief paragraph the Commission notes the interrelation of the Communications Act and the Copyright Act when it comes to the retransmission of copyrighted broadcast programming. Readers will recall the long-running Aereo saga, in which Aereo, an Internet-delivered programming service, initially claimed that it was exempt from copyright obligations to the broadcasters whose programming it retransmitted. The Supreme Court put the kibosh on that claim, largely because, in the Court's view, the service Aereo was offering looked a lot like cable service (minus, of course, any actual "cable").

As we reported, following the Court's ruling Aereo moved to Plan B, which was to claim that the Court had in effect declared it to be a cable system, as a result of which Aereo was entitled to the compulsory copyright license afforded to cable systems by Section 111 of the Copyright Act. That plan was foiled by the Copyright Office, which (also as we reported) told Aereo that Internet retransmissions of broadcast programming "fall outside the scope of the Section 111 license". To support that conclusion the Office cited not only its own previous holdings, but also the Second Circuit's 2012 decision in the *ivi, Inc. case* in which the Court said that Section 111 covers only "localized retransmission services … regulated as cable systems by the FCC".

But if Section 111's compulsory license is available to services that the FCC chooses to regulate as cable systems, and the proposed redefinition of MVPD would effectively bring Internet-delivered services like Aereo into the cable fold, then that redefinition could make Aereo's Plan B a winner – if only Aereo can survive its current bankruptcy proceeding.

The FCC's proposal is far-reaching and important to anyone involved in the delivery of video programming. As noted above, the *NPRM* has been published in the Federal Register, so we know that comments are due to be filed by ***February 17, 2015*** and replies are due by ***March 2***. Comments and replies may be filed through the FCC's ECFS online filing system; refer to Proceeding No.14-261.

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'em" (meaning neither team is favored). I say go with the mad genius and the Pats. Final score will be New England 27 Seattle 21.]

As always, take that pick with a grain of salt, since football isn't really my game. You're better off coming back to me for my thoughts on the winner of the next FIFA World Cup or UEFA Champions League. Just know that both of those are heavily protected trademarks as well…

And, since it's right around the corner, let's talk "March Madness", too. That's a registered trademark of the NCAA so similar rules apply, even if the NCAA, when compared to the NFL is a relatively scandal-free, upstanding organiz … oops – nevermind.

[*Editor's note: As indicated in the note on page 15, this issue is hitting the stands late. The Swami put his CORRECT prognostication on the line significantly in advance of the Big Game.*]

The bigger they come …

Size Still Matters to M&A Regulators

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Another annual ritual is upon us: the Federal Trade Commission has announced the dollar value thresholds that will trigger automatic federal review of mergers and acquisitions for the next year or so. And it's good news (sort of) for readers who keep Hart-Scott-Rodino checklists at the ready, because they won't have to update much this year. That's because the 2015 annual adjustment is the smallest we have seen in years – barely noticeable at one-half of one percent, well down from the annual 3%-7% leaps we had seen in recent years.

The FCC has the option of choosing to review, or not to review many, if not most, communications-related transactions in detail before issuing an approval. But under federal antitrust law, the Department of Justice and the Federal Trade Commission ***must*** review transactions that cross certain dollar amount thresholds. So if you're considering a merger or acquisition, bear in mind that the administration will automatically be sending at least two agencies to take a closer look at transactions where either:

> the total value of the transaction exceeds $305,100,000; or
>
> the total value of the transaction exceeds $76.3 million and one party to the deal has total assets of at least $15.3 million (or, if a manufacturer, has $15.3 million in annual net sales) and the other party has net sales or total assets of at least $152.5 million.

The new thresholds are set to take effect as of ***February 20, 2015***.

Bear in mind, too, that the filing fees that parties to a deal have to pay the government for the pleasure of going through the review process have also been adjusted. (Fees are split between the FTC and the Department of Justice.) For most of 2015, parties to any deal subject to review and valued at less than $152.5 million will pay a $45,000 fee. For deals valued at more than $152.5 million but less than $762.7 million, the review fee will be $125,000. And if you're proposing a deal valued at more than $762.7 million, get set to fork over a tidy $280,000.

