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Memorandum to Clients

February 2015

NEWS AND ANALYSIS OF RECENT DEVELOPMENTS IN COMMUNICATIONS LAW

No. 15-02

Another ownership reporting cycle, another acronym

Form 323: So Long, SUFRNs; Hello, RUFRNs?

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The Commission has once again waded into the muck of how individual interest holders listed in broadcast ownership reports should be required to identify themselves. Six years after a failed effort to require all such interest holders to provide social security number-based FCC Registration Numbers (FRNs), five years (and three full ownership reporting cycles) after implementing an alternative ID approach based on "Special Use FRNs" (SUFRNs), and two years after proposing to scrap SUFRNs altogether, the Commission is now proposing to require use of something it calls a "Restricted Use FRN" (RUFRN). To get an RUFRN, an individual would have to provide his or her name, residence address, date of birth and the last four digits of his/her social security number (SSN).

For readers who missed the initial rounds of this long-running matter (and who aren't inclined to read through our archives explaining it all – like here, here, here and here, for openers), some background. In 2009, at the Commission's direction, the Media Bureau attempted to revise its commercial broadcast ownership reports (Form 323). One goal of the revision was to insure that every individual interest holder identify himself or herself with an FRN – which would have required that each such interest holder provide the FCC with his or her personal SSN. That proposal met with significant opposition arising not only from security concerns but also from the inappropriate and less-than-transparent manner in which the Bureau attempted to make the change.

The Commission responded by allowing individuals to obtain an SUFRN in lieu of a full SSN-backed FRN (a so-called "CORES FRN" obtained through the Commission Online Registration System, a/k/a CORES). After additional litigation which succeeded in clarifying important aspects of the use of the SUFRN, the revised Form 323 featuring the SUFRN function was deployed in mid-2010. It has been used for three rounds of biennial Ownership Reports, in 2010 (postponed from 2009), 2011 and 2013.

In imposing the FRN/SUFRN reporting requirement, the FCC was hoping to develop a comprehensive, reliable, searchable database reflecting the identities of everybody who holds an attributable interest in any commercial broadcast station. The Commission sees such a database as critical to measuring diversity in ownership and ultimately in supporting any regulations designed to increase that diversity.

Now, however, after three biennial reporting cycles, the Commission has determined that use of SUFRNs may be undermining the usefulness of the information being obtained from licensees' ownership reports.

In a new Notice of Proposed Rulemaking (*NPRM*, although technically its title is "Second Further Notice of Proposed Rulemaking and Seventh Further Notice of Proposed Rulemaking", for those keeping count), the Commission proposes to abandon (or at least sharply curtail) use of the SUFRN and replace it with the RUFRN.

According to the Commission, since SUFRNs first became available at least 25 percent of individuals have used them. Moreover, some individuals have obtained multiple SUFRNs while some SUFRNs have been used in connection with multiple persons. As a result, the Commission concludes that it "cannot confidently determine" how many individuals are in fact using SUFRNs. And regardless of the precise number of SUFRN users, the Commission believes that that number is high enough to undermine the utility of the information collected in ownership reports. To enhance its data collection efforts (or, at the least, to expand its acro-

(Continued on page 10)

Inside this issue . . .

Not with a bang, but a whimper

FAA Throws in the Towel On FM Spectrum, Apparently

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For years, the Federal Aviation Administration has toyed with the idea of regulating use of some portions of the spectrum – including particularly the FM band (approximately 88 MHz–108 MHz) – even though conventional wisdom says that such matters are statutorily (not to mention logically) controlled by the Federal Communications Commission. The FAA backed down from these aspirations to some degree in 2010, but in doing so it sniffed, in effect, that we all hadn't heard the last from it on this point.

Now, five years later, the FAA appears to have thrown in the towel. In a three-sentence letter to the FCC's Office of Engineering and Technology, the FAA has advised that it is "no longer pursuing the proposed frequency notification requirements for FM radio stations" which it has long had its regulatory eye on.

Ideally, this means that the FAA has finally abandoned any hope of affirmatively regulating FM radio station transmission facilities.

In fairness, the FAA's interest in that particular chunk of the spectrum is not by any means crazy. Modern aviation systems – both on-board aircraft and on the ground, particularly in the vicinity of airports – use radio spectrum for a variety of important purposes, including communications and navigation. As it turns out, the FM band bumps up against aeronautical frequencies: it's immediately adjacent to a band (108-137 MHz) used by the FAA. Since FM stations generally operate at power levels far greater than FAA equipment, the chances that FM stations might cause electromagnetic interference to nearby FAA facilities are not trivial. The result could be inaccurate navigational guidance to the pilot – showing the aircraft to be on course when it's not – or interference to air-to-ground communications. We can all agree that such results are best avoided.

The FAA for decades sought to insert itself into the process of authorizing broadcast stations, primarily through its acknowledged control over towers near airports. This led to considerable tension with the FCC and many broadcasters (as well as other spectrum users). It's one thing for the FAA to regulate the height of towers and other structures that might get in the way of aircraft landing and taking off. It's another for the FAA to assert that it can or should dictate the geographical areas in which certain radio frequencies may be operated.

In 2006 the FAA opened its own proceeding looking to expand its regulatory control over spectrum use. It wanted to require, as part of its Determination of No Hazard process, notice of most any change to any station operating on a wide range of frequencies. New or modified structures that would hold RF generators using those frequencies, changes in channels, power increases of 3 dB or more, antenna modifications, etc., etc. – everything would have to go through the FAA first for its blessing. And without that blessing (in the form of a Determination of No Hazard), the change would not be permitted.

The potential for bureaucratic delays was huge, as was the potential for inter-agency confusion and inconsistency.

