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Memorandum to Clients

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NEWS AND ANALYSIS OF RECENT DEVELOPMENTS IN COMMUNICATIONS LAW

No. 15-05

Permanent Kibosh on "Temporary Facilities"?

Audio Division Crack-Down on Non-Compliant, Less-Than-Permanent Facilities

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A broadcast construction permit comes with conventional expectations. The permittee is expected to build the facilities specified in the permit and to do so by the deadline specified in the permit; once constructed (presumably on a permanent basis), those facilities are to be utilized in the ongoing, continuous operation of the station; and a license application reporting the successful and timely completion of the construction is to be filed. Many permittees, probably the vast majority, do what they're expected to. Others, however, try to get around the construction requirement by setting up facilities that don't meet the specs of the permit and are at best temporary; those permittees crank up their here-today-gone-tomorrow gear briefly, so they can at least say they broadcast for a while; they then file an application for a license based on those facilities.

The Audio Division has some bad news for folks who go that route.

Faced with a permittee who had sought a license apparently based on the construction of temporary, non-compliant facilities, the Audio Division has made unequivocally clear that "temporary facilities fail to satisfy" the relevant rule regarding construction. As a result, if the staff determines that only temp facilities have been constructed prior to a construction permit's expiration date, the permit will be deemed to have expired automatically as of that date and the erstwhile permittee will be left empty-handed.

The permittee in this case held a noncommercial FM permit issued in December, 2010, with an expiration date of December 8, 2013. On December 9, 2013, the permittee filed its license application certifying that the facilities had been built and the station was operating pursuant to program test authority.

But the Audio Division must have smelled a rat.

On December 13 Enforcement Bureau agents (we're guessing at the behest of the Audio folks, but we don't know for sure) happened to drive up to the station's general vicinity and couldn't find the station's signal. They reported that to the Audio Division, which asked them to double check. Four days later the field agents were back, this time using a "specialized vehicle" because of the remote location of the transmitter site. They found no evidence of any construction at the site, which was odd because the antenna was supposed to have been installed on a 60-meter tower. They also noted that there were no power lines within miles of the site, another indicator that the permittee's license application might not be exactly accurate. The agents also determined that the site was on land controlled by the Bureau of Land Management (BLM). A check with the folks at BLM confirmed that BLM had not authorized use of the site and would not have authorized it even if asked.

Responding to a Division inquiry, the permittee acknowledged that it had no BLM permission to construct at the site and that the facilities it had built were dramatically different from those specified in the permit. The permittee claimed that, using a generator for power, two 10-foot pipes, and a transmitter accessing programming through a laptop with an Internet hot spot, it had managed to get the station up and running on December 6, two days before its permit was to expire. (According to the permittee, it used a "small dog house" to house the transmitter and generator.) Whatever facilities may have been built appear not to have been especially sturdy, because the permittee also reported that, sometime after the station supposedly started operation, that operation ended when "the wind was tumble the tower [*sic*]", damaging the antenna.

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This should get your attention III

iHeart Whacked for $1 Million for Misuse of EAS Tones

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We have previously reported on the FCC's crackdown on the misuse of EAS tones, a crackdown that has thus far resulted in more than $2.5 million in penalties. No, wait – make that more than $3.5 million, thanks to a Consent Decree by which the Commission has extracted a cool $1 million from the coffers of iHeartCommunications for yet another violation of the Commandment Against Non-Emergency EAS Broadcasts.

Unlike previous instances in which the EAS tones were improperly used in advertising (presumably to get the audience's attention), this time the problem is the fault of syndicated radio host Bobby Bones. In October, 2014, Mr. Bones was engaged in "commentary" about an interruption in his viewing of Game 2 of the World Series. Apparently the cable system on which he had been watching the game ran its monthly EAS alert during the game, presumably to Bones's displeasure. While we didn't hear the broadcast, we're guessing that, to illustrate just how annoying and disruptive an EAS alert can be, Bones played the EAS tones – but ***not*** the tones as they were heard during the baseball game. Instead, he used a recording of the EAN Event code from the November, 2011, nationwide EAS test.

The mere broadcast of the tones in a non-emergency context would ordinarily have been enough to fetch a hefty fine. (Anyone who doubts that should take a quick look at Section 11.45 of the Commission's rules). But there was more. Bones's show is carried on more than 70 stations. A number of EAS participants downstream from those stations didn't have their own EAS gear set to recognize the November, 2011 date of the EAN Event code, so they responded as though it were a real live EAS message, which they dutifully retransmitted to other EAS participants further downstream.

The result: "a multi-state cascade of false EAS alerts". Oops.

The downstream meltdown should not have been a surprise. As we have reported (with a link, to boot), our friends at the Society of Broadcast Engineers warned us all several years ago that the use of EAS header tones can trigger EAS gear at stations downstream in the EAS system, putting the public in danger.

The FCC has zero tolerance for that kind of thing, as you might have figured from the amount of the iHeart penalty. In 2014 ESPN got nailed for airing a spot for "Olympus Has Fallen" that happened to include a faux EAS tone a total of 13 times over three cable networks. That miscue cost ESPN $280,000. At the same time, Viacom aired the same spot 108 times over seven networks. It got spanked to the tune of $1.12 million. By contrast, Mr. Bones's boner occurred once. But it went out over more than 70 stations and it had that pesky cascading effect. iHeart may figure that it got off easy by keeping the damage to $1 million.

Back in 2013 we provided an emphatic reminder to broadcasters and cable networks, a reminder which we repeated in 2014. Looks like it's time for the 2015 version:

The rationale for the ban on non-emergency broadcast of EAS tones is obvious. Broadcasters (and cable programmers) who air fake EAS attention signals are, in effect, "crying wolf" and thereby undermining the integrity and effectiveness of the EAS system. If the public can't be sure whether a particular announcement is real or fake, the public may not recognize truly dangerous situations until it's too late. And as noted above, the use of EAS header tones can cause EAS gear to lock-up at stations downstream in the EAS system, resulting in unnecessary danger.

