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NEWS AND ANALYSIS OF RECENT DEVELOPMENTS IN COMMUNICATIONS LAW

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"Local" no more

Radio, Cable, Satellite All Moving their (Previously) Local Public Inspection Files to the Internet

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To no one's real surprise, the FCC has decided to expand its online public inspection file requirement – first imposed on television broadcasters in 2012 – to include radio broadcasters, cable operators and satellite radio and TV operators, too. While the expansion will be phased in (supposedly to ease the burden on smaller operations and noncommercial radio licensees), everyone should expect to have their previously "local" public inspection files online and available to just about anybody anywhere as of March 1, 2018 at the latest.

While the specifics of the new online rules vary somewhat from service to service, the essential elements here are the same across all platforms. To the extent that you have been required by the FCC to maintain a "local public inspection file" available to the public, you will be expected to upload most, but not all, of the contents of that file to an FCC-maintained online system. Some materials that are filed with the FCC (*e.g.*, broadcast applications and/or reports filed through CDBS) will be automatically dumped into the online file by the FCC. But, as of a date the FCC will eventually announce (see below), pretty much anything else that's in the file will have to be uploaded in electronic format to the FCC's system.

The primary exception will be (as it was on the TV side) each entity's political file. Documents already in the existing political file will ***not*** need to be uploaded to the online file; they will, however, have to be maintained locally for as long as the rules require them to be retained (for broadcasters, that would be two years). But going forward from the effective date of the online system, all new political materials will have to be uploaded "as soon as possible" which, under the rules, means "immediately absent unusual circumstances".

A second exception for commercial broadcasters will involve "letters from the public". Commercial (but not NCE) broadcasters are, of course, required to place in their local public inspection files copies of letters and/or emails received from members of the public concerning station operations. Because of privacy concerns, such correspondence will ***not*** be required to be uploaded. Instead, stations will be required to continue to maintain, at their main studios, a public file containing such letters, in the unlikely event that anyone might ever ask to see them. (How unlikely? Even the Commission has acknowledged that "it's hard to imagine anyone ever visiting a station solely for the thrill of reading its mail". And following up on that très obvious (to us, at least) observation, the Commission has committed to opening up a separate proceeding looking to eliminating the "letters from the public" retention requirement. When that will occur, however, remains to be seen.)

The expanded online public file requirement is set to be rolled out as follows.

Before anybody has to do anything, the new rules will have to be given the once-over by the Office of Management and Budget pursuant to the hilariously-named Paperwork Reduction Act. That process is likely to take at least three-four months, possibly longer if unanticipated snags crop up. Once OMB has signed off on the new rules, the FCC will announce that sign-off in the Federal Register. Thirty days after that announcement, the new rules will be deemed effective.

That does not, however, mean that anybody will have to be in full compliance with the new rules as of that effective date. Rather, the effective date will be the first date on which

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On tap, the next five-year plan

CRB Kicks Off Three Ratemaking Proceedings

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A lot of attention has been devoted to the *Webcasting IV* decision which the Copyright Royalty Board (CRB) announced on December 16, 2015 (and then promptly revised on December 24). (Don't be embarrassed if you're not up to speed on all this; it was the middle of the holidays, after all. Just check out our post and you should be OK.) The ink on that decision isn't even dry – in fact, the full decision hasn't been published yet. We've seen the ultimate rates and terms for the next five years, but the rationale for those rates and terms hasn't shown up yet.

And yet, the CRB is back at it again.

The CRB has kicked off three (count 'em, three) separate ratemaking proceedings relating to the performance of other copyrighted works. With three "Notices Announcing Commencement Of Proceeding With Request For Petitions To Participate" published in the Federal Register, the CRB has invited one and all to address 2018-2022 performance rates to be paid in connection with:

- Satellite radio and "pre-existing" subscription services;
- Reproduction and distribution of phonorecords; and
- Public broadcasting.

If you have any interest in any, or all, of these, you've got until ***February 4, 2016*** to get your foot in the door. You do that by filing your Petition to Participate and ponying up a filing fee of $150.00 per proceeding.