In 2010, the FAA decided that it wouldn't pursue its proposed changes, so it withdrew the proposal for required pre-construction notice for all frequencies *other than* the FM band (88.0-107.9 MHz). The question of FM spectrum was left open, to be resolved amicably by the FAA and the FCC. The FAA indicated that it would deal with that question "when a formal and collaborative decision [between the FAA and the FCC] is announced".

No such "formal and collaborative decision" has been announced in the interven-

(Continued on page 13)

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One big step closer to payday

TV Stations: The SESAC Check is (Almost) in the Mail

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If you're a full-power TV operator in the U.S. (or its territories) and you obtained a performance license from SESAC any time after January 1, 2008, make sure you keep an eye out for a form you're likely to receive from the Television Music License Committee (TVMLC) or its attorneys entitled **"**SESAC Antitrust Class Action Settlement Refund Payments**".** Fill it out, return it, pass GO, collect much more than $200 and roll again. (Note: Stations owned or operated by Univision or Telefutura (now UniMas) or any station that opted out of the settlement don't qualify. We suspect that you know who you are.)

The settlement in question resolves claims made by the TVMLC against SESAC. I've already written in considerable detail about the settlement itself, so if you're at all hazy on the details, take a look at my earlier article. As I reported last November, the TVMLC and SESAC had reached a settlement agreement and submitted it to Judge Paul A. Engelmayer, the federal judge presiding over the case.

The form tells the TVMLC who to write the check to, so it needs to be dealt with … and fast.

The mere fact that the parties had resolved their differences was not the end of the story; the judge had to sign off on the deal, too. So a court-issued Notice was circulated giving any malcontents the right to protest the settlement terms or opt out. This was followed by a hearing held on February 18, 2015 – and one day later Judge Engelmayer sealed the deal in an Opinion and Order. With that, if you're a qualifying station, the money will now start coming your way once TVMLC crunches some numbers.

The bulk of the Opinion and Order is legal mumbo jumbo addressing certain necessary issues, like whether the class was properly certified (it was), whether the settlement was "fair, adequate, and reasonable, and not a product of collusion" (no problem there, either), whether the plan of allocation was also "fair and adequate" (yup), and whether the contemplated attorney's fees and costs make sense (they do).

But really, most affected TV licensees are probably far more interested in another set of questions, like:

Who gets paid? Any full power television station in the United States or its territories who obtained a performance license from SESAC at any time after January 1, 2008, ***unless*** the station is owned and operated by Univision or Telefutura (now UniMas) or the station opted out of the settlement.

What do they get? Each qualifying party will get its pro rata share of a total pay-out pool of $42.5 million fund. That figure represents "the alleged artificially inflated license fees paid to SESAC since 2008 as a result of the alleged anti-competitive conduct". (To be completely accurate, the $42.5M represents about 73% of the overall damages to be paid by SESAC; the rest is going elsewhere – you know that the lawyers have to get their cut.)

When will they get it? While the settlement has been approved, it's still going to take some months to get the money flowing. The "plan of allocation" requires that the TVMLC determine, first, the total license fees paid by each individual station to SESAC between 2008 and 2013 and paid or payable to SESAC for 2014, and second, each station's pro rata share of the total license fees, paid or payable to SESAC during these periods. The TVMLC will then distribute payments to station owners. If more than 1% of the total settlement fund is left over after the first distribution, lather, rinse and repeat. (On the off-chance that either of the first two distributions leaves funds amounting to 1% or less of the settlement, that residue stays with the TVMLC.)

This process is supposed to start within 60 days. It will kick off with the TVMLC reaching out to stations to gather the preliminary information from which to do the necessary calculations. **Again, television stations should keep their eyes out for a document entitled "SESAC Antitrust Class Action Settlement Refund Payments."** The form allows participating stations to tell the TVMLC who to write the check to, so it needs to be dealt with … and fast – the completed form is supposed to be returned within 10 days after it's sent out to the stations.

Drone even go there III

Newsgathering Drones: Prepare for Takeoff?

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It's a time-honored Washington tradition that, when an agency wants to avoid press coverage of a controversial action, it will release notice of that action late on a Friday afternoon, ideally just before a three-day weekend. So it looked like the Federal Aviation Administration (FAA) was taking that tradition a bit further by announcing, on *Saturday* of Presidents Day weekend, that the next day (yes, that would be a Sunday) it would be announcing proposed rules for Unmanned Aircraft Systems – what the FAA refers to as "UAS" but what many of the rest of us refer to as "drones".

Since the FAA has in recent years been trying to impose the strictest regulation of drones possible – a trend with which I (and many others) have taken issue – I feared the worst. So imagine my surprise when the proposed rules turned out to be … not so bad. In fact, adopting of the proposal would largely clear the way for the use of drones by media organizations.

Those who read our earlier articles on the subject will recall that the FAA considers journalism to be a "commercial" use of drones – something which can't occur without express FAA approval (at least according to the FAA). The agency threatened media entities using drones in a newsgathering capacity, sending cease and desist letters to innovators. (To our knowledge only one case has been actually litigated, and there the FAA suffered an initial set-back before winning on appeal before the National Transportation Safety Board. The case was then settled, with no admission of guilt by the drone operator and withdrawal of a number of charges by the FAA.)

The FAA's proposal would largely clear the way for the use of drones by media organizations.

But the recently announced (but not yet formally released) Notice of Proposed Rulemaking (*NPRM*) opens the door to eventual drone use. At 197 pages, it provides considerable detail which anyone planning on filing comments should review carefully. The rest of us can rely on the FAA's Press Release and accompanying "Overview" of the proposal.