The bottom line: Don't broadcast EAS attention signal tones, or anything that might be confused with such tones, except in connection with an actual emergency

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New gTLD soon to available on the open market

Sunrise for .SUCKS

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We told you to expect it, and now it's happening: new generic Top Level Domains (gTLDs) are becoming available almost daily. (Fuzzy on gTLDs? Check out our post from last year for more background.) Now would be a good time for businesspeople to focus on the new gTLD that many love to hate – .SUCKS.

Dot-SUCKS recently completed its "Sunrise Period". That was important if you've got a registered trademark, because that meant that you'had until ***May 29, 2015*** to take advantage of your rights as a registered trademark holder. The "Sunrise Period", of course, is the time during which trademark owners who have registered their marks in ICANN's Trademark Clearinghouse can get first dibs on registration of their mark in the .SUCKS domain. Now that the Sunrise Period has closed, registrations will be on a first-come/first-served basis and your trademark registration won't necessarily help you out if somebody else – a competitor, a disgruntled former employee, an unsympathetic consumer advocacy group, etc., etc. – happens to get in line ahead of you.

Prominent companies were not at all shy about availing themselves of the Sunrise Period opportunity. Far from it: a convenient ticker running on the website of Vox Populi Registry (the folks who run the .SUCKS registry) indicates that the following big names have already signed themselves up: XBOXLIVE, GUITARCENTER, CITIBANK, PLAYTEX, WALMART, UNDERARMOUR, VISA, TUPPERWARE, among lots of others.

According to Vox Populi (Latin for "voice of the people"), .SUCKS is intended to create an Internet space "for raw consumer commentary and corporate interests to cohere … enabl[ing] the benefits of the dialog without dampening its usual initial vehemence… [and] mak[ing] it even easier for consumers to find, suggest, cajole, complain and engage on specific products, services and companies". Vox Populi's website includes a short video that features stirring audio and video clips of Martin Luther King and Ralph Nader, with the latter proclaiming that "the word 'sucks' is now a protest word".

Notwithstanding those lofty goals and renowned soundbite sources, it's obvious from its pricing structure that Vox Populi recognizes that registered trademark holders likely have a serious interest in keeping the "theirtrademark.SUCKS" domain out of unfriendly hands. Folks who took advantage of the Sunrise Period opportunity were charged $2,499 for the "standard" option. (There was also an individually priced "Premium" option.)

A bit pricey, but after the Sunrise Period went away, .SUCKS domains can be had for $249, or possibly even less than $10. (The $10 rate would be limited to applicants willing to agree to use the domain only to resolve to a website forum devoted to discussion of the product in the domain name.) So it may have been expensive for the registered trademark owner to tie down its domain name during Sunrise, but it'll be relative peanuts for anybody else – including the aforementioned competitors, disgruntled former employees, etc., etc. – when the .SUCKS gTLD is opened for general availability. While that pricing structure has been criticized by a number of folks, there doesn't appear to be any change in the immediate offing.

So there was clear incentive for registered mark holders to tie their .SUCKS domains down during the Sunrise Period, rather than risk having them scooped up on the cheap by others.

> *Trademark holders likely have a serious interest in keeping the "theirtrademark.SUCKS" domain out of unfriendly hands*

And while we're at it, let us remind you that new gTLDs are being rolled out every week by ICANN. As we have explained in previous posts, it's a very good idea for you to be proactive in protecting your trademarks and other key identifiers as well as exploring the new business venues that these top level domains will open.

Why? Because of obvious promotional and protective reasons. First, the new gTLDs present new marketing and other opportunities for you and your company to take advantage of. New gTLDs will include a host of terms likely to offer more readily identifiable domain names for your business than .COM (where desirable domain names have long-since disappeared) and new opportunities for online marketing – think ROCK.RADIO and COUNTRY.MUSIC. Opportunities to expand your brand and your business will be plentiful.

Second, the risk that your established identity – as reflected in your trademarks, catch phrases, call letters, etc. – could be diluted if others secure domain names using these valuable properties should be obvious. As discussed above, many businesses want to register their names in .SUCKS and .PORN before someone else does – concerned that there might be a threat to their online reputations if someone else obtains these domain names first. (Whether aggrieved trademark holders may have anti-cybersquatting or other remedies available is beyond the scope of this post.)

As things currently stand, a myriad of top level domains

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Keeping Box Elder, SD safe from aliens

In Search for Copyright Relief, Pandora Opens Box of Ownership Requirements

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This is the story of *how* Pandora, in an effort to cut its copyright royalty costs, managed to saddle itself with a complex array of ownership reporting requirements designed by the FCC to keep Box Elder, South Dakota safe from aliens. It's a true story.

Pandora, of course, is the prominent Internet music streaming operator. Since its business consists of transmitting recorded music digitally, it's on the hook for a lot of copyright royalties payable, through ASCAP, BMI and SESAC, to the composers of the music it transmits. The precise rates it pays are generally subject to direct negotiation between Pandora and the performance rights organizations (PROs).

In contrast to Pandora and other streaming services that are limited exclusively to Internet distribution, radio broadcasters do not have to negotiate individually with respect to royalties. Rather, broadcasters' rates are set industry-wide through negotiations between, on the one hand, the Radio Music License Committee (RMLC) acting on behalf of broadcasters and, on the other, the various PROs. (The federal courts are also involved in the process to a degree.) Those negotiations have been good for traditional over-the-air broadcasters, who as a result pay lower royalties for their own digital transmissions than do Pandora and other Internet-only services. And those lower rates apply even if the broadcaster's stream(s) carry content other than what the broadcaster is sending over-the-air.

Pandora had an idea: why not simply become a broadcaster?

Pandora has been involved in acrimonious negotiations, and even litigation, with ASCAP regarding its royalty rates. But then it had an idea: why not take advantage of the attractive over-the-air broadcaster rates by simply becoming a broadcaster?

And so it was that Pandora came to Box Elder (pop. 7,800), where the only radio station in town was for sale.

