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At Long Last – AM Revitalization!

Translator windows, interference protection changes, MDCL ... and adios to the ratchet rule

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Two years in the making, the FCC's AM Revitalization decision (full name: "First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry" – let's just stick with *Revitalization Decision*, shall we?) has finally worked its way through the peristalsis that is the FCC's rulemaking process. And while it may not be precisely what many AM licensees would have preferred, it's considerably more than what they might have expected from the Wheeler Commission. (For those of you with short memories, it was just last March that Chairman Wheeler seemed to be putting the kibosh on FM translator windows available only to AM licensees.)

So without further ado, let's take a quick look at the major components of the *Revitalization Decision*.

FM Translator Windows

First, AMers will be getting a series of filing windows over the next two years which should make it easier for them to acquire FM translators on which to rebroadcast. The initial two windows – dubbed "Modification Windows" and set to be opened sometime in 2016 – will *not* allow applications for *new* translators. But it's pretty much the next best thing.

During those windows AM licensees will be permitted to acquire and move any currently authorized (by license or permit) FM translator on a non-reserved channel (*i.e.*, 92.1 MHz to 107.9 MHz) up to 250 miles ***AND***, to the extent necessary, change the translator's channel to *any* non-reserved FM channel that satisfies the rules. The first of the two Modification Windows will be available only for translators that will rebroadcast Class C or D AM station; that window will be open for six months. Following that six-month period, a second, three-month, window will be available for *all* AM licensees (including Class C and D stations that did not file an application in the first window).

The AM licensee proposing the modifications to the translator need not be the translator's licensee. The AM station could be a proposed purchaser of the translator (as long as an application proposing the purchase is on file), or it could simply have a written rebroadcast agreement with the translator's licensee or permittee.

There are a few caveats here. First, each AM station may apply for *one and only one* translator. Second, any translator acquired during these windows will be required to rebroadcast the AM station specified in the application for a minimum of four years (exclusive of silent periods) from the date it commences service at its modified location. Third, applications filed in the Modification Windows will be on a first-come, first-served basis. In other words, earlier-filed applications will have cut-off priority over later-filed applications, so any licensee – and particularly Class C or D licensees – thinking about taking advantage of this opportunity would be well-advised to start planning *now* in order to be ready to file as soon as the Modification Windows open. (On that front, Professor Dan Ryson, a crackerjack engineer with our pals at Cavell, Mertz and Associates, has prepared a translator search tool which is now up and running, for free, on their website. All you have to do is key in an AM call sign on their FCCInfo page. That'll get you to the station's page – where you'll find a link that lets you create a listing of commercial band FM translators within 250 miles of the station's site. That should give you a good start in the process.)

To increase the inventory of translators potentially available for acquisition in these windows, the Commission will also waive the three-year construction period for translator permits issued in connection with Auction No. 83 (applications for which were filed in the notorious 2003 translator window). According to the FCC, some 1,300 such permits are set to expire in 2016. But, in the Commission's view, waiver

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Dueling letters

SESAC Seeks to Sidestep Settlement

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As we reported several months ago, in July the Radio Music License Committee (RMLC) reached a settlement agreement with SESAC that resolved RMLC's antitrust lawsuit against SESAC and brought some measure of certainty and stability to the license fees charged by SESAC to radio stations. The RMLC recently started sending the paperwork to radio stations across the country inviting those so inclined to opt into the settlement agreement. It was a happy ending. We thought so, at least.

Until SESAC threw a wrench in the works by sending letters to radio stations offering them a "reduced fee schedule" for 2016-2018 if they sign onto the deal by November 15. We're hearing a lot of chatter from radio stations on the heels of this letter, with stations confused as to (1) whether signing on directly with SESAC binds them to the settlement agreement or not, and (2) what to do.

The answer to (1) is clear: a letter you receive from SESAC inviting you to sign an alternative to the RMLC-SESAC settlement agreement is ***NOT*** the same as the RMLC-SESAC settlement agreement itself.

The answer to (2) is a little less clear: we don't provide individual legal advice through the *Memo to Clients*, so you have to consult with your own legal counsel. We will attempt some clarification of the options available so that, ideally, no station will sign an agreement that it didn't really mean to sign.

SESAC's big selling point is a discounted rate in the short term. The reduction being dangled is 5% for 2016, with 2017 and 2018 being subject only to cost-of-living increases based on the Consumer Price Index-All Urban Consumer. SESAC also points out that, by accepting this offer, stations will not have to sign up for the RMLC alternative. According to SESAC, that alternative has still not produced any solid fee rates for 2016-2018, since that's still a matter of negotiation and, possibly, arbitration. SESAC also points out that, by opting for doing a direct deal with SESAC (rather than being repped by RMLC), stations will not be tapped for the administrative fee being charged by RMLC.

In response, RMLC has brought a number of points to the attention of radio licensees who have not yet joined the RMLC team with respect to SESAC. Reduced to its basics, RMLC's answer is that the SESAC offer is little more than "an effort … to repudiate the terms of a carefully negotiated settlement, and to avoid the consequences of having SESAC's monopoly pricing subjected for the first time to careful scrutiny by an arbitration panel".

While it offers no guarantees, RMLC seems confident that the negotiation/arbitration system will result in license fees considerably below those now being offered by SESAC for 2016-2018. Moreover, RMLC points out that SESAC's offer doesn't promise any reduction beyond 2018; under the RMLC/SESAC settlement, fees would be governed by the negotiation/arbitration approach for another 20+ years. RMLC also notes various other favorable provisions of the settlement, the benefits of which stations signing up individually with SESAC (as opposed to signing up with RMLC) would not enjoy.

So radio stations have a choice. They can sign up individually for SESAC licenses, in which case they will be on their own to negotiate future fees on a one-on-one basis. Or they can sign up with RMLC, thereby aligning themselves with a broad cross-section of the radio industry on one side of the negotiating table – with the added assurance of an arbitration process as a safety net if the negotiation fails.

The crucial bottom line to understand: the deal presented in the SESAC letter cur-

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Deadlines, opening bids, other procedures now set

The Broadcast Incentive Auction: An Overview of the Reverse Auction Process

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The FCC's preparations for the long-in-the-works Broadcast Incentive Auction have taken the final turn and are now barreling down the stretch. With a 300+ page Public Notice (including two appendices and an attachment) setting out the auction procedures and other important details, the Commission has filled in many of the blanks relative to when and how the elaborate auction process will work. Perhaps of more interest to many, in a separate notice it has also disclosed the opening prices which it will offer to all full-power and Class A TV stations eligible for the auction. Here are links to:

the Public Notice;

two appendices released separately (only one of which is directly relevant to the reverse component of the auction – it lists baseline coverage (areas/pops) for DTV stations; the other appendix lists information relevant primarily to the *forward* auction – but note that this article is limited to matters relating to the *reverse* auction); and

a public notice accompanying a separate listing of the reverse auction opening bids for all eligible TV (full-power and Class A) stations. In addition, here's a link to a separate, possibly more useful, version of that list, set up in spreadsheet form prepared by our friends at Cavell, Mertz & Associates. (Their version is fully searchable and includes links to a database providing specifics about each station's facilities.)

*Broadcasters considering participation in the reverse auction must begin to plan **NOW.***

The auction is technically set to begin in late March, 2016, ***BUT*** these latest releases make clear that broadcasters considering participation in the reverse auction must begin to plan ***NOW***, as the Form 177 – that's the application to participate in the reverse auction – must be filed no later than ***6:00 p.m. (ET) on December 18, 2015***.

The materials linked above are chock-a-block full of detailed information. We recommend that anyone considering participation in the reverse auction review them all carefully. For now, here are just a few of the highlights:

- The ticket into the auction is FCC Form 177. The window for filing these forms will run from ***12 Noon (ET) on December 1, 2015*** through (as noted above) ***6:00 p.m. (ET) on December 18***. The form requires disclosure of: the licensee's name; the owners of 10% or more of the licensee; the names of up to three people authorized to bid on the licensee's behalf; and certification that the licensee understands and will comply with the auction rules. The applicant must also identify all of the bidding options (*see below*) it wishes to be considered for once the reverse auction starts, and channel sharing agreements (CSAs) (or intent to enter into a CSA) must be disclosed. Class A TV licensees are also required to certify continued compliance with the statutory eligibility requirements for Class A status. Non-commercial educational stations must also indicate whether they operate on a reserved or non-reserved channel. NOTE: A licensee holding licenses for multiple eligible stations may include all of its stations in a single application.