The bottom line: While the FAA will still impose certain conditions on commercial (*i.e.*, "non-recreational") use of "Small UAS", those conditions are not as onerous as I'd have envisioned. They include:

- A weight limitation of 55 pounds (although the FAA is also considering development of a separate set of criteria to be applied to "Micro UAS" weighing no more than 4.4 pounds (*i.e.*, 2 kg)).
- "Small UAS" operators would need an "operator's certificate" (but ***not*** a pilot's license). Such a certificate would require only that the operator be at least 17 years old and pass a "recurrent aeronautical knowledge test" every 24 months.
- Flights could occur only during the daytime.
- There must always be "line of sight" contact with the drone – the operator (or an observer) must always be able to see the drone without anything aiding his or her vision (other than regular eyeglasses). (The *NPRM* does ask whether operations beyond "line of sight" should be allowed and, if so, under what conditions.)
- The drone cannot fly higher than 500 feet or faster than 100 mph; must stay away from airport flight paths, avoid restricted airspace, follow temporary flight restrictions and always give right of way to other aircraft.
- The drone may not "operate over" any persons not "directly involved" in the drone's operation unless those folks happen to be inside or under a "covered structure".
- The drone cannot be operated in a careless or reckless manner and it cannot be used to drop objects.

The proposed rules would ***not*** apply to "model aircraft" as defined under existing federal law; those would be subject to existing regulations governing "model aircraft" and would likely be subject to any rules eventually adopted with respect to "Micro UAS".

If adopted, the "Small UAS" rules will be a big step forward, even though they probably don't go as far as I think they should. To my mind, the biggest shortcoming of the proposed rules is the prohibition against "operating over" people. That's a bit much, even in light of the safety concerns that prompt that particular limit (the primary concern: protecting unsuspecting folks on the ground from falling drones.) I'd much prefer a standard that balances safety concerns with the public interest involved. But, realistically, that's not how federal agencies write rules.

In any event, it's clear that several extremely beneficial, but currently prohibited, uses of drones could now occur. These would primarily include getting video from disaster sites or inaccessible areas for newsgathering purposes. Comments on the *NPRM* are due by ***April 24, 2015***. Given the usual pace of federal rulemaking proceedings, we can probably expect final rules to be issued in about 12-18 months – soon enough that you might want to start checking out the market for some new toys. Check back with CommLawBlog for updates.

Let's get digital!

Coming Soon to the 21st Century: New Remote Pickup Rules

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It looks like broadcasters' Remote Pickup (RPU) operations may finally be getting pushed into the digital 21st Century. In response to separate petitions filed by the Society of Broadcast Engineers (SBE) and the Engineers for the Integrity of Broadcast Auxiliary Services Spectrum (EIBASS), the Commission has issued a Notice of Proposed Rulemaking and Order (*NPRM/O*) resolving a couple of RPU-related questions and proposing a number of changes to the RPU rules.

An RPU, of course, is one type of Broadcast Auxiliary Station. RPUs are used to send program-related information – including programming – from remote sites back to the station or network. They operate in one of three bands which are either shared with Private Land Mobile Radio Services (PLMRS) or close to PLMRS frequencies. Back in 2002 the Commission took steps to "harmonize" RPU standards and PLMRS standards in the hope that broadcasters would use PLMRS gear, which tends to be more spectrum efficient (largely because PLMRS gear is digital).

But that hope has been frustrated by a couple of practical problems.

For example, PLMRS operations – walkie-talkies, vehicle dispatch, two-way communications, etc. – use narrowband transmission and, therefore, don't provide the higher audio quality (with no delay) that broadcasters need for audio program feeds.

No problem. The Commission concluded in 2002 that broadcasters could combine, or "stack", the narrower channel segments to create wider band segments more suitable for their purposes. But that proved to be a less than ideal solution: The RPU rules require that RPU licenses specify the "channel center" on which the station will operate, and when you stack an even number of channel segments the "center" of the resulting stack does not match up with any of the center frequencies specified in the RPU rules. According to both SBE and EIBASS, this anomaly has discouraged broadcasters from using stacked segments; each offered suggestions for clearing up the anomaly.

As far as the Commission is concerned, though, no change is necessary because the rules already address the stacking of even numbers of channel segments: in such situations, the applicant merely specifies a center channel which is half-way between the lowest and highest frequencies in the stack. Problem solved.

SBE also noted that the determination of center channel can result in a frequency specified out to six decimal places, *e.g.*, 455.496875 MHz, a degree of precision not easily achievable with most analog equipment. The Commission addresses that concern by observing that, as long as the broadcaster complies with applicable emission masks and programs its center frequency as closely to the specified center frequency as the equipment will allow, that will be deemed to be in compliance.

Another factor may have discouraged broadcaster use of PLMRS equipment: under the FCC's rules, RPU operation must be in analog, *not* digital, mode. But most PLMRS gear is designed for digital use. Both EIBASS and SBE urged that the analog limitation on RPUs be tossed so that RPUs could use any form of digital modulation (as long as the broadcaster complies with the applicable emission mask and bandwidth emission requirements). The FCC is on board with that suggestion, and is now seeking comment on how best to implement it.

SBE also asked for an interim blanket waiver to permit all RPUs operating in the VHF or UHF bands to operate digitally using FCC-certified narrowband RPU equipment right away. The Commission wasn't willing to go that far, however. Until various questions concerning digital RPU operation are resolved in this proceeding, the FCC is reluctant to jump the gun and permit such operation industry-wide. (One open question: Digital RPU operation would also require changes to the station identification requirements; the Commission is looking for comments on how best to handle that. Another open question: Should digital use be permitted in the HF RPU band?)

Finally, the FCC agrees with SBE's observation that the need for 100 kHz RPU channels is a thing of the past. Accordingly, it proposes to eliminate such channels in the future. Existing authorizations for 100 kHz channels would be grandfathered indefinitely, and new such authorizations might be issued on a case-by-case waiver basis.