After cutting a deal to buy the station, Pandora filed an application for FCC approval of the acquisition. In that application it was upfront about its motivations for purchasing the station, *i.e.*, it was looking, among other things, to lower its copyright royalty burden. Not surprisingly, the application drew opposition from ASCAP.

In its Petition to Deny, ASCAP argued that Pandora's proposed acquisition was essentially a sham to attempt to obtain better royalty rates. Perhaps recognizing that this argument by itself was unlikely to persuade the FCC, ASCAP also challenged Pandora's compliance with the Commission's ownership rules. Specifically, ASCAP alleged that Pandora had failed to properly disclose all of its ownership; more importantly, it alleged that Pandora had failed to show that it complies with the FCC's limits on foreign ownership in broadcast licensees.

The Communications Act limits *direct* foreign investment in broadcast licensees to 20% and *indirect* ownership by foreign entities to 25%. While these limits are frequently waived for non-broadcast licensees, they have long been essentially hard and fast rules for broadcast licensees. Although the Commission has in recent years indicated a willingness to loosen the limits for broadcasters on a case-by-case basis, that willingness has not yet evolved into any actual loosening.

The alien ownership charge posed considerable problems for Pandora – not necessarily because it was in violation, but because it couldn't prove that it wasn't in violation. That's because it's a publicly traded company whose stock is widely held by companies or individuals, some foreign, some not. For a number of reasons it was impossible for Pandora to determine with confidence the nationalities of all of its shareholders.

Nevertheless, it tried. Initially, Pandora submitted a NASDAQ survey of a sampling of its stockholders' mailing addresses, which showed foreign ownership of around 16%. It argued that its Board of Directors was composed entirely of U.S. citizens, and that eight of ten of its executive officers were also U.S. citizens, greatly reducing the possibility of foreign influence or control over broadcast operations. That wasn't enough for the FCC, primarily because mailing addresses aren't necessarily a reliable indicator of nationality.

Pandora then tried a second approach based on an analysis of SEC filings by its shareholders. That study showed that around 18% of its voting interests might be held by foreign individuals or entities. The FCC still wasn't satisfied because this alternate approach measured only *voting* interests, rather than equity interests. The Communications Act limits foreign ownership of *both* types of interests.

Finally, Pandora gave up. It acknowledged that it

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couldn't prove the level of its foreign ownership to the FCC's satisfaction, in part because of SEC regulations designed to protect shareholders. Those regs prevent Pandora from requiring its shareholders to disclose their citizenship. (While the organizational documents of most publicly-traded broadcast companies include provisions requiring shareholders to waive this SEC protection, Pandora's did not – because it had never been a broadcaster and thus hadn't had to worry about this sort of thing.)

Still confident that its foreign ownership was well under the limit but unable to demonstrate compliance with the FCC's rules, Pandora asked the FCC for a declaratory ruling. Specially, it asked the Commission to confirm either that: (a) foreign investors could hold up to an aggregate 49.99% voting interest and 100 percent equity interest in Pandora's parent company without additional FCC approval; or (b) in processing Pandora's application, the FCC would use the policy it routinely applies in the common carrier context. That latter option would permit 100% foreign equity and voting interests without prior Commission approval, subject to certain conditions.

Pandora has its work cut out for it ... and its application still hasn't been granted.

After cogitating on all this for the better part of a year, the Commission finally agreed to cut Pandora some slack. In so doing, it blew past ASCAP's arguments about how Pandora is just trying to get better copyright royalty rates. As far as the FCC is concerned, Pandora's motivation has nothing to do with the foreign ownership rules, which were, after all, the sole focus of Pandora's declaratory ruling request. And anyway, the Commission said, if ASCAP thinks that Pandora's acquisition of a station will undermine the existing copyright licensing regime, ASCAP should take that up with some other agency, or maybe Congress, or maybe the courts – but not the FCC.

As far as Pandora's alien ownership is concerned, the Commission concluded that the information submitted by Pandora had "not raise[d] immediate concerns regarding foreign influence or control". That was the good news for Pandora.

The bad news was that, in order to make sure that aliens don't sneak in and take over Pandora, the FCC imposed a long list of rigorous requirements on it. As a result, if Pandora wants to become a broadcast licensee, it will have to:

- ☑ Obtain prior Commission approval before any foreign citizen or entity obtains a greater than 5% equity or voting interest (10% for certain institutional investors). Prior approval will also be required before (a) Pandora's aggregate foreign ownership (equity or voting) can exceed 49.99%, or (b) foreign citizens comprise a majority of the Board of Directors.

- ☑ Amend its certificate of incorporation, bylaws or other corporate documents to ensure that it can determine its levels of foreign ownership and otherwise comply with the other terms of the Declaratory Ruling. Those amendments must provide Pandora not only the right to require disclosure of its shareholders' citizenship, but also the right to "take any and all actions that the Board of Directors deems necessary to so comply or cure any noncompliance", including (but not limited to) the right to compel the redemption of shares held by aliens.

- ☑ Monitor its foreign ownership percentages and, with every biennial ownership report, certify to its continued compliance with the conditions set out in the Declaratory Ruling. The Commission provides six suggested monitoring methods.

- ☑ Submit to the Commission, within 90 days, a list of steps it has taken, or plans to take, to ensure compliance with all of these conditions. That submission must also include a detailed description of the methods Pandora plans to use to determine its foreign ownership percentages. If the Commission approves that submission, the terms described by Pandora in that submission will themselves become part of the conditions of the Declaratory Ruling.

So Pandora has its work cut out for it. And get this: Pandora's application *still* hasn't been granted. In fact, processing of the application won't even pick up again until Pandora has satisfied the various conditions described above. So while Pandora's petition for a declaratory ruling may technically have been granted, Pandora still has a ways to go before it can become a broadcast licensee.

And all of this effort is intended to prevent Box Elder's only radio station from falling under the control of aliens. Really?