- The bidding options available to eligible licensees are: (1) go off-air (an option available to all stations); or (2) move to a Low-VHF channel (available to UHF or High-VHF stations); or (3) move to a High-VHF channel (available only to UHF stations). An applicant will ***not*** be obligated to bid for all of the options selected in its December Form 177 filing once the auction cranks up, ***BUT*** buy-out options not listed on the December filing will be off the table.

- Applicants will have until ***6 p.m. (ET) on March 29, 2016*** to make their final commitment relative to which option they will take in the first round. *This deadline is crucial*. In the Commission's words, this commitment "will constitute an ***irrevocable*** offer by the applicant to relinquish the relevant spectrum usage rights in exchange for the opening price offer for that bid option". (We added the emphasis on "irrevocable" there because it deserves your attention.) In other words, as of the March 29 deadline, broadcasters participating in the auc-

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tion MUST designate the option that they will take in the first round. If the broadcaster elects to go off the air at the opening bid price, that will be its initial bid; the bid can change in subsequent rounds based on the different options the broadcaster elected on the initial form, but the first round will be limited to only one bid option.

- Where a CSA has already been reached, it must be submitted along with the Form 177, in full and with no redactions. Any applicant intending to enter into such agreements after the auction must do so before the date it is required to relinquish its license. Parties entering into CSAs are also required to certify that, among other things, the resulting arrangement will comply with multiple ownership rules, will not result in a change to the Designated Market Area, and will satisfy community of license coverage requirements.

- After the initial Form 177 filing deadline, only minor amendments will be permitted. In this context, "minor" changes include things like deletion or addition of authorized bidders, revision of addresses and telephone numbers of the applicant, its responsible party, and its contact person. Such amendments to update information in the application must be made promptly (*i.e.*, within five days) after the applicant learns of the need to file the amendment.

- "Major" amendments will ***not*** be permitted after the Form 177 deadline. Such *verboten* amendments include: adding or removing a license identified for relinquishment; changing the relinquishment option for a particular license; certain changes in ownership that would constitute an assignment or transfer of control of the applicant; changing any of the required certifications or the certifying official; adding a new CSA or changing a party to a CSA; or a change in the applicant's legal classification that results in a change in control.

- The FCC is waiving its "Red Light Rule", meaning that applicants indebted to the FCC will be allowed to participate in the auction. The hitch: an applicant already subject to a "Red Light" restriction must acknowledge its obligation to pay past and future debts along with accrued interest, penalties, and costs, and must further agree to permit the FCC to deduct such amounts from its share of auction proceeds.

- After the December 18 Form 177 deadline comes and goes, FCC staff will send a confidential letter to the contact person listed on each applicant's Form 177. The letter will identify – with respect to each station included in the application – whether the application (1) is complete, (2) has been rejected, or (3) is incomplete or deficient because of minor defects that may be corrected. The letter will include the deadline for resubmitting corrected applications; applications not corrected by that deadline will be dismissed ***with no opportunity for resubmission***. The FCC's letter will also inform the applicant of any potential FCC liabilities with respect to a particular station that cannot be resolved before the reverse auction.

- Once all the final option commitments are filed (no later than March 29, 2016), the Commission will run all the information through its computers and calculate what its "initial clearing target" is going to be. The "clearing target" is the amount of TV spectrum to be freed up through the reverse auction. The clearing target will determine which broadcasters' commitments will be accepted and which won't. In other words, it's at least possible that some, perhaps many, broadcasters will be advised that they will not be able to participate further in the auction process. (That could occur if, for example: (1) a broadcaster's commitment option could not be accommodated as a result of the clearing target, or (2) the FCC determines that a particular TV station's spectrum isn't needed to meet the clearing target.)

Opening bids listed by the Commission are just that — opening bids.

- Of course, the Commission expects that all applicants will perform due diligence research and analysis before applying to participate in the auction.

Anyone contemplating participation in the reverse auction should be especially aware that the opening bids listed by the Commission are just that, opening bids. Many observers anticipate that the bids will shrink, perhaps dramatically (*i.e.*, by half, or even more), before the bidding ends. While some stations on some channels in some markets may not encounter such shrinkage, they will likely be in a slim minority. In other words, would-be participants should be prepared to deal with eventual bids well below the tempting numbers dangled by the Commission to encourage participation.

One more note: The Commission will be conducting mock auctions to permit reverse auction participants to get an idea of what the process entails. Those auctions have not yet been scheduled. Applicants who qualify to participate in the reverse auction will be advised (by confidential letter) of the date of the mock auction to which they have been assigned once the FCC has established, and announced, the initial clearing target. That announcement is expected to happen sometime in late April, 2016. Because the reverse auction process is going

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Another Memo to Clients Sidebar!

Auction Notice Hits the Federal Register, and FCC Seeks OMB Approval of Form 177 ... STAT!!!

Acting with uncharacteristic speed, the FCC managed to get the sprawling Incentive Auction Public Notice into the Federal Register a mere two weeks after the notice was initially released. This triggers the 30-day period during which affected parties can seek reconsideration (by the delegated authorities responsible for the Notice – in this case, presumably the Wireless and Media Bureaus) or review (by the full Commission). Anyone so inclined has until November 30, 2015 to get his pleadings in – but, in view of the juggernaut nature of the auction process at this point, it would probably be best not to hold out too much hope of success.

As we reported in a post on CommLawBlog.com, the Federal Register version of the auction notice (unlike the original version released by the FCC) indicated that the hilariously-named Paperwork Reduction Act might come into play somehow. Exactly how was not explained, but we guessed that it might have something to do with Form 177, the form that broadcasters will be required to file in order to participate in the reverse auction.

It's probably a good bet that OMB will accede to the FCC's wishes.

And sure enough, the very next day the FCC published another Federal Register notice requesting comments on (wait for it) FCC Form 177! Who knew?

That second notice did not itself include a copy of the proposed form, but it provided directions for tracking a copy down on the website of the Office of Management and Budget. The Federal Register notice did make it clear, however, that the Commission is looking to short-circuit the usual PRA review process by months. According to the PRA, that process entails a 60-day comment period (with comments to be filed with the FCC), followed by a second, 30-day comment period (with comments to be filed with OMB). What with at least cursory FCC and OMB review and analysis of any incoming comments – after all, it's important to sustain the illusion that the statutorily-mandated opportunities for public input may in fact have some meaningful effect – the PRA process often takes a total of four or more months.

Not this time.

The FCC has requested "emergency" consideration by OMB. And by "emergency", it means that it wants to totally bypass the initial 60-day comment period and whack down the 30-day period to 14 days. But wait, there's more! The Commission has also requested that OMB approve the form "no later than 19 days after the [draft form] is received at OMB", *i.e.*, a mere five days after the close of the abbreviated comment period. That's the governmental equivalent of Same Day Service!

The Federal Register notice doesn't explain what the big rush is, but it's not that hard to figure out. Broadcasters intending to participate in the reverse auction will have to file their Form 177s no later than December 18, which is (uh, let's see, 30 days hath November, plus 18, plus 1) fewer than 50 days from now. But that's longer than the initial 60-day PRA-mandated comment period ... without tacking on the other 30-day period. No wonder the Commission is asking for expedited treatment.

It's probably a good bet that OMB will accede to the FCC's wishes. But that doesn't mean that interested parties should pass on the chance to check out the draft form and offer up their thoughts on it. Anyone interested in doing so has until ***November 13, 2015*** to get their comments in to OMB.