Deadlines for comments and reply comments in response to the *NPRM/O* have not yet been announced. Check back with CommLawBlog for updates.

Flo and Eddie, on a roll

Pre-1972 Sound Recording Litigation: The Beat Goes On

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For those of you awaiting the next installment of "Flo and Eddie Get Sirius", we have some news. Recall that last November, the former Turtles were oh-so-close to getting a judgment against Sirius XM in the New York version of their fight to collect for infringements of Flo and Eddie-owned copyrights covering a number of pre-1972 sound recordings. The only thing that stood between them and a favorable judgment was Judge Colleen McMahon's invitation (actually, it was an order) to Sirius XM to show cause why judgment shouldn't issue.

As we expected, Sirius XM came up with a number of arguments, none of which struck paydirt. It claimed that the plaintiff corporation, Flo and Eddie, Inc., didn't really own the copyrighted works at issue – a claim Judge McMahon rejected. Sirius XM's argument was based on the notion that, while Howard Kaylan and Mark Volman (who used the *noms de disque* Eddie and Phlorescent Leech a/k/a Flo, respectively) clearly held title to the recordings, it wasn't clear that they had formally transferred title to their corporate persona, "Flo and Eddie, Inc." Judge McMahon reviewed the available evidence and was convinced that the corporation held title.

Flo and Eddie are in an interesting spot: Take the money and run or continue to pursue class action status.

Along the same lines, Sirius XM argued that Flo and Eddie had implicitly authorized the digital transmission of their works by appearing on (and hosting) various Sirius XM shows. Judge McMahon wasn't convinced, mainly because anybody alleging such implied authority has a very high burden to meet (and Sirius XM didn't meet it). Along the same lines Sirius XM claimed that Flo and Eddie had waived any infringement claims or that they should be estopped from raising them. McMahon concluded that this was akin to the "implicit authority" claim and rejected it.

Sirius XM did win a minor victory with respect to the relevant statute of limitations. Sirius XM claimed that the appropriate limit was three years, not six as alleged by Flo and Eddie. Judge McMahon agreed – but that merely reduced the extent of infringement. In other words, Flo and Eddie would still be entitled to damages for infringements within the preceding three years, so this was neither a major win for Sirius XM nor a major setback for Flo and Eddie.

Then came the final point.

Flo and Eddie had indicated that they wanted their case to proceed as a class action, but they hadn't yet formally moved for that status. Sirius XM argued that Judge McMahon could not issue a judgment in favor of Flo and Eddie until she has decided whether class certification is warranted. While the law on that particular point is not as slam-dunk as Sirius XM tried to make it out, Judge McMahon agreed that, ordinarily, issuance of a judgment to a single plaintiff prior to a determination as to class certification is inappropriate. So she gave Flo and Eddie the choice. They can either: (a) opt for class action status, in which case they would have to go through the necessary steps (including class discovery); or (b) notify the court that they wish to proceed individually (*i.e.*, with no class certification), in which case McMahon would presumably issue the judgment in their favor promptly.

This puts Flo and Eddie in an interesting spot. They can take the money and run, leaving to another day the question of whether a class action is appropriate here. Or they can sit tight, run through the class action process and see what happens.

While class certification can be a big issue, that may not necessarily be the case as far as Flo and Eddie are concerned. After all, if they decide not to pursue class action status here, that shouldn't hurt them directly, nor is it likely to hurt others who might otherwise have chosen to participate in a class action had the class been certified. There are certainly going to be plenty of motivated plaintiffs willing to go through the extra few steps of filing their own lawsuit (as opposed to simply joining an existing class of plaintiffs), especially since Flo and Eddie have paved the way. So it wouldn't be a surprise if Flo and Eddie were to decline to pursue class certification in this case.

On the other hand, given their success thus far, Flo and Eddie may prefer to go the class action route. If they are successful in getting the class certified, that could enhance their ability to negotiate a favorable deal for themselves and other class members. And if they don't get a class certified, they can still seek a

(Continued on page 13)

STELAR aftermath

Ban on Joint Retrans Negotiations, Other Retrans Rules Revised

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Back in November (as we reported), Congress passed the STELA Reauthorization Act of 2014 (a/k/a STELAR). Among other things STELAR required the Commission to modify certain rules to implement a number of Congressionally-dictated changes. STELAR also required that those modifications take effect pronto – some within 90 days, others within nine months of STELAR's enactment. Obviously mindful of both the chores Congress assigned it and the limited time frame provided by Congress to get those chores done, the Commission has taken the first step in that direction, releasing an Order amending its rules to incorporate four STELAR-mandated provisions. The four provisions address sunset dates, the ban on joint retransmission consent negotiations, expanded protections for significantly viewed stations and elimination of the "sweeps prohibition".

Don't be fooled by its meager five-page length: the Order will undoubtedly have far-reaching impact.

Don't be fooled by its meager five-page length and ostensibly limited scope: the Order will undoubtedly have far-reaching impact.

First, and most straightforwardly, the sunset dates for certain retransmission consent rules have been extended five years. The rules – previously set to expire December 31, 2014 or January 1, 2015 – will now expire December 31, 2019 or January 1, 2020, respectively. The rules involve: the retransmission consent exemption for carriage of distant network signals by satellite carriers; the prohibition on exclusive retransmission consent contracts; and the expiration of the reciprocal good faith negotiation requirements.

Second, and perhaps most importantly, the Order implements the STELAR-dictated ban on joint negotiation by broadcasters in retransmission consent. As readers will recall, earlier in 2014 the Commission had adopted its own joint negotiation prohibition. But, as called for by the Commission, that prohibition applied only to Top-Four-ranked stations, in the same market, that did not share some common attributable ownership (as measured by the Commission's ownership rules). Under STELAR, that joint prohibition has been expanded to bar joint negotiations between ***any*** two same-market TV stations not under common *de jure* control. Concluding that this STELAR-mandated version is in all ways broader than its existing prohibition, the Commission has now simply incorporated the STELAR language almost verbatim into the rules.