Memo to Clients readers are probably least likely to feel much need to participate in the Satellite radio and "pre-existing subscription services" matter. That's because that proceeding will set the rates and terms for digital performance of sound recordings by satellite radio services – currently only Sirius XM – and cable radio services, also a relatively limited universe. And in keeping with the "we just finished and now we're back at it theme", litigation appealing the rates and terms set in 2013 by the CRB for these services for the years 2013-2017 was completed just a little over a year ago.

We're getting a bit warmer when we move to the reproduction and distribution of phonorecords. This involves the "mechanical reproduction" rate you pay to a songwriter or music publishing company when you want to make a copy of that song, most commonly as a cover version of the song on vinyl, CD or MP3 but also – importantly for many radio stations – on-demand streaming and podcasts.

The "public broadcasting" proceeding will set the rates and terms paid by noncommercial broadcasters to ASCAP, BMI and SESAC for performance of musical works via over-the-air broadcasting. While commercial radio stations are represented by the Radio Music License Committee in negotiations with ASCAP, BMI and SESAC (with the first two subject to oversight by a federal district court), noncommercial rates are set by the CRB. Just to be clear: this proceeding is NOT limited only to only public broadcasters; rather, it will set the rates for ALL noncommercial radio stations, including: (a) NPR/PBS affiliates; (b) non-NPR radio stations affiliated with educational institutions; and (c) other NCE radio stations that are neither NPR affiliates nor licensed to an educational institution. (For more detail on the nuances that differentiate these three categories, check out my CommLawBlog.com post from December 2012 – but remember, the new CRB proceeding involves all three.)

So wannabe participants have about a month to decide whether they want to pay

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If at first you don't succeed …

FCC Unveils Latest Versions of Broadcast Ownership Reports

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The FCC's seemingly *Sisyphian* quest to design the Perfect Broadcast Ownership Report has yielded a number of changes. Whether, as the Commission hopes, they are changes for the better remains to be seen, presumably when the next round of biennial ownership reports need to be filed in late 2017. For now, though, readers should be aware that the SUFRN is out (but not entirely), the RUFRN is in, and individuals in attributable positions with noncommercial educational (NCE) licensees will be having to get themselves an FRN or an RUFRN or risk some unspecified enforcement comeuppance. Also, NCE licensees will have to adjust their calendars: going forward, their biennial ownership reports will be due on December 1 of every odd-number year (with each report reflecting attributable interest holders as of the previous October 1.) And for those of us who end up actually having to fill in the form and get it filed, the FCC has tweaked the process in a number of ways, at least one of which should be helpful.

(Readers interested in some background on the recent history of ownership reporting may want to check the CommLawBlog archive before proceeding further. We think you'll find it at least as informative as, and considerably more entertaining than, the 11 single-space pages of background – with 93 footnotes! – provided by the Commission.)

So long, SUFRNs! Hello, RUFRNs!

Since 2009 the Commission has been trying to figure out how those with attributable interests in broadcast licensees should be required to identify themselves in ownership reports so that the FCC (and various outside researchers and analysts) will be able to keep reliable track of who holds what from year to year. The Commission initially left it to the Media Bureau to come up with a plan. The Bureau decided that every attributable owner, officer and director should be required to get his or her own unique FCC Registration Number (FRN). Those attributable principals would then be required to identify themselves in ownership reports with their respective FRNs.

Since individual principals – as distinct from licensees – had not previously had to get their own FRN's, and since they would have to give the FCC their social security numbers (SSNs) in order to do so, there was considerable opposition to the Bureau's plan. Before the FRN requirement could be implemented, the Commission came up with Plan B: the option of letting individual principals use a "Special Use FRN" (SUFRN). SUFRNs would be generated by an FCC computer during the completion of the ownership report, and would be available to anyone who preferred not to have to turn their SSN over to the Commission.