As Commissioners Pai and O'Rielly observed in separate concurring statements, this decision highlights flaws in the Commission's treatment of foreign investment in broadcast licensees. Had Pandora been trying to acquire a license in some other regulated service – including, say, wireless licenses giving it access to the bazillions of smartphones in everyone's hands – its foreign ownership levels could have been approved presumptively, without the need for exhaustive, and in Pandora's case unavailable, documentation. The FCC's insistence on such documentation here is especially bizarre in view of the fact that (as Pai points out) the available evidence indicates that Pandora already meets the existing alien ownership limits.

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2015 Regulatory Fees Proposed: Stability Reigns (At Least For Now)

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Just in time for the Memorial Day weekend, the FCC released its proposed regulatory fees for 2015. So we all had something to mull over during all those boring parades, fireworks shows, baseball games and cook-outs. Lucky us!

As usual, the proposed fees are set out in a Notice of Proposed Rulemaking (*NPRM*) in which the FCC solicits comments on the proposals, as well as some other incidental matters relating to the fees. While the final figures (usually adopted in July or early August, payable in late August or September) may vary here and there from the proposed fees, generally any changes can be expected to be minor. Still, the *NPRM* gives one and all an opportunity to comment on the proposals before they get etched in stone (although many may question the utility of trying to sway the Commission on the fee front).

For TV folks, reg fees appear to be stabilizing. Prior to last year, you may recall, the Commission had two separate TV fee schedules, one for VHF, the other for UHF. That differential treatment was tossed out in 2013 (effective with the 2014 reg fees). That led to some rough water on the UHF side – and smooth sailing on the VHF side – last year: VHF licensees noticed a substantial drop in their fees (as much as 48% for some), while UHF licensees suffered a major uptick (running from 15% to 30%). This year the proposed TV rates are proposed to remain largely where they were last year, with only modest (1% - 4%) increases. The only exception: FM/TV Translators and Boosters and LPTV Stations, whose fees will go up 6% -- but, since last year's fee was only $410, that amounts to only a $25 hike to $435.

This year the longstanding $10 broadcast auxiliary fee is gone.

On the radio side, no changes are proposed at all. Since none were made last year, either, that means that, if the current proposals are adopted, the radio industry will not have seen any increases in reg fees for three straight years.

And good news for all broadcasters. Historically, broadcasters have chronically been stuck for payments for their remote pickups, STL's and other such auxiliary licenses, each of which required a $10 fee. But last year the FCC eliminated that particular fee. As a result, this year the longstanding $10 broadcast auxiliary fee is gone.

We've prepared a handy table listing the proposed fees (and last year's TV fees, for comparison purposes) – you can check it out here.

When it comes to paying, remembers that last year the Commission imposed an all-electronic payment requirement: no cash or checks accepted. That's still true this year, but heads up. Thanks to our pals at the U.S. Treasury, the maximum payment that will be permitted to be charged to a credit card will be $24,999.99. (This edict came out last year, effective this June.) The old limit was $49,999.99. The new limit applies to single and bundled payments. If you owe more than $24,999.99, you will ***not*** be permitted to split it up into multiple payment transactions, nor will you be permitted to pay it over several days by using one or more cards. The FCC recommends that anyone looking at a fee obligation of $25,000 or more consider debit cards, Automated Clearing House (ACH) debits from a bank account, or wire transfers.

In addition to the fees themselves, the *NPRM* sets out various other proposed changes, several of particular interest.

First, the Commission wants to know whether it might be time to reexamine the apportionment of fees among broadcasters. That could involve a recalculation of the number of FTE's (that's FedSpeak for "Full-Time Employee" or "Full-Time Equivalent") devoted to radio vs. the number devoted to television in order "to more accurately take into account factors related to 'the benefits provided to the payor of the fee by the Commission's activities'". Such a recalculation could lead to readjustments of the overall fees to be collected from both the radio and TV sides.

Second, along the same lines, the FCC is wondering whether the ways in which fees are apportioned within each of the radio and TV sectors should be revisited. On the TV side, fees have historically been assigned according to market ranking; on the radio side, the allotment is based on both population served and type/class of service. The Commission asks for comments on whether these criteria need to be adjusted in any way. Possibilities suggested by the Commission: assess radio fees based on market rather than population served; or consolidate the radio categories and reapportion radio fees merely as a function of market rank or population served. The good news is that, even if the Commission eventually opts for some type of reapportionment, the result would not apply to FY 2015 fees.

Third, the Puerto Rico Broadcasters Association (PRBA) has asked the Commission for relief for Puerto Rican radio broadcasters because of "significant population de-

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PROPOSED 2015 REGULATORY FEES

(FCC 15-59, released 5/21/15)

TELEVISION FEE CATEGORY	Final 2014 Fees (USD)	Proposed 2015 Fees (USD)	% Differential (Green = decrease from 2014; Red = increase over 2014)
Markets 1-10	44,650	46,450	+4%
Markets 11-25	42,100	42,850	+2%
Markets 26-50	26,975	27,400	+2%
Markets 51-100	15,600	16,150	+4%
Remaining Markets	4,750	4,800	+1%
Construction Permits	4,750	4,800	+1%
Low Power TV, TV/FM Translators/Boosters	410	435	+6%
Broadcast Auxiliary	10	0	-100%
Earth Stations	295	340	+15%
All Markets	1,550	1,550	NC
Construction Permits	1,300	0	-100%

Commercial Radio Stations Proposed 2015 Regulatory Fees						
Population Served	AM Class A	AM Class B	AM Class C	AM Class D	FM Classes A, B1 & C3	FM Classes B, C, C0, C1 & C2
< 25,000	$775	$645	$590	$670	$750	$925
25,001-75,000	$1,550	$1,300	$900	$1,000	$1,500	$1,625
75,001-150,000	$2,325	$1,625	$1,200	$1,675	$2,050	$3,000
150,001-500,000	$3,475	$2,750	$1,800	$2,025	$3,175	$3,925
500,001-1,200,000	$5,025	$4,225	$3,000	$3,375	$5,050	$5,775
1,200,001-3,000,000	$7,750	$6,500	$4,500	$5,400	$8,250	$9,250
> 3,000,000	$9,300	$7,800	$5,700	$6,750	$10,500	$12,025
AM Radio Construction Permits		$590				
FM Radio Construction Permits		$750				

Federal Circuit provides NFL team much-needed defense

Slants Route May Help Redskins

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For years the NFL franchise associated with Washington, D.C. has been a laughingstock on a number of fronts. Image-wise, both on the field and off, it's hard to beat them for comedic source material. Here in the CommLawBlog bunker, though, we tend not to focus on things like team record (a .350 winning record over five years – if only that were a batting average, they'd be heading for Cooperstown!), dubious management decisions and the like.