When negotiating deals, all parties would be well-advised to bear these thresholds in mind. Once those lines are crossed, the prospect of additional (and considerable) time, expense and hassle to navigate the federal review process is a virtual certainty.

Start-Date for Certain Mandatory ECFS Filings Set

Last month we reported on the FCC's expansion of the use of its ECFS (short for "Electronic Comment Filing System") online filing system to permit – and, in five cases, ***require*** – certain non-docketed materials to be filed through ECFS. For the five types of filing that ***must*** be filed through ECFS, the dates by which that requirement is to take effect had not yet been fixed as of our last report.

For two of those types, we were able to calculate the effective date to be January 12 and, sure enough, the Commission has since confirmed the correctness of our calculation: January 12 is indeed the date as of which Section 224 pole attachment complaints and formal Section 208 complaints ***must*** be filed through ECFS.

And thanks to a notice published in the Federal Register, we know the effective date as of which the remaining three types of filings will have to be filed electronically.

The following types of filings will have to be submitted electronically as of ***February 12, 2015***:

> Network change notifications by incumbent local exchange carriers;
>
> Domestic Section 214 transfer-of-control applications; and
>
> Domestic Section 214 discontinuance applications.

Once accepted through ECFS, each such notice or application will be assigned its own ECFS docket number, so related follow-on submissions should be filed through the conventional, docket-number-based ECFS interface.

For now, at least

Top Ten Nonbroadcast Video Networks? The Winners Are …

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When you're trying to track down the national rankings of video programming networks, you may not think to check with the FCC – but, thanks to the Twenty-First Century Communications and Video Accessibility Act of 2010 (*CVAA*), that's the first place you should look. Every three years, at least.

As long-time readers may recall, back in 2011 the Commission, pursuant to Congress's direction in the *CVAA*, adopted extensive video description rules applicable to broadcasters and multichannel video programming distributors (MVPDs). As to the latter, the rules require that MVPDs with more than 50,000 subscribers must provide 50 hours per calendar quarter of video-described prime time or children's television on the five most popular nonpopular cable channels.

You might think that Disney will be dropping off the list come July. Not so fast.

Popularity in this context is determined based on (take a deep breath) an average of the national audience share during prime time of nonbroadcast networks that reach 50 percent or more of MVPD households and have at least 50 hours per quarter of prime time programming that is not live or near-live or otherwise exempt under the video description rules. (The relevant Nielsen ratings period this time around was September 30, 2013-September 28, 2014; the relevant stats were Nielsen's "live +7 day" ratings, *i.e.*, the ones that include incremental viewing that takes place during the seven days following a telecast.)

While the calculation of Top Five nets could presumably be performed annually (or even more often), the Commission chose to update its list only every three years. The first three-year term has screamed by since the 2011 adoption of the rules. And as promised, the Media Bureau has now announced the Top Five nonbroadcast video networks that will trigger MVPD video-description obligations until July 1, 2018. (Actually, it announced the Top Ten, presumably to provide for alternates should they be needed.)

The lucky networks:

> USA Network, ESPN, Turner Network Television, TBS Network, History. The next five runners-up were: Disney Channel, Fox News Channel, Nickelodeon, A&E Network, and FX.

Video description requirements for the new Top Five will kick in as of July 1, 2015. Until then, the currently reigning Top Five (you know, the ones the FCC identified back in 2011) will continue to be subject to those requirements. The current top five are: USA, the Disney Channel, TNT, Nickelodeon, and TBS.

You might think that Disney will be dropping off the list come July. Not so fast. The rules don't apply to networks that provide fewer than 50 hours per quarter that is not live or near-live (*i.e.*, broadcast within 24 hours of recording). That's why ESPN (as well as Fox News) didn't make the first list, and why we expect that ESPN will be axed from the latest list. If ESPN goes, Disney should be next up.

Any network that thinks it should be excluded from the Top Five has an opportunity – to March 5, 2015 – to seek an exemption.

We suspect, but can't guarantee, that, once any exemption requests have been ruled on, the Commission will issue a follow-up public notice closer to July 1 to notify all affected MVPDs of the final Top Five. Check back with CommLawBlog.com for updates.