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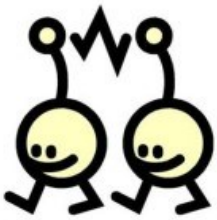
to be something outside of everybody's experience, we strongly recommend that anyone assigned to a mock auction take advantage of that opportunity. We cannot emphasize enough that the auction design is brand new and, as yet, untried by anybody. While the FCC has reportedly made extensive efforts to simplify the auction mechanics, whether or not those efforts have been successful remains to be seen. The best way – and, perhaps, the only way – to check that out will be to participate in the mock auction.

To re-state the obvious, we are highlighting only a small portion of the extensive content of the materials released by the Commission. Broadcasters interested in participating in the auction are advised to carefully review the Public Notice and accompanying documents to ensure sufficient preparation for the upcoming deadlines.



Yet another Broadcast Incentive Auction update

FCC Modifies Rules and Policies Governing Channel Sharing Agreements

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In a further effort to encourage broadcaster participation in the reverse portion of the Broadcast Incentive Auction, the FCC has both (a) clarified its policies toward "back-up" channel sharing agreements (CSAs) and (b) increased the time available for successful bidders to transition to shared facilities after the auction.

Back-up CSAs

A CSA, of course, is an arrangement pursuant to which two or three stations agree to share the 6 MHz of spectrum of one of the stations when one or more or more of the stations relinquish their spectrum in the auction. But what if all the CSA participants opt to participate in the auction – and then the FCC accepts the bids of *all* stations to relinquish their respective spectrum? That would leave no spectrum for any of the stations to share. That and other scenarios with similar results could discourage auction participation by licensees who wish to continue to broadcast after the auction.

A back-up CSA is something of an insurance policy

Enter the "back-up CSA".

It's something of an insurance policy by which a party to a primary CSA agrees to share with yet another station should circumstances prevent the implementation of the primary CSA. And now the FCC has expressly clarified that it will indeed be permissible for "either or both parties [to a CSA] to also enter into a back-up CSA with one other station in the same DMA to act as the back-up host or sharer station".

Note the limitations: unlike a primary CSA, a back-up CSA may be with only one other station, and that station has to be in the same DMA. Fox, ION, Tribune and Univision had proposed that licensees should be allowed to use "contingent multi-party CSAs across multiple markets". The Commission, however, was not willing to go that far. It suspected that the proposal was intended to give participants in such multi-party/multi-market arrangements the ability to improperly communicate with one another about bids and bidding strategies. Such communications among reverse auction participants are strictly prohibited – but the Commission has carved out a limited exception for CSA participants, an exception which Fox *et al.* may have been trying to exploit.

While the FCC was not willing to allow such exploitation, it did have to acknowledge that *some* opportunity to communicate with participants in back-up CSAs should be allowed. Accordingly, the rule on communications concerning bids and bidding strategies now includes the following wrinkles:

> the CSA exception to the prohibition against such communications applies only to communications between parties to a single CSA at any given time, and only if the CSA (or back-up CSA) was entered into and filed with the Commission by the December 18 deadline for applications;
>
> if both stations in a primary CSA have a bidding status of "frozen—provisional winner", then parties to a back-up CSA may communicate regarding bids and bidding strategy, ***BUT*** they must cease such communication with the party to the primary CSA.

Another problem: under the reverse auction bidding procedures, the bidding status of a "frozen—provisional winner" is not necessarily permanent; that is, it may change to "bidding in the current round" if the auction enters a subsequent stage. Should that happen, the prohibition shifts again. To illustrate:

> Let's assume that a primary CSA has ceased to be operative because the host station's status became "frozen—provisional winner" at one stage of the auction. If either station to that primary CSA also has a back-up CSA, the host's "frozen—provisional winner" status opens the door for the CSA participants to begin to communicate with a back-up CSA partner, if any of them has one.
>
> But let's then assume that, in a subsequent stage, the primary CSA's host station's status changes back to "bidding in the current round". If the primary CSA expressly provides that it becomes the operative sharing agreement under such circumstances, the host may notify the sharee(s) in the primary CSA of the change in status, and the CSA exception will again apply to communications between the parties to the primary CSA rather than with the back-up host. In other words, if a host station becomes "unfrozen", then all bets are off with the back-up CSA, the primary CSA goes back into effect, and the sharee station(s) may no longer communicate with the back-up CSA station.

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The shape of things to come, 2016-2020

Webcasting IV: The Pieces Start to Fall Into Place

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If you're a webcaster, we've got some news for you. While the Copyright Royalty Board (CRB) has yet to conclude its *Webcasting IV* proceeding, it has issued two orders recently that wrap up some aspects of that proceeding. And the Register of Copyrights has issued a separate ruling that could affect aspects of the proceeding not resolved by the CRB's orders. So those of you who have been awaiting with bated breath the word on webcasting rates and terms for the 2016-2020 period – and you know who you are – this is for you.

It is, of course, about time. After all, *Webcasting IV* began in January 2014. One would think that the CRB shouldn't need nearly two full years to reach its conclusions. In this case, one would be wrong. (In fact, I'm guessing that CRB's final decision won't appear until mid-December, which would be consistent with its timing in *Webcasting III*, when a decision for the 2011-2015 term was issued in December, 2010. FWIW, that would still be quicker than *Webcasting II*, when the decision covering the 2006-2010 term wasn't issued until March 2007, *more than a year after the rates were supposed to have gone into effect*).

The CRB's final decision probably won't appear until mid-December.

In any event, the CRB's two recent decisions directly involve, first, Noncommercial Educational Webcasters, and next, public radio stations. The Register's ruling could affect all other webcasters.

Noncommercial Educational Webcasters – the SoundExchange/CBI Agreement

First up, the CRB has adopted (with one exception) the terms of a settlement agreement between SoundExchange and College Broadcasters, Inc. (CBI). The approved terms, which include the rates for the 2016-2020 term, will apply to "Noncommercial Educational Webcasters" (NEWs).

Not sure whether you're subject to these terms? To be an NEW, a webcaster must, among other things:

- © be exempt from federal income taxation under Section 501 of the Internal Revenue Code (or at least have applied for that status) or be operated by a governmental entity;
- © be directly operated by, or affiliated with and officially sanctioned by, a domestically accredited primary or secondary school or college or university, or other post-secondary degree-granting educational institution;
- © be substantially staffed by students of the educational institution;
- © *not* be a "public broadcasting entity"; and
- © take steps not to make transmission in excess of 159,140 "aggregate tuning hours" on any individual channel or station in any month, if it exceeded that threshold in any month during the previous year.

For all you webcasting radio stations out there, remember that the definition of "Noncommercial Educational" for webcasting purposes ***bears no relationship to your FCC license***. Just because the FCC may characterize you as "noncommercial educational" does ***not*** mean that you are an NEW for copyright purposes.

Under the SoundExchange/CBI deal adopted by the CRB, the key rates and terms for 2016-2020 will be:

- $ An annual minimum fee of $500 for each individual channel, side channel or station engaged in webcasting under the statutory license;
- $ A maximum monthly threshold of 159,140 aggregate tuning hours (ATH);
- $ Payment on a "per performance" basis at the rate eventually applied to "Noncommercial Webcasters" if the 159,140 ATH threshold is reached (it is interesting to note that, apparently, NO NEWs exceeded that threshold in the past three years);
- $ The option of paying a $100 "proxy fee" in lieu of filing Reports of Use if the webcaster did not exceed 80,000 ATH in more than one month during the previous year.

This leaves the licensing scheme for NEWs pretty much unchanged from 2011-2015, save for one item. That exception – which works in the webcasters' favor – involves the last bullet point above. During the 2011-2015 term, the $100 proxy fee was available only until the webcaster hit 55,000 ATH. The new deal increases that trigger to 80,000 ATH, which will allow even more

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Good faith? Totality of the circumstances?

The Retransmission Consent NPRM: An Overview as the Comment Deadline Approaches

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While many (if not most) television licensees are likely trying to sift through the several hundreds of pages of FCC materials laying out the fast-approaching incentive auction process, it's important not to lose sight of another upcoming deadline: the one for comments relative to the retransmission consent process. TV licensees not cashing in their chips and bidding the industry adieu in the auction will have to live with the new retrans consent process post-auction. With that in mind, those hangers-on should pay particular attention to the FCC's currently open retrans rulemaking.