But we have covered at least one aspect of the team's notoriety: its name. As we reported last year, some folks filed petitions to deny at the FCC objecting to a renewal application for a radio station that happened to be owned by a company controlled by Daniel Snyder, the team's owner. In the petitioners' view, the team name "Redskins" is so offensive that it warrants denial of license renewal. Ouch.

The FCC had the good judgment to reject the petitions. But the name debate has raged on elsewhere, most notably in the Patent and Trademark Office (PTO), where a number of Native Americans have been waging a years-long battle to have the registration of the mark "Redskins" cancelled because it's disparaging to, um, Native Americans. Most recently, they made considerable headway: last year the Trademark Trial and Appeal Board ruled that the mark is indeed disparaging, and it cancelled the mark's registration, a move that threatens the team's exclusive right to use the name and certain associated trademarks). [*Blogmeister's Note: Our blogger, Kevin "the Swami" Goldberg, is too modest to mention this, but we aren't. You can catch a recording of him analyzing the decision for the local CBS TV affiliate here.*] Mr. Snyder and company have taken the case to the United States District Court for the Eastern District of Virginia, where it's currently pending.

Which brings us to the Slants.

The Slants are an all-Asian, "ChinatownDanceRock" band formed in 2006 and fronted by Simon Shiao Tam. In 2010, Tam decided it was time to register the band's name as a trademark. As it happens, though, federal trademark law expressly permits rejection of a proposed registration if the mark "disparages" people (as well as institutions, beliefs or national symbols). Tam's first application was rejected by the PTO Trademark Examiner, who concluded that the name "Slants" disparages people of Asian descent, even though Tam pointed out that he and his band are themselves Asians. Tam re-filed his application in 2011. The Examiner again concluded that the mark is disparaging. On review, the Trademark Trial and Appeal Board agreed.

That conclusion is important for Dan Snyder because, but for that "disparagement" provision, there probably wouldn't be any basis for challenging the "Redskins" trademark.

Back to the Slants. Tam appealed the Board's decision to the U.S. Court of Appeals for the Federal Circuit, arguing (among other things) that the "disparagement" provision of the law is unconstitutional. In an opinion authored by Circuit Judge Kimberly Ann Moore, a three-judge panel of the Court affirmed the rejection of Tam's application because "Slants" disparages Asians.

Time to take another look at the constitutionality of the "disparagement" provision?

So that's good news for the Native Americans and bad news for Snyder when it comes to the "Redskins" mark, right?

Not so fast.

Tacked onto Judge Moore's 11-page opinion for the Court is a separate 24-page item, also penned by Moore, titled "additional views". And in those "additional views", Judge Moore explains in considerable detail why she thinks it's time to take another look at the supposed constitutionality of the "disparagement" provision.

Say what?

It appears that Moore and her two colleagues OK'd the rejection of the Slants application because Federal Circuit precedent supports the constitutionality of the "disparagement" provision. That, of course, was entirely consistent with the well-established concept of *stare decisis*, which provides that courts should generally follow their own precedent.

As Judge Moore explains in her "additional views", however, the hoary Federal Circuit precedent which the panel was following was based on the traditional view that trademarks are "commercial speech" not

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entitled to any First Amendment protection. But times have changed and commercial speech has gradually been accorded increasing constitutional protection. To the extent that trademarks are "commercial speech", they should be entitled to that protection.

Further, contrary to the Federal Circuit's previous holdings in this area (the primary one of which dates back several decades), denial of a trademark registration *does* impose the loss of several significant legal rights and benefits – *e.g.*, the right to exclusive use of the mark, a presumption of validity of your trademark rights, the right to sue. The government's ability to deny such rights and benefits imposes a chilling effect ostensibly intended to discourage the use of supposedly "disparaging" marks because of the marks' content. In general, such chilling effects raise serious First Amendment problems.

Moreover, requiring a mark to be non-disparaging appears (to Judge Moore, at least) to impose an "unconstitutional condition" placed on speech. While the government is entitled to define the limits of a program when it appropriates public funds to establish that program, the government cannot attach conditions that seek to leverage funding to regulate speech outside the contours of the program itself.

Does the bar on registration of "disparaging" marks violate the First Amendment?

And finally, Moore notes that the "disparagement" provision permits registration of marks that refer to a particular group in a positive manner, but does not permit registration of marks that do so in a negative manner. That smacks of viewpoint discrimination, which makes the law presumptively invalid. And there are no countervailing "substantial interests" which might justify the bar against disparaging marks. At most, the bar reflects a desire to disfavor certain unpopular messages, which violates the "bedrock principle underlying the First Amendment … that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable".

In other words, as Moore sees it, a lot has changed on the landscape encompassing trademarks and the First Amendment since the Federal Circuit last considered the constitutionality of the "disparagement" provision in depth. While she stops slightly short of declaring that provision unconstitutional, you can tell where she's heading. And she does expressly announce that, in her view, it's time for the Federal Circuit to "revisit" this issue. If the rest of her Federal Circuit confrères were to agree, the validity of the "disparagement" provision would be seriously in question, which would be good news for (a) Mr. Tam and (b) Mr. Snyder.

And what do you know. A mere week after the three-judge panel (led by Judge Moore) had – notwithstanding her stated reservations – concluded that "The Slants" had properly been rejected for trademark registration, the full Federal Circuit – acting on its own motion – has vacated that panel decision. The full Court has set the matter for an *en banc* hearing on the specific question:

Does the bar on registration of disparaging marks in 15 U.S.C. § 1052(a) violate the First Amendment?