While that seemed to work fine as far as regulatees were concerned, the FCC wasn't happy. After three rounds of biennial ownership reports using SUFRNs, the Commission found that folks weren't using SUFRNs the right way and, as a result, the Commission wasn't getting the useful data it had been hoping for. Some reporting principals were apparently using more than one SUFRN (one was supposed to be the limit), and some SUFRNs were showing up for multiple individuals (again, each SUFRN was supposed to be assigned to, and used by, one and only one individual).

> *The Commission seems to think that the RUFRN option won't suffer from the problems encountered with SUFRNs.*

Enter the RUFRN.

The FCC has now adopted the "Restricted Use FRN" (RUFRN). This is a unique ID number assigned to each attributable principal (individuals only, no entities) of a broadcast licensee for use in ownership reports; going forward, each principal (with some limited exceptions – see below) will have to be identified in each report by reference to his or her RUFRN. (Of course, principals can also use full-fledged FRNs if they're so inclined.)

You'll get your RUFRN through the Commission's "Commission Registration System" (CORES) by providing your name, residential address, birth date and the last four digits of your SSN. The Commission figures that requiring just the last chunk of an SSN will assuage the fears of those reluctant to hand over their full nine-digit SSN. Once you've got your RUFRN, you'll have to report it in each ownership report you appear on.

The Commission seems to think that the RUFRN option won't suffer from the problems encountered with SUFRNs. That thinking may be a bit optimistic. It seems possible, if not likely, that individuals will be able to get themselves more than one RUFRN without much difficulty, whether by accident or design. We shall see.

Meanwhile, the Commission acknowledges that there are still bound to be hold-outs who refuse, for whatever reason, to get their own RUFRNs. For instance, some folks – think, in particular, high-profile celebrities, government officials, and the like – may prefer not to submit their

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residential addresses into large federal databases. There are also those who believe that, with the information being required by the FCC, miscreants would still have more than a 40% chance at correctly guessing the full SSN. And while the FCC insists that its databases are secure to the max, history suggests otherwise. As Commissioner Pai put it, "To anyone who believes that data stored in federal government IT systems is completely secure, I would respond with three letters: OPM."

Recognizing that some licensees may encounter "recalcitrant" principals who refuse to get their own RUFRNs (and who also refuse to provide the licensee with the necessary information to get RUFRNs for them), the Commission is leaving open the SUFRN option. But a reporting licensee may avail itself of that option ONLY after it has made "reasonable and good faith-efforts" to get the "recalcitrant" principal to get his/her own RUFRN – AND only after the licensee has informed the principals of "their obligations and the risk of enforcement action for failing to provide" their own RUFRN.

NCE biennial ownership reports will be due by December 1 of each odd-number year.

Hold on there – "risk of enforcement"? What exactly does that mean? That's unclear. The Commission merely raises an arched regulatory eyebrow and says that, when an SUFRN is used, "the Commission may take enforcement action against the filer and/or the recalcitrant individual." Such actions are to be made "on a case-by-case basis based on the facts and circumstances of each unique case." You have been warned … sort of.

NCE Licensees Must Now Include Unique Identifiers, and Other Personal Information, for Each Attributable Principal

When the Commission started down the road of requiring unique identifiers for all principals, that requirement applied only to commercial licensees. NCE licensees – and, more importantly, their principals – were off the hook.

Not anymore. Going forward, principals of NCE licensees will have to get their own RUFRNs (or FRNs) for inclusion in ownership reports. And, in addition to their unique identifiers, those principals will also have to provide their race, gender and ethnicity, as well as their addresses.

These new requirements may run into some resistance. After all, many (probably most) NCE licensees are non-stock entities whose governing boards consist of volunteers. In a substantial number of cases – state public broadcast licensees, for example – the boards include elected officials in an *ex officio* role. It seems likely that some will be reluctant to give the Commission all the information it's looking for, particularly since they haven't had to do so in the past. Again, we shall see.