In their current form the retrans consent rules require television licensees and cable and satellite operators to conduct their retrans negotiations "in good faith". The rules set out two separate ways to determine whether any particular negotiations meet that standard. First, the FCC has identified a number of specific practices that are *per se* violations of the requirement. Second, in the absence of any of those practices, the good faith or bad faith of any negotiating party will be based on analysis of the "totality of the circumstances".

In a flashback to the days of Chairman Martin , the NPRM does not propose any specific rules.

As we reported almost a year ago, Congress (in the STELA Reauthorization Act of 2014, a/k/a STELAR) added two *per* se violations to the existing list. The two new, Congressionally-mandated violations of the "good faith" bargaining requirements (about which we previously reported): (1) joint negotiations by non-commonly owned station within a market and (2) blocking by a broadcaster of the importation of a significantly-viewed signal into its market. Congress also directed the Commission to take another look at the "totality of the circumstances" standard used in determining whether retrans negotiations have been conducted in good faith. And in a Notice of Proposed Rulemaking (*NPRM*) released last month, the FCC has asked for comments on what, if anything, it might do along those lines. We can expect the proceeding to be contentious.

Historically, the FCC has had surprisingly little to say about the "totality of the circumstances" in retrans negotiations. It has issued decisions in only four cases of "good faith" claims, and it has ever found only one violation. (This doesn't mean the issue hasn't been raised more often. In practice, when such claims are filed, the parties themselves usually reach an agreement fairly quickly, mooting the claim before the FCC can come to a decision. Frequently in such cases, though, the Commission has informally involved itself by reaching out to both parties in an attempt to resolve disputes after the filing of a claim.)

What does the Commission have in mind now? It's hard to say because, in a flashback to the days of the Chairman Martin Commission, the *NPRM* does not in fact propose any specific rules. Instead, it asks a long series of questions about whether certain specific practices should be considered in a claim of bad faith, and what, if any, more general changes may be required to update its "totality of the circumstances" test. While cable and satellite operators may be cheered that the majority of the practices about which the FCC specifically requests comments address broadcasters' actions in negotiations, the Commission does identify a few practices applicable to MVPDs as well as broadcasters. And in any event, the FCC does indicate that any standards it adopts will be applied to both parties to a negotiation (to the extent they apply).

The *NPRM* is primarily devoted to discussion of certain specific negotiation practices that – according to some interested parties (mainly MVPDs, it would seem) – should be considered evidence of bad faith. The Commission requests comment on whether these practices should be considered at all and, if so, whether they should be deemed to be *per se* evidence of bad faith or just items to be considered under the "totality of the circumstances" test.

Among the behaviors considered is the practice by some broadcasters of preventing online access to their programming while their signals are blacked out on a particular cable or satellite system. The FCC acknowledges that, in such circumstances, the broadcaster's programming remains readily available to the local audience through over-the-air reception; but the *NPRM* evinces some apparent concern with this practice, particularly if it affects customers who subscribe only to the MVPD's Internet services (*i.e.* not their video offerings) or customers who reside in markets that are not otherwise affected by the retrans consent dispute. The FCC also requests comment on the practice of granting to third parties (*e.g.*, networks) the right to negotiate or approve retransmission consent agreements. That, of course, is a practice to which MVPDs have been vocally opposed.

Further demonstrating the increasing importance of online access to programming, the FCC also requests

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comment on how, if at all, it should consider an MVPD's demand for online rights, or a broadcaster's refusal to grant such rights.

The *NPRM* also requests comment on the practice of "bundling" in the more traditional sense. In this context, "bundling" involves the insistence by a broadcaster that the MPVD carry programming from other broadcast stations or cable networks as a condition to consent to carry the desired broadcast station. What a difference a decade and a half makes! In 2000, the FCC had found that this practice was presumptively acceptable (absent any violation of the antitrust laws). Indeed, "bundling" was one of the primary forms of compensation broadcasters historically received (at least until cash compensation became a viable negotiating term). That was then, this is now: the *NPRM* specifically requests comment on whether it would be a violation of good faith for a broadcaster to insist on the MVPD's agreement to carry an as-yet-unlaunched programming source as a condition to allowing the MVPD to carry the broadcaster's existing station. (Perhaps not surprisingly, DISH recently complained that Sinclair Broadcasting has made such a demand.) And if insistence on bundling were to be deemed a factor to be considered under the "totality of the circumstances" analysis, the Commission asks how an alternative offer of standalone carriage (presumably in return for cash consideration in lieu of any bundling) should be factored into the mix.

Without significant discussion of any specifics or in-depth analysis, the *NPRM* also requests comment on whether any of the following practices should be considered in the "totality of the circumstances" analysis:

- Setting expiration dates immediately prior to "must see" programming (*e.g.*, Superbowl®). Such scheduling can put pressure on the MVPD to get a new deal done in time to insure that it will be able to provide the "must see" programming to its subscribers; failure to achieve that goal can result in negative publicity;
- Preventing an MVPD from importing an out-of-market signal during a broadcaster-imposed blackout following the initial failure of the parties to reach a retrans agreement; ditto for prohibiting (under the same circumstances) an MVPD from exporting a signal to another market, at least where the station is significantly viewed;
- Placing limits on subscribers' use of lawful equipment (*e.g.*, DVRs, etc.);
- Demanding fees based on viewers who are not video subscribers of the MVPD;
- A failure by either party to provide substantiation for its negotiating positions;
- "Surface bargaining", *i.e.*, conduct that's "designed to delay negotiations, but that does not necessarily constitute an outright refusal to bargain";
- Discrimination against non-affiliated MVPDs by an MVPD-affiliated broadcaster;
- Demanding "most favored nation" (a/k/a MFN) protections;
- Failure by a broadcaster to make an initial proposal at least 90 days prior to expiration of an existing agreement;
- Preventing an MVPD from disclosing rates, terms or conditions to the FCC or other governmental forum in connection with the prosecution of a complaint or other proceeding;
- Imposition of penetration requirements;
- Demand for placement of affiliated channels on a specific tier;
- Discrimination by broadcasters between MVPDs absent a showing of a legitimate justification; and
- Failure by either party to negotiate based on actual local market conditions.

More generally, the Commission is also looking for input on how it should determine whether any of these practices, or others that may arise, could be factored into the determination of whether or not parties have negotiated in good faith. Back in 2000 the FCC had concluded that Congress expected it to follow established precedent from other areas of law – especially labor law – in determining whether negotiations had been conducted in good faith. The Commission is now asking whether there have been any recent precedents – in labor law or in other areas of the law – that might be useful in determining what constitutes good faith.

Retransmission consent has become crucial to many TV stations, as well as MVPDs. The existing system has afforded many television licensees the opportunity to negotiate on a playing field substantially different from the field that existed when the retrans consent option was first introduced more than 20 years ago. But the *NPRM* clearly suggests that the FCC is contemplating changes – and likely major changes – to the existing system.

The outcome of this proceeding will be critically important both to broadcasters who rely on retrans fees as a source of revenues and other compensation and to MVPDs trying to keep down the costs they pay for programming. In view of the open-ended nature of the questions posed in the *NPRM*, it would obviously behoove any and all interested parties to share their own views and experience with the FCC. Comments in response to the *NPRM* are due to the Commission by ***December 1, 2015***; reply comments by ***January 14, 2016***. Comments may be submitted through the FCC's ECFS filing system; refer to Proceeding No. 15-216.

A STELAR assortment of changes

Some (But Not All) New Market Mod Rules Kick In November 2

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The market modification process is about to get, um, modified, and thanks to Congress, it will be more inclusive as a result. In fact, the FCC has already signed off on the changes and some, but not all, of them are set to take effect on November 2. Read on for details.

As a general rule, a broadcast television station is carried on cable systems located in the station's local market. That market is determined by the Nielsen-assigned Designated Market Area, or DMA, in which the station operates. Satellite services similarly deliver a station's signal to subscribers located in that market.