The Commission does clarify one perhaps somewhat overlooked aspect of STELAR: where the original, FCC-designated joint negotiation prohibition did not apply to ***any*** stations that shared common attributable ownership, that exemption has now been narrowed to apply ***only*** to stations that are actually under common *de jure* control. So where, prior to STELAR, two Top-Four-ranked same-market licensees with at least some common ownership could still engage in joint retrans negotiations, under the STELAR-imposed standard such joint negotiations involving two same-market stations (regardless of whether they are Top-Four-ranked) are permitted ***only*** if the two licensees are under common *de jure* control.

Third, the Commission has incorporated into its rules a prohibition barring a television station from preventing an MVPD, by contract or otherwise, from importing a distant signal if that signal qualifies as "significantly viewed" or if the MVPD is otherwise legally authorized to import the signal.

Finally, the Order removes the long-standing "sweeps prohibition" from the Commission's rules. This provision has long prohibited a cable MVPD (although not a satellite operator) from deleting a station's signal during a Nielsen "sweeps" period.

Attentive readers might question why the Commission has adopted these rule changes without first undertaking the conventional notice-and-comment rulemaking proceeding. Such proceedings are ordinarily required by the Administrative Procedure Act. But that Act exempts situations in which the FCC determines that such a proceeding is unnecessary. In this case, Congress explicitly dictated the rule changes to be made, including the narrowing of the joint retrans negotiation prohibition. Since Congress is the FCC's boss, the Commission's got to follow Congress's direction. Accordingly, the Commission had no choice but to adopt those changes, so it concluded that no public notice and comment proceeding was required.

Barring court challenge or reconsideration, these four provisions will take effect 30 days after the Order is published in the Federal Register. Check back with CommLawBlog for updates.

Incentive auction update

Projected Opening Bids (Seem To) Shoot Up in Latest Greenhill Report

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Let's say that you're a TV broadcaster (full-service or Class A), and you've been thinking about participating in the Incentive Auction but, so far, at least, you haven't been quite persuaded. Maybe the FCC's new estimated opening bids will change your mind. Or will they?

The Commission has released an update to the now-infamous Greenhill Report released just last October. This updated version is revised to incorporate procedures and analytics currently out for comment at the Commission, including: elaboration on the options to go to high- or low-VHF; the proposed "bid hierarchy" of multiple bidding options and the "preferred" bid option; and additional fleshing out of the post-auction transition, payment of proceeds, and disbursement of relocation funding for repacked stations. It also incorporates consideration of the results of the recently-closed, wildly successful AWS-3 auction.

The result? Lots of *cha-ching* … or so it would seem until you look a bit closer.

The revised Greenhill Report implies that it has incorporated the results of the wireless industry's generous response to the AWS-3 auction to increase the expected opening bid price per MHz-pop from $1.50 to numbers ***north of $2.00 per MHz-pop***! A broadcaster might well look at the table of opening bids in this revised report and think, my goodness – numbers that were previously just ridiculous are now bordering on obscene! But pull back the Wizard's curtain and you will see that these numbers are not the same as the previously-released figures. In fact, these opening bid figures are apples to the October Greenhill Report's Estimated Auction Proceeds' oranges.

In the October report's Appendix, a table of Estimated Potential Auction Compensation listed the expected maximum and median end-of-auction proceeds for full power and Class A TV stations in each market. In the latest report iteration, however, the appended table has been *replaced* by one entitled "FCC Proposed Opening Bid Prices". At first glance, for example, it would appear that the *median* opening bid for a full power New York City station is now $660M, up from the paltry $410M previously estimated. In fact, however, both numbers are in play: the new report simply tells us that the median *opening bid* for a full power NYC station is $660M, ***and*** that the median expected walk-away price a station in NYC will get is $410M.

We are a little disturbed that the FCC would pull such a sleight of hand in an apparent effort to goose broadcaster participation interest.

FHH - On the Job, On the Go

On February 9, **Frank Montero** made a presentation on structuring media and telecom transactions to a breakfast meeting of Mergers and Acquisitions practitioners hosted by the Corporate & Business Law Society at the George Washington University Law School. Having obviously caught the presenting bug, **Frank** will be doing the same thing on March 17, when he'll make a presentation on non-profit organizations and their impact on government policy to a class at the American University School of Law. In between the two presentations, **Frank** has attended meetings of the National Alliance of State Broadcast Executives (during its State Leadership Conference), the New Jersey Chamber of Commerce and the New Jersey Broadcasters Association, all in Washington, D.C. And March 4-5 **Frank** will be in Big D for the Radio Ink Hispanic and Sports Radio Conferences, where he'll conduct an interview with **Commissioner Mignon Clyburn**.

On March 3-5, **Peter Tannenwald** and **Laura Stefani** will be attending the biennial "Hearing on the Hill", in connection with which they'll make a presentation to the Hearing Industries Association in Washington, D.C.

Meanwhile, **Frank Jazzo** and **Michelle McClure** will be stepping out to Satellite 2015 at the Washington, D.C. Convention Center from March 16-19.

NAB Update: Add **Frank J.** and **Peter** to the FHH crew set to hit Vegas for the NAB in April. **Peter** will be speaking on a panel on April 13 as part of the ATBA-NAB "LPTV Day". Check back next month for a final roster of FHH NAB attendees.

Concentrate and ask again

Is There a Geofencing Exemption from Digital Performance Royalties?