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packing protection: May 29, 2015 also marks the deadline for correcting any errors that licensees "may have made in providing [the Commission] their operating parameters" if the licensees want to protect the correct, as opposed to the erroneous, parameters. Corrective modifications will be protected if a modification application that complies with the Freeze Public Notice is filed and granted, ***and*** a covering license application is filed, by May 29, 2015.

Finally, it should be highlighted – even though the Commission buries this important nugget in a *footnote* – that the Pre-Auction Licensing Deadline will also determine which facilities are eligible for voluntary relinquishment of spectrum usage rights in the Incentive Auction. In other words, what you have licensed (or have filed a license for) as of May 29, 2015 is what will be eligible for the auction, should you choose to participate. Now would be a good time to check the Commission's database, just to be sure.

(Continued from page 1)

for impairment to uplink service could be significantly higher – possibly up to 50% – than the downlink threshold. Whatever the threshold ultimately adopted, a county subject to impairment over that threshold would be deemed to be "impaired", which would then be taken into account in calculating the relevant clearing target. In addressing these questions, commenters also might consider why the proposed methodology for determining impairment is based on *county*-level data rather than the partial economic areas (PEAs) that will be used to apportion wireless licenses for auction.

In any event, once the Commission has resolved these preliminary questions, it proposes that the initial clearing target will be determined as one in which impairments, on an aggregate nationwide basis, affect less than 20% of the total U.S. population, weighted to reflect geographic variation in license prices as determined in prior auctions.

Price Break for Impaired Wireless Blocks

In addition to its importance in determining the clearing threshold that will be crucial to the operation of the reverse auction, the definition of "impairment" will be similarly crucial in the forward auction. The extent of impaired spectrum in a given block of wireless spectrum available for auction will affect that block's price. The Commission proposes to place in the forward auction two categories of generic license blocks:

The definition of "impairment" will be crucial in both the forward and reverse auctions.

- Category 1 blocks, which would include no more than 15% (and as little as zero) impaired population; and
- Category 2 blocks, which would include spectrum subject to more than 15% but not more than 50% impairments.

Prices for both categories of blocks would receive a 1% discount for each percentage of impaired pops. Blocks with more than 50 percent impaired pops would not be offered.

Reverse auction bids methodology

The overwhelming success of the recently closed $45 billion AWS-3 auction demonstrates without question that demand exists for wireless spectrum. Presumably, then, the success of the Incentive Auction will depend on the ability of the reverse auction to make enough wireless spectrum available. And that, in turn, will depend on the willingness of broadcasters to clear the spectrum to be repurposed for wireless operators.

Because of the need to encourage broadcaster participation, opening prices offered to broadcasters in the reverse auction must be high enough to draw broadcasters into the process. BUT they can't be so high as to lead to infinite rounds of reverse bidding or, worse still, result in an aggregate financial obligation to broadcasters so high that the forward auction of the cleared spectrum won't generate enough proceeds to satisfy the auction's final stage rule.

How to walk this delicate line? The Commission has developed a methodology for determining each station's opening price.

The FCC proposes that a station's opening price first be weighted based on a number of factors that will affect the station's impact on the repacking process. The Commission will look at (1) the "interference" for which the station's continued use of its current channel would be responsible and (2) the amount of population it serves. Taken together according to the following formula, these factors would be called the station's "Volume":

$$\text{Station Volume} = (\text{Interference})^{0.5} \times (\text{Population})^{0.5}$$

(This concept has also been referred to colloquially in the broadcast community as "scoring".) "Population" here means the number of people residing within the station's interference-free service area. "Interference" is a far more complicated notion which, for our purposes here, may be summarized as "the number of co-and adjacent channel constraints a station would impose on repacking on a pairwise basis."

Once the Volume has been calculated, the opening price will be figured by multiplying the station's Volume by a "base clock price". What's a "base clock price"? We probably couldn't do it justice, so we'll just quote the FCC's own description:

> The base clock price is a constant amount per unit of volume. Based on our work to date on the design of the incentive auction, we expect that a base predicated on an opening bid price of $900 million for the station with the highest volume will achieve robust participation by stations across multiple markets. We therefore propose to set the base clock price so as to yield an opening bid of $900 million for this station. To do this, we will calculate volume for all stations and then rescale so that the maximum station volume is one million. Dividing the $900 million opening bid price for the highest volume station by one million results in a base clock price of 900. The base clock price will drop in each round of the reverse auction, while a station's volume will remain constant. The price offered to a bidder to go off air in a given round will be the product of the base clock price in that round and the station's volume. The markets and stations needed in the reverse auction will depend on which

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stations choose to participate, and actual compensation to stations will be determined by the auction.