In certain cases, however, the DMA doesn't accurately reflect the true "local" market of a particular station. Recognizing this, the Commission has long had procedures in place to allow a broadcaster or cable operator to modify the relevant market for carriage on any particular cable system. Until now, the market mod procedure has *not* been available for satellite carriage. In STELAR, however, Congress directed the Commission to expand the procedures to cover satellite carriage as well as cable; Congress also directed the FCC to amend its rules for both services to promote access to in-state programming. (We reported on the FCC's initial response to Congress's direction back in March.)

*The FCC has added a fifth factor to be considered in **both** cable **and** satellite mod petitions.*

Under the new rules, satellite market modification petitions will entail essentially the same considerations as cable market modifications, with a few key differences. Some of the new changes will also be applied to future cable market modifications.

Historically, the Commission has considered four statutory factors in evaluating a market mod request:

- Whether the station, or other stations in the same area, have been historically carried on the cable and/or satellite systems serving the community;
- Whether the station provides local service to the community;
- Whether any other station eligible to be carried by the cable or satellite system covers local news and events of interest to the community; and
- Evidence of over-the-air viewership in the community.

Note the significance of the concept of "community". Whether or not a market mod is granted depends largely on a showing that a given community is (or is not) part of the broadcast station's "local market", regardless of what Nielsen may have determined. In the cable context, this tends to be straightforward, since cable operators generally register with the Commission to serve specific communities and are assigned Community Unit Identification Numbers (CUIDs).

But what constitutes a "community" for purposes of *satellite* carriage? In that context, the Commission has decided to evaluate satellite market mod requests on the basis of counties. This definition was chosen mainly because DISH bases its coverage on counties and DirecTV, while it bases coverage on zip codes, had indicated that it would accept the county as the community unit.

Based in part on this new definition of "community" for satellite market modification purposes, the Commission also decided that it would be a good idea to allow county governments to petition for market modifications insofar as satellite carriage is concerned. Note that this differs from the rules applicable to cable, which accord "standing" to file modification petitions only to the broadcaster or cable operator. (While the FCC recognizes that it's unlikely that a county could obtain a market modification without the agreement of either the broadcaster or the satellite operator, it figures that expanding its standing rules for satellite market modifications could help solve the "orphan county" problem STELAR had directed it to address.)

To the four factors listed above the FCC has now added a fifth factor, which will be considered in ***both*** cable ***and*** satellite modification petitions. The goal is to promote access to in-state programming. Under this factor, the FCC will favor any modification petition that would promote access to an in-state station by adding a community to the local market of any station licensed to that state. Under this factor, the Commission will require only that the station show that it is licensed to an in-state community; the station will ***not*** need to show that it in fact provides local service to the community that it is requesting to add to this market. Nor will the station need to show that the community-to-be-added is not already served by other in-state stations (although such showings will be considered as "enhancing" a petition).

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While this new factor may be important, the Commission has confirmed that it does not trump the other four factors. If those other factors are not satisfied, a solid showing under the new factor will not necessarily result in grant of a petition. Conversely, failure to satisfy this new factor will not preclude grant of a modification petition. In cases where the community is not in the station's state, the factor will simply be inapplicable.

Under the new rules, the evidentiary showing required for satellite modifications will, with the addition of in-state showing noted above, be the same as it has been for cable market modification petitions. Any modification will be applicable only to the specific communities and stations included in the petitions. Modifications will also be granted only against the satellite operator(s) named in the petition.

While a station can name both DISH and DirecTV in a single request, modifications for cable and satellite cannot be combined in a single petition. Prior cable market modifications will not be automatically applied to satellite, but they will be considered under the "historical carriage" factor.

Prior cable market modifications will not be automatically applied to satellite.

One ministerial change adopted in the Order (and not before its time) is to update all references to a station's Grade B contour to the digital Noise Limited Service Contour (NLSC) to reflect the completion of the conversion to digital broadcasting.

If a cable or satellite market modification is granted under the new rules, the station will have 30 days from the effective date of that grant to elect mandatory carriage or retransmission consent relative to the covered cable or satellite operator. The new rules do not, however, change what happens if a station fails to make that election: it will default to must-carry on cable operators and to retransmission consent on satellite.

If the station elects mandatory carriage, the covered satellite operator must commence carriage within 90 days of that election. A petition for reconsideration will not toll that deadline, although the filing of a recon petition will toll a satellite or cable operator's right to implement a modification that deletes a community from a station's local market.

The major difference between cable and satellite market modification procedures is the availability to satellite operators of an "infeasibility" defense to a market modification petition. This is what Congress ordered: in STELAR, it directed the Commission to exempt a satellite carrier from any carriage modification if it was "not technically and economically feasible" for the satellite carrier to implement that modification. The Commission has duly adopted some detailed procedures for how an "infeasibility" defense could be raised, and the evidence that would be required. While they may look good on paper, they may end up being somewhat difficult to implement.

First, it will be considered *per se* infeasible for a satellite operator to carry a station to areas outside those covered by the spot beam on which the station is currently carried. If a satellite carrier submits a "detailed certification" (discussed below) making this showing, it will not be required to carry the station to such areas. All other potential grounds for an infeasibility defense will be considered on a case-by-case basis; in the event that the asserted grounds apply to only part of a county, the satellite operator will be exempted from carrying the station only to that part of the applicable county.

As part of any infeasibility claim, the satellite operator will have to: describe (under penalty of perjury) the process by which it determined that carriage is infeasible; and certify (also under penalty of perjury) that the same analysis has been applied to all other stations on the spot beam of the affected station. The Commission will not routinely require supporting documentation for such a certification, but it reserves the right to do so in any particular case. Accordingly, the satellite operator must retain such documentation during the pendency of any market modification in which the defense is raised.

Recognizing the inefficiency of examining all of the other market modification factors in a case where the satellite operator will ultimately claim infeasibility, the Commission has provided a "pre-filing coordination process" by which a station considering a market modification petition can find out if such a defense will be raised. Under the process, the petitioner (most likely a broadcast station, but possibly also a county government) must request in writing whether the satellite operator will raise an infeasibility defense to a proposed market modification. The satellite operator must then respond, via ECFS, explaining in detail any infeasibility defense it intends to raise. Such responses must be provided within "a reasonable amount of time", which generally means within 45 days, although that time may be extended under extenuating circumstances.

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NEWs to take advantage of the proxy fee, thus reducing their recordkeeping burdens and technological needs.

The one provision of the SoundExchange/CBI deal that the CRB declined to bless just now is the provision that would have made SoundExchange the "Collective", *i.e.*, the sole designated receiving agency to administer the statutory license by collecting and distributing royalties from NEWs. The CRB will get around to selecting a Collective when all the rest of the *Webcasting IV* proceedings are concluded. (SoundExchange probably doesn't have much to worry about, though, since the CRB observed that no other entity has been proposed to serve as the Collective with respect to any of the webcaster classifications. As a result, it's almost certain that SoundExchange will eventually get the nod.)

Public Radio Webcasters – the SoundExchange/NPR-CPB Agreement

Things moved similarly smoothly for public radio webcasters. This group includes National Public Radio (NPR), American Public Media, Public Radio International and Public Radio Exchange, as well as up to 530 originating public radio stations. (To qualify, a radio station must be either: an affiliate of NPR, American Public Media, Public Radio International, or Public Radio Exchange; a member of the National Federation of Community Broadcasters; or qualified to receive funding from the Corporation for Public Broadcasting (CPB) pursuant to its criteria). The CRB has adopted a partial settlement negotiated by SoundExchange, on the one hand, and NPR and CPB (on behalf of the public radio webcasters), on the other. (As with the NEWs arrangement described above, the CRB declined for the time being to name SoundExchange as the Collective, even though the agreement called for it.) There don't appear to be any manifest changes in rates or terms from the arrangements in effect during the 2011-2015 period. However, public radio will continue to administer the arrangements as in the past, so eligible stations should be on the lookout for direct notice(s) from NPR or an NPR affiliated entity for guidance.

Other Webcasters

What of everyone else – the Commercial Webcasters (including "pureplay" webcasters), the Commercial Broadcasters, the Noncommercial Webcasters that don't fall into either the Noncommercial Educational or the Public Radio classifications? What will they pay? What will be their cut off for the highly coveted "small" or "microcaster" classifications that enjoy exemption from the Report of Use filing requirement? Will those "small" or "microcaster" classifications even exist (there was scant, if any, mention of them in any of the parties' pre-hearing briefs to the CRB)?