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Will geofencing really provide webcasting broadcasters a shield that they can deploy against royalty claims? While that question was raised in a lawsuit last spring, it won't be getting answered soon: the case has been dismissed ... for the time being, at least. Thanks to considerations that many may view as "technicalities", U.S. District Judge Michael F. Urbanski tossed the suit filed last April by VerStandig Broadcasting. But he did it "without prejudice", so the core question and may still be raised, and resolved, in a later suit.

As we have previously reported, "geofencing" is a technology that, in theory, permits a webcaster to limit access to its programming based on the physical location of the computers receiving the webcast. It works by checking the "receiving computer's IP address, WiFi and GSM access point, GPS coordinates, or some combination against a real world map of those virtual addresses", according to VerStandig.

Why would that give a webcasting broadcaster a way around webcaster royalties? Because of Section 114 of the Copyright Act. While broadcasters are exempt from performance royalties for their *broadcast* programming, they're still on the hook for royalties for recorded performances that they retransmit on the Internet, *i.e.*, digitally. But thanks to Section 114(d)(1)(B)(i), broadcasters are exempt from performance royalties for digital retransmissions of their broadcast signals as long as those retransmissions don't go "more than a radius of 150 miles from the site of the radio broadcast transmitter".

Historically, many – probably most – folks figured that that 150-mile exemption applied only to what we may think of as conventional "retransmission" mechanisms: retransmission of broadcast signals by a cable system or an over-the-air translator or booster. But, VerStandig reasoned, if a radio station's webcast signal can be prevented from reaching listeners beyond 150 miles of the station's transmitter, why shouldn't the royalty exemption apply there as well? Not necessarily a bad argument.

But, as it turned out, VerStandig aimed its lawsuit at the wrong target and pulled the trigger a bit too soon.

In asking for a court order confirming its reading of Section 114, VerStandig named SoundExchange as the sole defendant. It presumably reasoned that SoundExchange, which serves as the collection agent for webcasting copyright royalties, would be an appropriate target. It reasoned wrong, at least as far as Judge Urbanski was concerned.

In Urbanski's view, VerStandig was looking for a ruling protecting it from claims of copyright infringement. Such claims may be brought only by copyright holders, not by SoundExchange, which is merely the copyright holders' agent for collection purposes. So VerStandig should (in the Judge's view) have sued *not* SoundExchange, but one or more copyright holders in a position to sue VerStandig for infringement. Since SoundExchange was the only named defendant, Urbanski concluded that he could not in any event provide the relief sought by VerStandig.

Moreover, VerStandig hadn't even deployed geofencing technology, so it couldn't demonstrate that that technology would in fact prevent its digital stream from being received beyond the 150-mile perimeter. VerStandig did have a bunch of experts who claimed that the technology would work but, in the Judge's view, VerStandig had "done little or nothing to demonstrate that geofencing is anything more than a pipe dream".

Fans of geofencing shouldn't view this as a final defeat by any means.

Constitutionally, federal courts have the authority to decide matters ***only*** when there is some actual "case or controversy". That normally requires that there be some concrete, definite, immediate dispute between the parties before the court. Here, Judge Urbanski concluded that there was no real dispute between VerStandig and SoundExchange. And he further concluded that the basis for VerStandig's claim – *i.e.*, that geofencing would keep the digital signal within 150 miles of the transmitter – was far from established. In other words, as presented by VerStandig, this lawsuit did not pose a "case or controversy", and it had to be dismissed.

Fans of geofencing shouldn't view this as a final defeat by any means. Urbanski's decision clearly leaves the door wide open for another case – maybe even filed by VerStandig – directed against a proper defendant and supported by a more persuasive showing relative to the effectiveness of geofencing. Will some broadcaster take this up (possibly with the assistance of geofencing technology suppliers, who might consider providing their gear at a deep discount to a broadcaster willing to fight the fight)? And if some such lawsuit gets filed and the concept of a geofencing-based exemption gets traction, will Congress be inclined to step in to eliminate that notion? We'll keep an eye on things. Check back with CommLawBlog for updates.

(Continued from page 1)

nym collection efforts), the Commission now proposes the RUFRN.

Historically, an SUFRN was assigned within the Form 323 itself, and its use has theoretically been limited to that form. By contrast, the RUFRN would be obtained through the separate CORES system in the same manner as a "traditional" CORES FRN. Unlike a CORES FRN, which requires disclosure of the individual's SSN, the RUFRN would be obtained by submitting an individual's address, birth date, and only the last four digits of his or her SSN. An individual's RUFRN would then consistently be used by that individual any time he or she appears in a broadcast station's ownership report. The RUFRN would be available only to individuals, not to entities, and (like the SUFRN) could be used only for the purpose of completing ownership reports.

To avoid duplication, CORES would be revised to check the information submitted to ensure that no individual is allowed to obtain multiple FRNs (whether CORES FRNs or RUFRNs). The Commission tentatively concludes that use of the RUFRN would provide reasonable assurance that individuals are uniquely identified across all ownership reports in which they appear, but requests comment on this. The Commission also concludes that use of a consistent identifier by each individual will improve the quality of the data collected in ownership reports by making it easier to identify and correct errors, as well as to track individuals across multiple reports.

The FCC candidly acknowledges that many of its data problems stem from the "complexity of the information required to accurately file" Form 323.

In the *NPRM*, the Commission acknowledges that a parallel proceeding is already underway looking to revise the CORES system itself. That system, in place for more than a decade, has historically allowed individuals to obtain more than one FRN for a given SSN, and even permits assignment of FRNs without any SSN at all. While the use of SUFRNs may have undermined the Commission's ability to develop a reliable database of broadcast ownership interests, the design of the CORES FRN system itself may have posed an even greater problem on that front. In any event, the Commission's efforts to revise CORES will proceed on a parallel track regardless of the ultimate fate of the RUFRN proposal.