While the vacation of the panel decision and the setting of an *en banc* proceeding don't necessarily mean that the "disparagement" provision is toast, that's not a bad bet. *En bancs* don't happen every day; *sua sponte en bancs* are even rarer; and *sua sponte en bancs* that pop up only a week after the panel opinion being reviewed are about as rare as a winning season at FedEx Field. So Mr. Tam has reason to be optimistic about his chances. And that means that Snyder and his team should be equally optimistic about *their* chances.

The "Redskins" case is pending in the Eastern District of Virginia (and presumably heading from there to the Fourth Circuit, rather than the Federal Circuit). Should the PTO's Slants decision get overturned by the *en banc* Federal Circuit – with the "disparagement" provision getting tossed as unconstitutional – the District Court (even one in a different Circuit) could be convinced to follow suit in the Redskins case. (Of course, if the Federal Circuit were to go one way on the issue and the Fourth Circuit the other way, that would set up what we in the biz refer to as a "circuit split". That's the kind of thing that often leads to review by the Supreme Court. A trip to the Supremes would be the legal equivalent of making it to the Super Bowl®, which would presumably give Mr. Snyder the type of thrill he has yet to – and doesn't seem likely to – experience in the football universe.)

Why would Judge Moore take the extraordinary step she took – tacking on "additional views" that seem to contradict her own opinion? Who knows? Maybe this was, in her view, the most appropriate way to honor both the strictures of *stare decisis* and her own personal commitment to First Amendment values.

Or maybe it's because, according to Wikipedia, Judge Moore, a Maryland native, is "a big fan of the Washington Redskins". And maybe, just maybe, she's sick of their losing.

In any event, even though Dan Snyder has not (as far as we know) been involved in any way with Mr. Tam and the Slants, his prospects for success on the trademark front are suddenly looking a lot rosier. Perhaps this is what he and his organization mean when they claim that they're "winning off the field".

The Paperwork Reduction Act re-opens an old question

Public Inspection File Rule: The FCC Asks (Again) If It's Really Necessary

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The Paperwork Reduction Act strikes again! As we all know, the PRA requires the FCC to get clearance from the Office of Management and Budget for "information collections" the FCC wants to impose on its regulatees. OMB clearances have a shelf-life of three years, meaning that the Commission has to truck on back to OMB every three years to re-up previously issued clearances.

Those of you with reasonably long memories may see where this is heading.

Three years ago was when OMB last approved the Commission's local public inspection file (and related political file) rules for broadcast and cable operators. (Those rules may be found at §§73.3526, 73.3527, 73.1943 and 76.1701.) And sure enough, the FCC has now solicited comments on those rules yet again as part of the process necessary to secure another three-year OK from OMB.

If the FCC's numbers look a bit odd to you, join the club.

We reported on the 2011 proceedings back when they first got started. You may want to take a look at that report, because not much has changed this time around. The Commission is again inviting comment on several boilerplate questions, including:

> (a) whether the public file rules are "necessary for the proper performance of the functions of the Commission, including whether the [collected] information shall have practical utility"; and
>
> (b) whether the Commission's burden estimate is accurate.

As to that "burden estimate", the numbers continue to amuse and amaze. Recall that in 2011 the Commission estimated that 52,285 respondents (providing a total of 52, 285 responses) would require anywhere from 2.5-109 hours to comply with the public file rules, resulting in a "Total Annual Burden" of "1,831,706" (the 2011 notice didn't put any units on that total burden estimate, but we figure it probably referred to hours) and a "Total Annual Cost" of (are you sitting down?) "none".

This time around, the corresponding estimates are: 24,558 respondents (providing a total of 63,234 responses); one hour to 104 hours per response; "Total Annual Burden" – 2,375,336 hours; "Total Annual Cost" – $882,236.

If these numbers look a bit odd to you, join the club.

The number of respondents this year is down more than 50% from 2011, but the number of responses is up by more than 20%. While the time per response has gone down, the Total Annual Burden has skyrocketed by almost 30%. And how about that estimated "Total Annual Cost"? It has shot from "none" (which is where it had been pegged by the FCC in 2008, too) to $882,236. And let's not forget that in 2008, the Commission included an estimate of the "Total Annual 'In-house' Cost" – $37,469,148. How that might have been squared with the "Total Annual Cost" figure of "none" was never explained. The 2011 and 2015 notices have not provided "Total Annual 'In-house' Cost" figures.

The OMB website reflects that, in 2011, a number of broadcast groups submitted comments. While those did not succeed in getting the kibosh put on the rules, they may have had some impact: we heard off-the-record reports that the folks at OMB had a bunch of questions for the Commission before approving the rules then. As it turns out, that approval contained the proviso that "[d]uring the period before the next three-year renewal, the FCC will continue its work to modernize and streamline the inspection file requirement". And in 2012 (when OMB had to consider some proposed tweaks to the public file rules – a proposal which also attracted considerable broadcaster comments), OMB specified in its approval that, going forward, the Commission would have to "review and take into consideration submitted comments regarding the burden placed on affected entities and where necessary, propose possible revisions to the associated information collection to reduce unnecessary burden while continuing to maximize the practical utility of the information requested from respondents".

So it's at least possible that the comment opportunities provided by the PRA may not be entirely useless after all.

The public file rule might serve some valid purpose – but, since the Commission has never done anything to investigate the validity of that proposition, nobody can say for sure. It's probably safe to assume that the FCC is not enthusiastic about launching such an investigation on its own. (As we have previously observed, the Commission has ignored for nearly a decade a petition for rulemaking filed by our friend, communications attorney David Tillotson, challenging the validity of the public file requirement.)

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But the Paperwork Reduction Act requires the Commission to justify rules like this every three years, so we all have another chance to make the case: do the public file rules serve a useful purpose, are the FCC's burden estimates valid and, if so, does the supposedly useful purpose justify the supposedly valid burdens? And let's not forget: the Commission must satisfy the OMB that the FCC's assessment is correct.