The jury – or, more accurately, the CRB – is still out on those and other similar questions. But the webcasters did score a victory recently when the Register of Copyrights issued a memorandum saying that direct licensing agreements between webcasters and record labels ***can*** be entered into evidence and considered by the CRB in the ratemaking process.

The backstory here starts with Section 114(f)(5)(C) of the Copyright Act, which bars the CRB – in setting rates and terms for future periods – from relying on settlement agreements entered into by webcasting representatives, on the one hand, and SoundExchange, on the other, pursuant to the Webcaster Settlement Act of 2009. The particular agreements that the CRB may not rely on were intended to settle lawsuits seeking to overturn the CRB's 2007 *Webcasting II* decision; they led to the overall licensing structure that has largely stayed in place since the agreements were reached. But Congress did not want the particular settlement agreements to guide the CRB going forward because of the peculiar circumstances from which they arose: those agreements were, in the Congress's words, motivated by "the unique business, economic and political circumstances of webcasters, copyright owners and performers rather than as matters that would have been negotiated in the marketplace by a willing buyer and willing seller".

Since then, webcasters have in many instances engaged in direct licensing negotiations with copyright holders for the right to use the copyrighted works. These negotiations, of course, had nothing to do with the Webcaster Settlement Act of 2009 or the long-past litigation over the *Webcasting II* decision. Rather, they constituted arm's length efforts by webcasters and copyright holders to determine the actual current value of digital performance of sound recordings.

However, some of these licenses contained language very similar – even identical – to language that appeared in the settlement agreements reached under the Webcaster Settlement Act of 2009. Because of that, SoundExchange argued that the CRB should not consider them as part of the CRB's effort to set rates and terms for the 2016-2020 period. Webcasters, by contrast, argued that, while likely influenced by the earlier settlement agreements, these negotiated licenses were separate and distinct from the limited universe of settlement agreements identified by Congress as out-of-bounds for the CRB.

The Register (for a number of detailed reasons we don't need to get into here) agreed with the webcasters, which is probably a good thing for webcasters. SoundExchange is seeking a sharp increase in webcast-

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Revision of On-Air Contest Rule Hits the Federal Register …

but the new rule still won't be effective for some time.

Last September we reported on the FCC's decision to (finally) allow broadcasters to post on their websites the rules to contests they promote on the air. The Commission's Report and Order has now made it into the Federal Register. That's the good news. The bad news is that that fact does ***not*** mean that the new rule has taken effect. That's because the new rule imposes some "information collections", and we all know what that means: rules involving new "information collections" cannot take effect until they have been run through the Paperwork Reduction Act drill. That process requires the Office of Management and Budget to look the new rule over and declare it OK, at which point the FCC publishes another notice in the Federal Register announcing the effective date. While the OMB review process is already underway for the revised contest rule, it's not likely to wrap up for another few months. Check back with CommLawBlog.com for updates on that front.

The publication of the Report and Order in the Federal Register does do one thing: it establishes the date by which any petitions for reconsideration of the new rule must be filed. That date is ***November 23, 2015***. Given the seemingly unanimous support that this rule change attracted, we're not sure why anyone might seek reconsideration, but if they want to, they now know their deadline. We'll keep an eye out and report on any petitions for reconsideration that walk in the door.

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If a satellite operator responds that it does intend to raise an infeasibility defense, the prospective petitioner can then either file a full market modification petition nonetheless, or may file a petition challenging only the infeasibility claim. If a satellite operator does not raise an infeasibility claim during the "pre-filing coordination process" or during consideration of the initial market modification petition, it cannot later attempt to deny carriage on that basis without initiating an entirely new market modification petition to delete the added communities from the station's market. If carriage is currently infeasible, the FCC will not grant a market modification prospectively (*i.e.*, a mod that would become effective after the infeasibility was resolved).

With the new procedures now in place, we can expect television stations and both cable and satellite operators to start lining up to file petitions to add or delete communities. They may want to wait a bit, though, because such petitions may be filed once the rules become effective. When that will be is not entirely clear. Technically the new standards will take effect on November 2. ***BUT***, because some of the changes also involve new "information collections", those must be run past the Office of Management and Budget thanks to the Paperwork Reduction Act. Until OMB has blessed them, the Commission cannot implement those changes. It's unlikely that that process will be completed for another several months. (Check back here for updates on that front.)

So, what would the Commission do if it received a petition under the new standards before OMB approval? Based on one recent decision, it appears that the Commission will consider them nonetheless, although in that case – involving a cable market modification – the only new factor to consider was access to in-state programming, which was inapplicable in any event because the station was not in the same state as the communities. What happens in a case where a showing under the new standards are critical, or where one party argues that they should not even be raised before OMB approval, remains a more open question. Perhaps more interesting, however, is what happens if a broadcaster initiates a "pre-filing coordination process" before the rules take effect. Without OMB approval, the Commission can't enforce its requirement that the satellite operator file a response, since that would be an "information collection" not yet approved by OMB. What happens then? Who knows, and hopefully we will not need to find out.

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ing rates for 2016-2020. But, under the directly-negotiated licenses that the CRB may now consider as part of its rate-making deliberations, webcasters like Pandora, IHeartMedia and others are paying significantly less than SoundExchange is asking for. Importantly, the terms of those licenses stand out as actual, concrete examples of what a willing buyer and willing seller in this marketplace would agree on – in, fact, ***have agreed on*** – as the actual value for digital performance of a sound recording. In that regard they may provide the CRB more persuasive evidence of the proper rates to be set.

Webcasters seeking more of the same – or at least no significant changes from the rates and terms to which they have been subject – thus have reason to remain optimistic.

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of the construction deadlines for those permits is "presumptively in the public interest" as long as the AM station proposing to use the still-unconstructed translator commits to build it and commence operation promptly. (Also apropos of the 2003 translator applications, the Commission has committed to conducting an auction aimed at finally disposing of the still-ungranted mutually exclusive applications – but that won't happen until sometime after the Broadcast Incentive Auction has wrapped up.)

After both Modification Windows have opened and closed – *i.e.*, sometime in 2017 or thereabouts – the Commission will open another two FM translator windows for any AM station that did not file a modification application during either of the 2016 windows. Again, each applicant will be able to file for one and only one *new* translator. It will have to comply with the siting rules for fill-in translators rebroadcasting AM stations and, if the application is granted, the resulting translator will be *permanently linked* to the AM station specified in the application.

The Commission has now re-thought the notion of abandoning the Mattoon policy.

Again, the first of these two New Translator windows will be open only to Class C and D stations. The second – which will be open to all AM licensees and permittees who did not participate in any of the three earlier window – will be scheduled only after the first New Translator window has closed and the applicants in that window have had a change to resolve any mutual exclusivities through settlement or technical resolution.

Before the first Modification Window opens, the Media Bureau will engage in a three-month outreach effort to encourage Class C and D stations to participate in the process. That effort started immediately after the adoption of the *Revitalization Decision* with the release of a helpful public notice summarizing the process and conditions associated with the Modification Windows. Note also that the Bureau will be sending window-related information directly to all Class C and D AM licensees; look for an email addressed to the licensee's contact representative as listed in CDBS. (The notice provides instructions for checking and, if necessary, changing, your CDBS contact rep.) The Bureau has also established a dedicated email address – AMmodification@fcc.gov – for questions about the window process, and it plans to set up an AM Revitalization page on the FCC's website.

When the FCC first proposed some translator window filing opportunities for AM licensees back in 2013, it suggested that the availability of such opportunities might obviate the need for the *Mattoon Waiver* policy. That's the policy, invented by the Audio Division four years ago, that allows AM licensees some leeway in moving FM translators around so that they can be used to rebroadcast AM signals. The policy, as characterized by the full Commission, requires that:

> (1) the applicant does not have a history of filing serial minor modification applications;
>
> (2) the proposed site is mutually exclusive with the licensed translator facility; and
>
> (3) the translator will rebroadcast the proposed AM primary station.