So **Volume * Base Clock Price = Station Clearing Bid**. The base clock price will decrease in each subsequent round; the Volume will stay constant.

There are some further possible quirks. For example, if a UHF station opts to move down to a low VHF band, its opening price would be discounted to a percentage (in the 67%-80% range) of the opening price it would get for fully relinquishing its license. If the station opted to take a high VHF channel, the discount would reduce the opening bid further (to perhaps 33%-50% of the full relinquishment price). Other similar discounts could kick in in later bidding rounds.

Stations will be required at the outset to identify all the options they might accept. At each auction round, the broadcaster will be shown bid prices for the various options available to it at that point – *i.e.*, the price offered for full relinquishment; the price for a move to high-VHF (if available in a proposed reallocation analysis); and the price for a move to low-VHF, if available. Broadcasters will also get to see at each stage whether repacking is feasible and what that will entail.

The bids for a specific station will stop descending and a provisional bid will be accepted – meaning that that station will be "frozen" in terms of further auction activity – when the repacking feasibility analysis determines that there is no way the station could be assigned a new channel in its pre-auction band. In other words, the bid is accepted at the point where the station must go off the air. Keep in mind that one station's bids might be "frozen" while the bids continue for other stations. It is also possible that a station might become "un-frozen" if the landscape changes due to stations nearby dropping out of the auction.

The Commission is looking for input as to whether these proposed formulae are appropriate and whether the opening bids are likely to result in broad participation leading to a successful auction. Commenters are specifically asked for input on the proper discounting of UHF-to-VHF moves. In addition, the Commission asks whether *intra*-round bidding should be permitted – *i.e.*, that a broadcaster should be able to indicate within a round the price at which he or she would relinquish the station's spectrum rather than accepting the offered lower price in the round. Finally, broadcasters should consider the ramifications of possibly being frozen, then unfrozen, then frozen again, during the course of the auction.

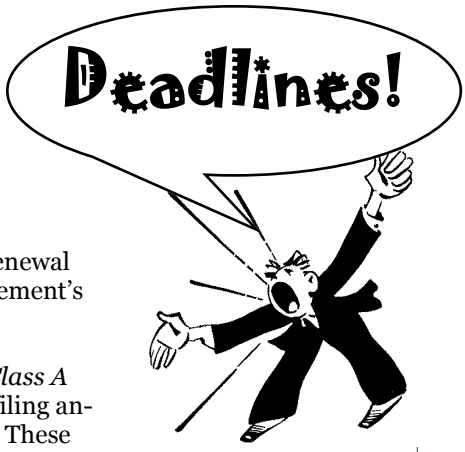
If this is not complicated enough, there is another wrinkle: dynamic reserve pricing (DRP). Because (obviously) there are a lot of moving parts here, it's possible, if not likely, that in the early rounds some bids to broadcasters could be unduly decreased by an apparent – but not necessarily actual – lack of alternate available channel reassignments. In other words, the FCC is concerned that the auction would fail in Round One if opening bids were predicated on the notion that alternate UHF channels are available for relocation of all participating UHF stations. To put this in context, in a congested market like Los Angeles, there are few, if any, open UHF channels, and certainly there won't be any if the band is shrunk down by a minimum of 13 channels.

But the FCC is confident that, if it keeps the auction rolling for a while, things will fall into place. To keep the bids high (and the broadcasters in the game), the Commission plans to use DRP to goose the system. The DRP mechanism would have broadcasters accept artificially lowered bids or risk being reallocated to the 600 MHz band. DRP, in theory, will promote enough spectrum to be relinquished so that repacking does become feasible at a later stage. However, it is unclear whether a station which drops out during DRP would then be then "frozen" into the 600 MHz reallocation. The FCC asserts that this DRP procedure will be discontinued once the remaining UHF stations could be repacked into the UHF band without unduly impairing the spectrum to be offered in the forward auction.