In other words, anyone who has any thoughts about the public file should take advantage of this opportunity to articulate them to the FCC. The Commission will be accepting comments through ***July 6, 2015***. After that, the Commission will bundle up any and all comments submitted and send them over to OMB, along with a statement in support of the rules (assuming that the Commission is not persuaded by the comments to drop the rules entirely). OMB will then provide an additional 30-day comment period. If OMB declines to approve the rules, the FCC will be unable to enforce them.

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are opening for Sunrise Registration this month, including .MARKETS, .NEWS, .CAFE and (the long-awaited) .BANK. Again, the .SUCKS Sunrise Period ended May 29 and opens for General Availability on June 1 at a registrar near you. .PORN (whose Sunrise Period has already closed) will be available for general registration on June 4. Open .XXX domain names, which have been available for some time, currently sell for $99.99 on GoDaddy.

As always, we are ready to help you and your business navigate the thicket of these new top level domain challenges and opportunities. Just contact Kathy Kleiman, Bob Butler, Kevin Goldberg or Jon Markman for assistance.

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And let's not forget that, whatever Pandora's foreign ownership might be, Pandora already provides its Internet service to more than 79,000,000 Americans (according to Commissioner Pai). So if Pandora's foreign interests do indeed have some insidious and malevolent plan afoot, it's possible that Box Elder is the *only* place where Pandora could not, right now, this instant, implement its nefarious little plan.

So the extensive hoops that Pandora will have to jump through just to get its application processed seem a bit silly. But at least the FCC didn't simply slam the door on Pandora. The Commission's willingness, however heavy-handed and begrudging, to leave the door slightly ajar does suggest a continued openness to the relaxation of its approach to broadcast alien ownership, relaxation that the Commission promised a couple of years ago.

In the meantime, we can only hope that, if Pandora does eventually acquire its Box Elder station, the resulting savings in copyright royalties will make it all worthwhile.

(Continued from page 6)

clines" and other economic factors, including unprecedented unemployment and low per capita income.

The Commission is not unsympathetic to PRBA's request. While the FCC is not inclined to reassess Puerto Rico's population every five years as opposed to every ten years – the necessary information is available from the U.S. Census only every ten years, and anyway, such population statistics would not likely affect things because reg fee calculations don't occur at that "granular" level – the Commission does ask whether the circumstances described by PRBA might warrant either:

- moving the Puerto Rico market stations to a different rate (*e.g.*, reducing them down to a lower population strata) because of the downward trend in the population and other factors; or
- creating a separate fee category for the Puerto Rico market at a lower rate; or
- adopting a special provision in the FCC's rules for economically depressed geographic areas to seek a "fast track" waiver of regulatory fees.

The Commission also questions whether the routine waiver process might be adequate to accommodate PRBA's concerns.

If you think you might want to chip in your two cents' worth on the proposed fees or related matters covered in the *NPRM*, heads up – you don't have much time to work with. Comments on all of the proposals set out in the *NPRM* are due by ***June 22, 2015***; reply comments are due by ***July 6***. Again, the *NPRM* – and the fees described in it – are still only proposals.We won't know the final fees until sometime this summer, and we won't know the deadline for paying the fees until sometime later – although the fees are generally due in late August or early/mid-September. Check back here for updates.

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Given all this, we should not be surprised by the outcome.

The Audio Division held that, because the construction here did not conform to the permit's specifications, it did not constitute the required timely construction. And since the permit had expired, the permittee was out of luck and, more importantly, out of a construction permit. The ruling was premised on Section 319(b) of the Communications Act, which provides that a CP is "automatically forfeited if the station is not ready for operation within the time specified [in the CP] ... unless prevented by causes not under the [permittee's] control". The ruling further relied on Section 73.3598(e) of the FCC's Rules, which states that "[a]ny construction permit for which construction has not been completed and for which an application for license has not been filed shall be automatically forfeited upon expiration without any further cancellation by the Commission".

Further, the Audio Division explicitly held that the ***temporary*** nature of the construction provided "an independent and alternative basis" for its decision. In other words, even if the facilities that were constructed had technically complied with the permit's terms, the fact that the facilities were plainly less than permanent was a separate kiss of death. According to the Division, constructed facilities are expected "to endure beyond the *de minimis* period necessary for it to file a license application". Stated another way, "a facility which is dismantled shortly after a license application is filed or which is constructed without the site owner's permission or knowledge is fundamentally inconsistent with the licensing principle".

All permittees should take this rigorous policy to heart.

The bottom line: "[W]e will not award licenses to permittees who have constructed temporary facilities."

While clear and unequivocal, that holding does have one possible loose end: The Division's decision doesn't define "temporary facilities". Obviously, facilities consisting of a couple of pipes, a generator-driven transmitter and a "tower" that can be "tumble" by the wind fit that bill. But what about otherwise compliant facilities that the permittee may intend to replace sooner rather than later? If those facilities conform to the specs of the permit *and* allow the station to operate continuously, shouldn't they be deemed "permanent" even if the permittee plans to swap out some of the component elements in the relatively short term? You might think so, but the decision is silent on where "temporary" ends and "permanent" begins, so caution is advised.

In any event, all permittees should take this rigorous policy to heart. Since this decision came out of the Audio Division, it applies to radio permittees; however, the same rules technically apply to TV permittees, so it would not be surprising if the Video Division were to adopt the same approach. The FCC believes that the standard construction periods provide adequate time to complete acquisition and permanent installation of the necessary equipment. Once you've got a permit, it's your job to take full advantage of the time provided. Remember, while permit expiration dates may be tolled under certain extraordinary circumstances, the Commission stopped granting extensions of construction periods back in the last century.

And there's plenty of incentive to get the facilities built out before expiration. Failure to do so means loss of the permit – which necessarily entails loss of any and all time, effort and money that went into obtaining the permit. If you cared enough to get the permit in the first place, you should care enough to finish the job.