The Commission has now re-thought the notion of abandoning the *Mattoon* policy. Instead, in the *Revitalization Decision* the FCC expressly directs the staff to continue granting *Mattoon* waivers where appropriate (*i.e.*, when the criteria listed above are met). Interestingly, the FCC also takes this opportunity to ratify a largely unreported tweak to the policy that the Audio Division had tacked on somewhere along the way: FM translator stations whose facilities are modified, pursuant to a *Mattoon* waiver, to permit rebroadcasting of an AM station must rebroadcast that station for at least four years (not counting silent periods).

The Commission was not, however, willing to extend the *Mattoon* policy as had been proposed in the *Tell City* proceeding. While that proceeding is still technically pending before the Commission, the agency declined to take this opportunity to resolve it one way or the other. It did, however, expressly hold that, until otherwise instructed, the staff is not to extend *Mattoon* beyond the criteria indicated above.

In addition to the translator windows, the *Revitalization Decision* includes a number of less dramatic – but still potentially helpful – technical tweaks to the AM rules. And according to the folks at Cavell, Mertz, some of these non-translator-related changes may provide some AM stations opportunities worth exploring. For example:

Community Coverage Requirements for AM Stations

To make it easier for existing AM stations to improve their facilities, the FCC has relaxed its city-grade signal requirements. Going forward, a licensed AM station's daytime 5 mV/m contour (predicted or measured) will need to encompass only 50% of the popula-

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tion ***or*** the area of the community of license. This relaxed standard will not be available to applicants for (a) new stations or (b) a change of an existing station's community of license.

The Commission also decided to eliminate the nighttime community coverage requirement for existing licensed AM stations. Again, though, that relaxation will ***not*** be available to applicants for new AM stations or changes in community of license; those folks will instead be required to cover (a) either 50% of the population ***or*** area of the community of license with (b) either a nighttime 5 mV/m signal or a nighttime interference-free contour, whichever value is higher.

"Ratchet Rule" Eliminated

The so-called "ratchet rule" has been eliminated. If you don't already know what the ratchet rule is, this is good news for you, since you won't have to try to wrap your mind around it. (For some background, check out our blog post on the topic; it dates back to 2009, when elimination of the rule was first formally proposed.) Suffice it to say that the ratchet rule was an extremely technical rule that, in effect, tended to discourage station improvements. Highly respected consulting engineers – namely, our friends Ron Rackley and Ben Dawson – recognized the overall counterproductivity of the rule more than six years ago, and so advised the FCC. The only real question here is why it has taken the Commission so long to get to the same conclusion.

Prior Approval to Use MDCL No Longer Required

Since 2011 the Media Bureau has allowed AM stations to utilize Modulation Dependent Carrier Level (MDCL) control technologies, subject to the Bureau's prior approval. MDCL allows an AM station to vary the carrier (or the carrier and sideband) power levels as a function of the modulation level, thus allowing the station to reduce transmitter power consumption while maintaining audio quality and signal coverage.

With four years' of apparently problem-free MDCL experience under its belt, the Commission has now decided to let AM stations use MDCL control operation without prior Commission authority. There are a couple of catches, though. A station using MDCL must notify the Commission within 10 days after commencement of MDCL operation. And, regardless of the MDCL control technology employed, stations will have to achieve full licensed power at some audio input level or when the MDCL control technology is disabled. Further, a station using MDCL control technology must disable it before field strength measurements on the station are taken by the licensee or others.

Antenna Efficiency Standards Relaxed

To give AM stations greater flexibility in site selection and antenna system design, the Commission has reduced the existing AM antenna efficiency standards by 25%. And while the FCC declined to eliminate the antenna efficiency requirements altogether, it did direct the Media Bureau to entertain requests for experimental authorizations that would allow existing AMers to operate with antenna systems that don't meet the modified antenna efficiency rules. To get such an authorization, you'll have to demonstrate both that: (a) such operation won't increase interference to other AM stations and (b) the proposed system will be stable.

Effective Dates

With the exception of the MDCL procedures, the various rule changes adopted will go into effect 30 days after the order is published in the Federal Register. The MDCL changes involve "information collections" which must first be run past the Office of Management and Budget, thanks to the hilariously-named Paperwork Reduction Act. Check back here for updates about both effective dates.

Additional Proposals

In addition to the specific changes described above, the *Revitalization Decision* includes a number of proposals for further changes. Some of these proposals are relatively specific; they're set out in the "Notice of Proposed Rule Making" (NPRM) portion of the decision. Others are more general and likely to require more time to gestate; they're in the "Notice of Inquiry" (NOI) portion. Because the former are presented in an NPRM, the Commission could act on them following the closing of the comment period. The proposals described in the NOI portion, on the other hand, will have to be the subject of a separate NPRM before they can be adopted.

The proposals included in the NPRM are:

- *Change the Nighttime and Critical Hours Protection for Class A AM Stations*. Interference protection for all Class A stations would be modified in various ways: (1) Co-channel protection, both day and night, would be to their 0.1 mV/m groundwave contour; (2) First adjacent channel protection, both day and night, would be to their 0.5 mV/m groundwave contour; and (3) Critical

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hours protection would be eliminated completely. If adopted, this proposal might allow some non-Class A stations to increase power.

- *Change Nighttime RSS Calculation Methodology*. The pre-1991 methodology for calculating RSS values of interfering field strengths and nighttime interference-free service would be reinstated. Under that methodology, an applicant would predict the nighttime interference-free coverage area using only the interference contributions from co-channel stations and using the 50% exclusion method. (If you have trouble understanding those last two sentences, fear not – you're not alone. You should get together with a consulting engineer familiar with the AM technical rules.)

The nighttime community coverage requirement has been eliminated for existing licensed AM stations.

- *Change Daytime Protection to Class B, C and D AM Stations*. The Commission is considering various changes to other protection requirements, including: (1) reducting the first adjacent channel protection for Class B, C and D stations to 0 dB daytime 1:1; (2) changing second adjacent channel groundwave protection; and (3) eliminating third adjacent channel groundwave protection. The goal is to allow stations sufficient signal strength to overcome current levels of environmental noise. The Commission is also proposing to change the daytime primary service contour for Class B, C, and D stations to the 2 mV/m contour, harmonizing the protection with the definition of "service area" adopted in the *Rural Radio* proceeding.

- *Relaxing Restrictions on Where FM Translators Rebroadcasting AM Stations May be Located*. Currently, the 1.0 mV/m contour of an FM translator rebroadcasting an AM station must be within the *lesser* of the AM station's 2.0 mV/m contour or a 25-mile circle around the AM station's transmitter site. Now under consideration: modification of that limit to provide that the 1.0 mV/m contour of an FM translator rebroadcasting an AM station must be contained within the *greater* of either the 2 mV/m daytime contour of the AM station or a 25-mile (40 km) radius centered at the AM transmitter site; under the proposal, though, in no event would the translator's 1.0 mV/m coverage contour be permitted to extend beyond a 40-mile (64 km) radius centered at the AM transmitter site.

- *Other Technical Rules Changes*. The Commission also proposes to relax in some measure its rules regarding partial proofs of performance and Method of Moments proofs. (If you would like further details regarding these proposal, please let us know.)

- *Expanded Band Issues*. Twenty-five station owners that were awarded an expanded band (1605 to 1705 KHz) license still also hold the license for the standard band station that the expanded band facility was intended to replace. This is contrary to the general expectation back when the band was expanded, *i.e.*, that a licensee taking advantage of the expanded band would have to give up its standard band station. The Commission is now proposing that any licensee with dual standard band/expanded band authorizations be required to surrender one of the two authorizations.

Finally, the NOI portion of the *Revitalization Decision* raises two questions for comment:

> Should the expanded band be re-opened for additional applications and, if so, what rules and procedures should be applied?
>
> Should the main studio requirements be relaxed for AM stations?

The deadlines for comments and replies in response to both the NPRM and NOI portions have not yet been set. Check back with CommLawBlog.com for updates.