While the Commission blames the SUFRN for many of its problems in achieving the reliable database it had hoped for, the FCC also candidly acknowledges multiple times in the *NPRM* that many of its data problems stem from the "complexity of the information required to accurately file" Form 323. But the Commission also optimistically concludes that use of the RUFRN may enable "burden-reducing form modification". Specifically, the *NPRM* notes that commenters in other proceedings have requested that the Commission eliminate the obligation to disclose, in each Form 323,all the other attributable interests held by each attributable interest holder listed in the form. So elimination of that requirement would, at least theoretically, simplify Form 323 and, also theoretically, improve the reliability of the data collected on that form. But such elimination would require an ability to consistently identify individuals across all filed ownership reports – which is the Commission's intended goal for RUFRNs.

Even if the RUFRN were to be adopted, the SUFRN might still be retained for limited purposes. In particular, the Commission asks whether the SUFRN should be available to individuals who simply refuse to provide their identifying information. Under the current SUFRN system, filers are required to use "reasonable and good faith" efforts to obtain from each individual interest holder the information required to obtain a CORES FRN before obtaining a SUFRN. The NPRM asks whether, if any use of a SUFRN is retained, substantiation of such efforts should be required, or if other steps should be required to encourage all interest holders to provide the information necessary to obtain a CORES FRN or RUFRN. Whether or not such a requirement would be consistent with the FCC's assurance to the Court of Appeals back in 2010 that no one would be required to submit a social security number to obtain an FRN for Form 323 purposes is unclear.

The *NPRM* also addresses use of the RUFRN in non-commercial ownership reports (Form 323-E). In a separate proceeding the Commission is considering the possible overhaul of that form, an overhaul that could impose the same type of unique identification of all individuals listed in the form as is used in commercial ownership report forms. In the *NPRM*, the FCC asks whether the proposed RUFRN system should be applied to non-commercial reports in the event that those reports are modified (in the separate proceeding) to mirror commercial ownership reports in the information they collect. The NPRM requests comment on whether any different concerns would be raised by applying the RUFRN to non-commercial

(Continued on page 11)

LMS watch

Form 2100 Gets Four More Schedules

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Last September we introduced our readers to the new "Licensing and Management System" (LMS) that the Commission plans to use as a one-stop-shop for all broadcast forms. Once LMS is fully operational, our old friend the Consolidated Database System (CDBS) will be put out to pasture. (Before you think about cheering for the demise of CDBS, you might want to take Form 2100 out for a test spin - CDBS may be a devil, but it's the devil we know.)

As we previously reported, in LMS all the various broadcast applications and forms which have traditionally been identified by separate numbers will now all have a common form number, Form 2100, but will be identified as separate "schedules" to that form. So, for example, where a full-power TV construction permit applicant used to have to file Form 301 in CDBS, in LMS the applicant will file Form 2100, including Schedule A. Full-service TV license applicants used to have to file Form 302-DT; in LMS they'll file Form 2100, including Schedule B.

As initially rolled out last fall, LMS offered only Schedules A and B. But progress is clearly being made on the LMS front: a recent public notice advises that four more schedules (Schedules C, D, E and F) have now been added to the Form 2100 options.

The new schedules are to be used by Class A, LPTV and TV Translator applicants for the following purposes:

- Schedule C – Obtaining a construction permit for an LPTV or TV Translator station. This replaces Form 346.
- Schedule D – Obtaining a license to cover an LPTV or TV Translator station permit. This replaces Form 347.
- Schedule E – Obtaining a construction permit for a Class A TV station. This replaces Form 301-CA.
- Schedule F – Obtaining a license to cover a Class A TV construction permit. This replaces Form 302-CA.

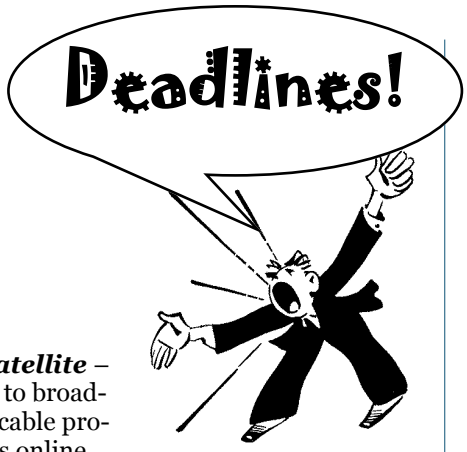
And heads up, if you're a Class A, LPTV or TV Translator applicant and you're planning on filing for a CP or covering license, you're going to *have* to use Form 2100 and the appropriate schedule as of ***February 23, 2015***.

(Continued from page 10)
ownership reporting.

Asserting, as it has in the past, that its CORES system is highly secure and well protected from any possible security breach, the Commission also requests comment on any data security concerns raised by the RUFRN proposal, including whether the specific information required to obtain a RUFRN reduces concerns over any security breach or potentially raises any new concerns. (Although the Commission claims to have learned from the experience, its confidence in the security of its data systems may be a tad over-optimistic in view of the fact that the FCC was apparently hacked in a less-than-highly-publicized incident back in 2011.) The Commission tentatively concludes that the RUFRN proposal would not violate the Privacy Act, but also requests comment on this conclusion.

Broadcasters should be aware that, if the Commission adopts these proposals, SUFRNs may become a thing of the past. If that were to happen, it may require significant effort on the part of reporting licensees to cajole reluctant interest holders to provide their information to the Commission. With the next round of biennial ownership for commercial stations due later this year, broadcasters would do well to focus on these matters now. It's not clear that the FCC can or will act so fast as to eliminate SUFRNs before the next round of Form 323s is due, but that possibility at least exists.