The FCC is confident that, if it keeps the auction rolling for a while, things will fall into place.

Commenters are asked to weigh on whether the DRP plan is reasonable, and if so, how long into the auction process the Commission should continue to be able to use DRP as a thumb on the scale. The FCC also asks whether the auction process should include a full channel reassignment optimization analysis – a time-consuming chore – during the use of DRP, or whether a limited version of the analysis would be acceptable. Commenters may also want to consider whether DRP could artificially lower auction bids, thus causing diminished participation and/or the reallocation of too many stations back into the 600MHz band so as to make the forward auction unworkable in many places.

There are plenty more proposed auction details in the invitation for comments, but these should give you the idea. Again, it's a *very* dense, highly technical document which underscores the incredibly complex interrelation of the forward and reverse auctions. It reminds us all of the importance of getting each and every detail right, because a misstep with respect to any detail here or there could send the entire process off-track. Readers inclined to immerse themselves in such things would do well to read the entire request for comments and provide input on the FCC's suggestions. The deadline for comments is ***February 20, 2015***, and for replies it's ***March 13, 2015***. Comments can be submitted through the FCC's ECFS online filing system; refer to Proceeding Numbers 14-252 and 12-268.



February 1, 2015

Television Post-Filing Announcements – *Television* and *Class A television* stations located in **New Jersey** and **New York** must begin their post-filing announcements with regard to their license renewal applications on February 1. These announcements then must continue on February 16, March 1, March 16, April 1 and April 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 **Delaware** and **Pennsylvania** must begin their pre-filing announcements with regard to their applications for renewal of license on February 1. These announcements then must be continued on February 16, March 1 and March 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.

February 2, 2015

Television License Renewal Applications – *Television* and *Class A television* stations located **New Jersey** and **New York** 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.

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Arkansas**, **Kansas**, **Louisiana**, **Mississippi**, **Nebraska**, **New Jersey**, **New York** and **Oklahoma** 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 **Arkansas**, **Louisiana**, **Mississippi**, **New Jersey**, and **New York** 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 **Kansas**, **Nebraska** and **Oklahoma** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

February 17, 2015

Update to Rules on Broadcaster Disclosure of Contest Terms – Comments are due in response to the Commission's proposals in its *Notice of Proposed Rule Making* (FCC-14-184A1, released) to update the rules on how broadcasters must disclose the rules of contests announced on-air.

February 20. 2015

Procedures for the Incentive Auction of TV Broadcast Spectrum – Comments are due with regard to the Commission's *Public Notice* (FCC-14-191A, released December 17, 2014) seeking comments on proposed methods and procedures for conducting the broadcast television spectrum incentive auction to convert broadcast TV spectrum to mobile broadband use.

March 13, 2015

Procedures for the Incentive Auction of TV Broadcast Spectrum – Reply comments are due with regard to the Commission's *Public Notice* (FCC-14-191A, released December 17, 2014) seeking comments on proposed methods and procedures for conducting the broadcast television spectrum incentive auction to convert broadcast TV spectrum to mobile broadband use.

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March 19, 2015

***Update to Rules on Broadcaster Disclosure of Contest Terms* –** Reply comments are due in response to the Commission's proposals in its *Notice of Proposed Rule Making* (FCC-14-184A1, released) to update the rules on how broadcasters must disclose the rules of contests announced on-air.

April 1, 2015

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

Television Post-Filing Announcements – *Television* and *Class A television* stations located in **Delaware** and **Pennsylvania** must begin their post-filing announcements with regard to their license renewal applications on April 1. These announcements then must continue on April 16, May 1, May 16, June 1 and June 16. 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.

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee** and **Texas** must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. For all stations with web-sites, 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 **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania** and **Tennessee** 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 **Texas** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

April 10, 2015

***Children's Television Programming Reports* –** For all *commercial television* and *Class A television* stations, the first quarter 2015 reports on FCC Form 398 must be filed electronically with the Commission. These reports 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 continues to require 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 re-strictions 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 pro-grams which provided the coverage, with information concerning the time, date, duration, and title of each pro-gram.