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rently being circulated is separate and distinct from – and mutually exclusive with – the RMLC settlement arrangement. Stations need to recognize that and, to the extent they have questions or concerns about which way to go, they should consult with their counsel before making a decision. The deadline set by SESAC for accepting their latest offer is November 15. To sign up with RMLC, a station has until November 20 to get its Authorization form submitted. (RMLC had originally set October 31 as the deadline, but has recently extended it to November 20.)

Reverse Auction Workshop Set for November 17

Further evidence that the Broadcast Incentive Auction is ramping up, and fast: the Commission has announced that it will be conducting a three-hour workshop devoted to the reverse auction process on ***November 17, 2015 from 10:00 a.m. to 1:00 p.m.*** Representatives of the Incentive Auction Task Force, the Wireless Bureau and the Media Bureau will take attendees through a wide range of useful auction information covering the "pre-auction process and guidance on how to complete and submit the Form 177, including an overview of ownership requirements, channel sharing agreements, and the red light rule". Exactly how they plan to cram all that into three short hours isn't clear, but what the heck.

The confab is going to be held in the Commission Meeting Room at the Portals in D.C. It's free, but seating will be limited, so you might want to get there early. The Commission recommends that you shoot to arrive at least 30 minutes prior to the start time "to allow time to go through the security process for admission to FCC Headquarters" – but we suggest that you allow even more time than that. You can streamline the check-in process by pre-registering (submit your name and company affiliation to auction1001@fcc.gov, with the subject line "Reverse Auction Workshop").

Can't make it to Washington that day? No problem – the workshop will be live-streamed at www.fcc.gov/live. Remote attendees will be able to email questions in through auction1001@fcc.gov. The gig will also be recorded for later viewing on the FCC's website.

The Incentive Auction is going to be an extraordinarily complex undertaking, with lots of moving parts. Any broadcaster planning on participating in the reverse auction component would be extremely well-advised to attend the workshop – and be prepared to take good notes.

FHH - On the Job, On the Go

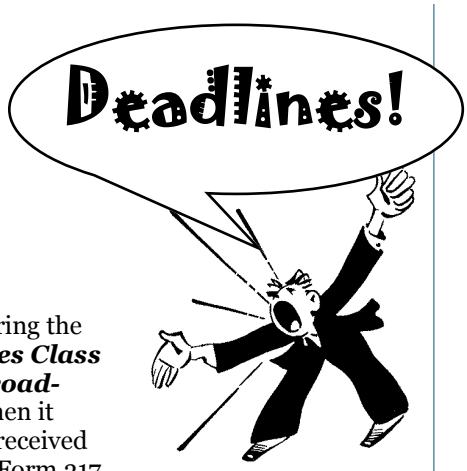
On October 23, **Kevin Goldberg** helped celebrate Free Speech Week by participating on a panel at the National Press Club in Washington on Free Speech in the Digital Age. In addition to **Kevin**, the panel – which was co-sponsored by the NAB's Educational Foundation and the NCTA – featured former high-level FCC staffer **Adonis Hoffman** as well as reps from The Huffington Post and Facebook.

Frank Montero will be pretty much living on the D.C.-NYC corridor in November. On November 8 he'll be in D.C. for the Hispanic Bar Association's Equal Justice Awards Dinner. Two days later, look for him in New Jersey, where he'll be attending a board meeting of the New Jersey Broadcasters Association. From there he'll toddle on up to the Big Apple for the Radio Ink Forecast conference on November 17. Then back down to D.C. for the National Hispanic Media Coalition's Impact Awards Reception on the 18th.

Despite his busy travel schedule this month, **Frank M** probably still won't log as many miles as **Frank Jazzo**. **Frank J** will be making the annual pilgrimage to Alaska, where he'll be leading the "Regulatory Update" session at the Annual Convention of the Alaska Broadcasters Association in Anchorage, which runs from November 4-6. **Frank**'s panel will be on November 5.)

Holiday Schedule Reminder

Fletcher, Heald & Hildreth, P.L.C.
will be officially closed on
Wednesday, November 11 (Veterans Day),
November 26-27 (Thanksgiving weekend),
December 25 and January 1.



November 17, 2015

Broadcast Incentive Auction – The FCC is providing a pre-auction tutorial on reverse auction processes. It will be held at the FCC's Headquarters and will be available via Internet at the FCC's website.

December 1, 2015

DTV Ancillary Services Statements – All DTV licensees and permittees must file a report on FCC Form 317 stating whether they have offered any ancillary or supplementary services together with its broadcast service during the previous fiscal year. ***Please note that the group required to file includes Class A TV, LPTV, and TV translator stations that are offering digital broadcasts***. If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report on Form 317 specifically asks for a list of any ancillary services, whether a fee was charged, and the gross amount of revenue derived from those services. Ancillary services do not include broadcasts on multicast channels of free, over-the-air programming for reception by the public.

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* and located in **Alabama**, **Colorado**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **Minnesota**, **Montana**, **New Hampshire**, **North Dakota**, **Rhode Island**, **South Dakota** and **Vermont** 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 **Colorado**, **Minnesota**, **Montana**, **North Dakota** and **South Dakota** 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 **Alabama**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

December 2, 2015

Biennial Ownership Reports – All *licensees* and *entities holding an attributable interest in a licensee* of one or more *commercial AM*, *FM*, *TV*, *Class A television* and/or *LPTV stations* must file a biennial ownership report on the FCC Form 323. Please recall that sole proprietorships and partnerships composed entirely of natural persons (as opposed to a legal person, such as a corporation) must file reports, as well as other licensee entities. All reports must be filed electronically. The Ownership Report must reflect information as of October 1, 2015. For this purpose, all Class A TV and LPTV stations are considered to be commercial stations.

December 18, 2015

Broadcast Incentive Auction – All *television* and *Class A television* stations wishing to participate in the spectrum incentive auction must file their applications on FCC Form 177 by 6:00 p.m. (ET). If an application has not been filed by this deadline, the station cannot participate in the incentive auction.

January 11, 2016

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the fourth quarter 2015 children's television programming reports must be filed electronically with the Commission. These reports then should be automatically included in the online public inspection file, but we

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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 there has been a notice about switching to the Licensing and Management System for the children's reports, and this system requires the use of the licensee FRN to log in; 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.

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Got all that? If you plan to enter into a CSA and a back-up CSA, you'd better – because we can all expect the FCC to be unforgiving should it find that its prohibition against bids/bidding strategies communications has been violated, regardless of the complexity of the rules it has contrived.

Even without this latest complication, the issue of prohibited communications is a landmine waiting to go off. The FCC has underscored its intent to enforce the prohibition rigorously, but at the same time the guidance the Commission has provided suffers from a certain degree of ambiguity and uncertainty. This is a major concern, because the consequences of being caught in a prohibited communication could be extreme: dismissal of auction applications, fines, and possibly even civil liability running well into seven figures (or more) if one party's violation is attributed to the other party to the communication, and that other party is fined or loses its auction application. Again, anyone participating in the auction should be extremely familiar with the prohibited communications rules and should take equally extreme care to avoid any conduct that might even arguably violate those rules.

To complicate things more, the FCC seems to contemplate only two-party CSAs, with only two licensees communicating about bidding strategy. But since there is no rule confining CSAs to only two parties, application of the anti-collusion rules to three-party CSAs may become a morass not unlike like the muck in the streets of a coastal community after a hurricane.

Extended Transitional Period

In addition to providing for back-up CSAs, the FCC has decided to extend the amount of time a sharee in a CSA (whether the agreement was struck before or after the auction) will have to relinquish its pre-auction channel. Originally, a sharee had a meager three months after receipt of its reverse auction proceeds to cease operation on its original channel and move on over to the shared channel. Not a lot of time for what could turn out to be a complicated process. But now that period has been expanded to ***six*** months (again, starting as of receipt of the auction proceeds). And, recognizing that even six months might not be enough in some cases, the Commission has indicated that it will be open to granting waivers to allow up to two additional three-month terms, so long as such waivers won't adversely affect the transition. So from the original three months, sharees will now have at least six months, and possibly even up to a year, to complete their move to shared facilities.