If you're itching to file comments, you've got until ***March 30, 2015;*** replies may be filed by ***April 13***. Comments and replies may be filed through the FCC's ECFS online filing system; refer to Proceeding Nos. 07-294 and 10-234.



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) which seeks comments on proposed methods and procedures for conducting the broadcast television spectrum incentive auction to convert broadcast TV spectrum to mobile broadband use.

March 16, 2015

Extension of Online Public File Requirements to Radio and Satellite – Comments are due with regard to the Commission's proposal to expand to broadcast radio licensees, satellite radio licensees, satellite TV providers, and cable providers the requirement that public inspection files be posted to the FCC's online database.

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 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 **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 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 continues to require the use of FRN's

(Continued on page 13)

(Continued from page 12)

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.

April 14, 2015

Extension of Online Public File Requirements to Radio and Satellite – Reply comments are due with regard to the Commission's proposal to expand to broadcast radio licensees, satellite radio licensees, satellite TV providers, and cable providers the requirement that public inspection files be posted to the FCC's online database.

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ing five years, which would suggest that the matter has since remained under discussion. Indeed, in a 2012 Notice of Proposed Rulemaking and Order, the Commission expressed "concern" that the issue remained unresolved. Partly in response to the FCC's concern – albeit three years after that concern was expressed – the FAA has now tersely but explicitly stated, without elaboration, that "the FAA is no longer pursuing the proposed frequency notification requirements for FM radio stations operating in the 88.0-108 MHz frequency band" associated with its 2006 rulemaking.

If true, that would mark the end of the protracted turf battle between the FAA and the FCC. We add the "if true" qualifier because we're not aware of any "formal and collaborative decision" between the two agencies having been announced. The FAA's letter provides no supporting citation to any particular order (or other document) in which the FAA might have unilaterally reached this decision. A search of the FAA's website turned up no evidence of any such formal, unilateral decision on the FAA's part.

Still, we do have the FAA's recent letter, which says what it says. That's at least something.

(Continued from page 6)

judgment solely in their own names. It will be interesting to see which way they go.

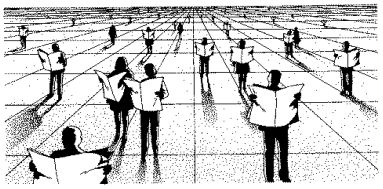
And speaking of other motivated plaintiffs, let's keep our eye on "Zenbu Magazines", which claims to own the copyrights in songs recorded by The Flying Burrito Brothers, Hot Tuna and the New Riders of the Purple Sage. Zenbu has filed seven separate copyright infringement lawsuits against some of the biggest streaming companies not called "Sirius XM" or "Pandora", specifically Apple's "Beat Electronics", Sony Entertainment, Google, Rdio, Songza, Slacker, and Escape Media Group (owner of the popular service Grooveshark). The suit was filed in the United States District Court for the Southern District of California on January 22.

Stay tuned. This is far from over.

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

Updates On The News

Reminder: If Uncle Sam is paying for the time, Uncle Sam is the sponsor – Long-time reader, broadcaster, Friend of the *MTC*, client (and, yes, attorney) Tom Taggart has suggested that a reminder about sponsorship identification might be useful in light of a recent situation he encountered. An ad agency bought time on behalf of the Centers for Medicare and Medicaid Services, a federal governmental agency, which was promoting enrollment in Obamacare in advance of the mid-February filing deadline. No problem there. The instructions accompanying the 30-second script indicated that it should be read "like a PSA with a sense of urgency". Again, no problem there.



But the script didn't happen to include any indication of who was paying for the spot – and *there* was the problem.

The mere facts that the spot was supposed to be read "like a PSA" and that it involved a subject that could qualify for PSA treatment were immaterial, since it was acknowledged by one and all that money was to change hands in exchange for broadcasting the spot. That being the case, an appropriate sponsorship identification was definitely called for, notwithstanding the omission of any such ID from the spot's script. Having recognized that omission, the station was entirely within its rights to take steps to insure that an appropriate sponsorship ID was included in the spot.

We don't know whether this incident arose from an over-enthusiastic, under-informed ad rep (or ad agency), or possibly a sponsor who preferred to avoid a sponsorship ID because it might somehow dilute the intended message, or possibly some inadvertent miscommunication somewhere along the line. Whatever the source of the problem, the solution was clear. If money is being paid in return for the broadcast of particular content, that must be disclosed, and it's the broadcaster's obligation to make sure that it is disclosed. It doesn't make any difference if the sponsor is a governmental agency, or if the subject matter of the spot might otherwise qualify as PSA-worthy.

Tom noted our recent reports on the FCC's recent enforcement efforts relative to the sponsorship ID requirement – here and here, for example – and thought a reminder about the rule might be appropriate. We agree – consider yourselves reminded.

Deadline updates — Last month we reported on the FCC's proposal to redefine the MVPD universe to include services "untethered" from any infrastructure-based definition – in other words, to include Internet-delivered, "over-the-top" services. The Media Bureau has now extended the comment deadlines in that proceeding. As a result, comments are now due by ***March 3, 2015*** and reply comments by ***March 18***. Comments and replies may be filed through the FCC's ECFS online filing system; refer to Proceeding No.14-261.

And in the waning days of 2014 we reported on the release of a Notice of Proposed Rulemaking (*NPRM*) in which the Commission proposed to expand the online public inspection requirement to include radio broadcasters, cable operators and satellite broadcast services. The *NPRM* has made it into the Federal Register, which means we now know the comment deadlines. Comments may be filed by ***March 16, 2015*** and reply comments by ***April 14***. Comments and replies may be filed through the FCC's ECFS online filing system; refer to Proceeding No.14-127.