Five in a Row! FHH Again Tops in Repping Media Deals

According to SNL Kagan, recognized as one of the preeminent sources of financial analysis in the media business, in 2014 Fletcher, Heald and Hildreth served as legal adviser in more media/entertainment/new media transactions than any other law firm. Hey, didn't we report this last year ... and the year before ... and the year before that ... AND the year before that? Yes, indeed.

Through the worst of some very rugged economic times, our clients continued to thrive and remain active on the transactions front. And now, as the dark clouds of the Great Recession seem to be parting at last, our clients have continued to call on us to provide guidance and counsel in structuring their deals and navigating them through the regulatory process. As we have in past years, we congratulate our clients for their successes, we thank them for the confidence they have placed in us, and we look forward to providing the same quality representation to clients, old and new, that we have been providing for more than 75 years.

Wilkommen, Bienvenu, Welcome!

David Janet Joins FHH

Fletcher, Heald & Hildreth is pleased to announce that David M. Janet has joined us as a member. David has more than two decades of practice experience in a variety of technology- and communications-related areas. His specialty is middle-market and startup companies in the software, data mining, digital media, government contracting, wireless and Internet content-provider, wireless application services, medical device distribution, and intraoperative monitoring industries and market spaces.

David received his law degree – with high honors – from Duke. His academic achievement there shouldn't surprise anybody because his B.A. from William and Mary came *summa cum laude*, with a side of Phi Beta Kappa. Don't be fooled into thinking that he spent all his time in the library, though; he was also an NCAA Division I wrestler during all four years with the Tribe. More recently, he has taken up guitar playing (and guitar collecting).

David can be reached at 703-812-0453 or djanet@fhhlaw.com.

FHH - On the Job, On the Go

Live! Without a Net! On February 5, **Kevin Goldberg** will be the "legal" in "Legal Hotline Live" at the Association of Alternative Newsmedia's Digital Conference in San Francisco. That's going to be a freewheeling session in which the attendees try to stump **Kevin** with questions while he avoids giving them legal advice in return ...

Frank Montero, busy as ever, was interviewed by Bloomberg in January. Bloomberg was looking for insight into the impact of normalizing U.S.-Cuban relations on telecommunications. He also emceed the Digital Impact Awards ceremony at MMTC's Broadband Summit in Washington, D.C. on January 21-22, where he also introduced Congressmen Charles Rangel and James Clyburn (yes, that would be Commissioner Mignon Clyburn's dad). Next up: a one-on-one interview with Commissioner Clyburn at the Radio Ink Hispanic Radio Conference and Sports Radio Conference in Dallas on February 13.

When the annual State Leadership Conference brings our friends from the National Association of Broadcasters State Associations to town February 23-25, look for **Frank M**, **Frank Jazzo**, **Scott Johnson** and **Matt McCormick** to be in attendance.

Frank J has been appointed Chair of the Arlington County Information Technology Advisory Commission.

If you're planning on hitting the National Religious Broadcasters Convention (a/k/a NRB15 – the NRB International Christian Media Convention) in Nashville from February 23-26, be sure to look for the FHH contingent, which will for sure include **Matt McCormick** and **Harry Martin**. **Harry M** has organized a panel, scheduled for February 23, on developments in radio regulation at the FCC. He'll be participating as a panelist, along with (among others) the FCC's **Peter Doyle**.

Looking even farther down the road, we can add **Howard Weiss** to the list of NAB-Vegas attendees in April.

Our in-house globetrotter, **Kathy Kleiman**, will be off again this month – this time to Singapore, for ICANN52 from February 9-13. Topics on the agenda: the IANA transfer, ICANN's accountability and the opening-up of the Domain System. If you're Singapore-bound for the confab, **Kathy** would be happy to meet you there.

Yup, we're late — by not quite a week — in getting the January, 2015 issue of the *Memo to Clients* out the door . . . and we're sorry. The editorial staff encountered some unexpected medical problems that interfered with our usual timeliness, much to our chagrin.

But here it is, better late than never. We aim to get back on track with the February issue, and we thank our readers for their patience in the meantime.