Of course, there will probably always be some folks who prefer to take chances and play a bit fast and loose, figuring that they won't get caught. The Division's decision here suggests that the staff may now be on the look-out for such players. (The permittee in this particular case seems to have been on the staff's radar already because of problems with other LPFM applications which had been dismissed for various reasons; those applications prominently involved an individual who was similarly involved in the permittee here. We suspect that that factor increased the staff's skepticism in this case.) The chances of getting caught appear to be on the rise. That's one more good reason not to roll the dice.

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or an authorized EAS test. As irresistible as the impulse to use EAS tones might on occasion be – since those tones are designed to get the audience's attention, an effect that advertisers and (apparently) syndicated announcers, crave – it must be resisted.

While the iHeart Consent Decree contains no real surprises, it does provide us with a closing take-home message. In addition to forking over one mil, under the Consent Decree iHeart is required to develop and implement a three-year compliance plan that will (at least in theory) prevent a recurrence. One element of that plan: iHeart must "make reasonable best efforts to permanently remove all simulated or actual EAS Tones" from its systems for digital storage and playback of audio content. ***All*** stations may wish to take the same step ***now***. That way, if the temptation to broadcast EAS tones creeps up some day, it'll be that much harder to succumb in a moment of weakness.

Swami to D.C.: I just wanna testify

Police Body Cameras: Kevin Goldberg Takes a Stand, On the Stand

One of the most hotly debated topics at the state and local levels around the country is that of police body cameras. Should they be used? If so, when should they be turned on and when should recording not occur due to privacy and other concerns? Since recordings made with police body cameras are public records, should they be accessible through state and local freedom of information or open records laws? What about the costs associated with collecting, maintaining, reviewing, redacting and releasing those recordings?

These and other questions are being thrashed out in more than 30 state legislatures and virtually every big city in the country, including the District of Columbia. In addition to moonlighting as the "Swami", our own Kevin M. Goldberg is the President of the DC Open Government Coalition, a non-profit organization which focuses on improving both public access to government information and the transparency of government operations in D.C. Kevin testified in that capacity on the topic of police body cameras at a public roundtable convened by the D.C. Council's Committee on the Judiciary on May 7, 2015.

We expect that many, if not most, of our readers are interested in the body camera issue, so we thought we should make Kevin's written remarks available. You can find them here. There's also a link to an on-demand stream of the video of the May 7 roundtable here, but head's up – we couldn't get it to work. (Because we couldn't view the official video, we couldn't get a screen grab of Kevin in action, so for our graphic, above, we're relying on a shot of Kevin on the Jumbo-Tron taken during his appearance.)

FHH - On the Job, On the Go

On May 14, **Laura Stefani** moderated a panel discussion at the Women Leaders in Technology Law conference in San Francisco. The conference brought together senior women from law firms and technology companies around the country to discuss leadership, gender issues and current trends in technology law.

If you're a movie buff, or a computer buff, or a documentary buff – or if you just like an interesting story – you may want to get yourself to the Landmark Sunshine Cinema on Houston Street (No. 143, to be precise) in NYC the first week of June for the first public screening of *The Computers*. That's **Kathy Kleiman**'s film about the women who, in 1945-1946, programmed ENIAC, the first electronic general-purpose computer. The flick, which is getting rave reviews at private showings, will be shown at the Landmark Sunshine on June 1-4. On June 3 there will be a special screening at 7:00 p.m., where **Kathy** herself will be holding a Q&A after the showing. And get this: If you would like to attend that special screening, we can totally comp you some tickets. Just send your name and the number of tickets you'd like to screening@fhhlaw.com and **Kathy** will make sure the tickets will be waiting for you at the box office.

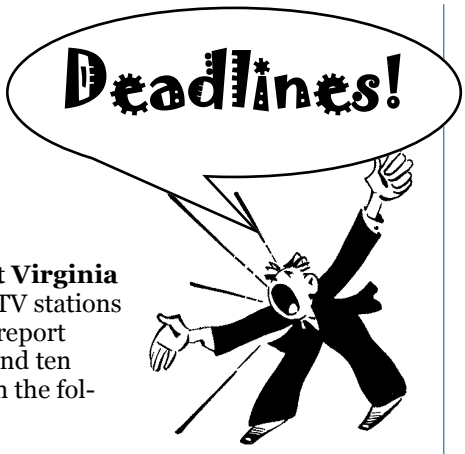
On June 5, **Frank Jazzo** will be speaking at the annual convention of the New Mexico Broadcasters Association in Albuquerque.

Busy as always, **Frank Montero** will be all over the place in June, including: the NAB Educational Foundation's Service to America Awards (Washington, DC, June 16); the New Jersey Broadcasters Association Annual board meeting and convention (Atlantic City, June 17-18); the Public Radio Conference (Washington, DC, June 26 -28); the New York State Broadcasters Association Annual Convention (NYC, June 22-23); and the SNL Kagan Annual TV and Radio Finance Summit (NYC, June 25).

On June 24, **Harry Cole** will be speaking at the FCC Boot Camp in San Francisco. **Cheng Liu** will also be attending the Camp.

And on July 2, **Paul Feldman** will be in Anaheim, attending the Broadband TV Conference where he will appear on a panel addressing the impact of net neutrality on over-the-top video strategies.

June 1, 2015



EEO Mid-Term Reports – All *radio* station employment units *with eleven (11) or more full-time employees* and located in the **District of Columbia**, **Maryland**, **Virginia** and **West Virginia** must file EEO Mid-Term Reports electronically on FCC Form 397.

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

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

July 10, 2015

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the second 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 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.

August 3, 2015

EEO Mid-Term Reports – All *radio* station employment units *with eleven (11) or more full-time employees* and located in the **North Carolina** and **South Carolina** must file EEO Mid-Term Reports electronically on FCC Form 397.

EEO Public File Reports – All *radio* and *television stations with five (5) or more full-time employees* located in **California**, **Illinois**, **North Carolina**, **South Carolina** and **Wisconsin** 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 **Illinois** or **Wisconsin** 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 the **California**, **North Carolina** or **South Carolina** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.