No More Rolling Due Dates for NCE's

The Commission has decided to sync up the biennial filing date with the biennial filing date currently applicable to commercial licensees' ownership reports. That means that, going forward, all NCE biennial ownership reports will be due by December 1 of each odd-number year, and the reports will have to reflect the licensee's attributable principals as of the previous October 1. Historically, of course, NCE biennial reports have been due on the renewal application anniversary, which meant that a station's deadline depended on what state it happens to be in. No more. (And for all licensees, NCE and commercial, heads up to the ***December 1*** deadline: Since 2009, the technical deadline for commercial reports has been November 1, but each time that deadline has rolled around, the Commission has extended it to December 1. From now on, no extensions will be necessary, because the FCC has decided to move the deadline to December 1 from the get-go for all biennial ownership reports.)

Technical Tweaks

Beyond those major changes, the Commission has also fine-tuned some aspects of the ownership report filing process. For example, to reduce the number of multiple filings that large parent entities with multiple licensee subsidiaries have to submit, the Commission has decided that the parent should be permitted to file one report that covers all of those separate licensees. This should be a welcome change for lots of licensees.

The Commission also mentions a number of other seemingly slight technical changes to the ownership report. Exactly how important those might be will probably not be evident until we all try our hand at completing the revised form. While the Commission's decision includes drafts of both the revised Form 323 (the commercial broadcasting ownership report) and Form 323-E (the NCE version), those revised versions have not yet been approved by the Office of Management and Budget. Presumably, though, we'll all have a chance to kick the tires on the form before the 2017 deadline for the next biennial reports.

All these changes, while formally adopted, will not take effect for several months. The new forms will have to be run past the Office of Management and Budget pursuant to the Paperwork Reduction Act, a process which generally takes at least several months. Once OMB has signed off on things, the FCC will issue a notice in the Federal Register formally announcing the effective date. Check back with CommLawBlog.com for updates on that front.

Webcaster wake-up call!

Annual SoundExchange Requirements Roll Around Again

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[*Editor's Note: This article first appeared on CommLawBlog in January. While the deadline for filing the annual statements of account (i.e., February 1) has already passed, we are including the article in this issue because it provides other useful information concerning webcasters' ongoing responsibilities.*]

It's been about a month since I wrote about *Webcasting IV*, the decision of the Copyright Royalty Board that set webcasting rates and terms for the next five years. We still haven't actually seen the CRB's full decision, so there still might be some nuances to the ruling that weren't previously apparent in the initial announcement of rates/terms. And even without those nuances, we've seen some controversy surrounding the ruling from many camps.

SoundExchange (along with the record labels and artists for whom it collects royalties from those engaged in streaming) isn't happy that the royalty rates didn't increase by very much. It's presumably even less happy that in some instances (like the rates for commercial broadcasters and certain subscription services) the rates decreased. Meanwhile, small, online-only webcasters were shut out entirely and pay full freight. Even small broadcasters felt a bit of a pinch, losing their exemption from the requirement to file Playlist Reports of Use.

SoundExchange prefers that webcasters use their somewhat new "SoundExchange Licensee Direct" website .

But as we wait for the full text of the CRB's ruling, argue about whether the CRB reached the right result, and plan next steps, one thing is certain. The usual annual filing obligations are still in place for all webcasters, including the requirement to file an Annual Minimum Fee Statement of Account form and pay the annual minimum fee of $500 per channel by **February 1, 2016**. ***This applies to ALL webcasters, commercial and noncommercial.*** And, as always, the compliance obligations don't end there.

Here's a brief summary of what each classification of webcasters (there are now really only three that are relevant to our readership) must do this year, with a link to the SoundExchange page offering more information for that particular classification:

Commercial Webcasters (the classification which now includes both (a) broadcasters engaged in webcasting and (b) online-only webcasters):

By February 1, 2016: File an Annual Minimum Fee Statement of Account form and $500 per channel fee.

Monthly, within 45 days of the end of the month: (1) File a Monthly Statement of Account form identifying the number of performances you had in the given month; (2) pay any fees accrued at this year's per performance rate of $0.0017; and (3) submit a Report of Use identifying certain information about every song played during the month. (Webcasters who do not exceed the $500 annual minimum fee do get something of a break here: they can file "sample" reports on a quarterly basis, covering two separate seven day periods each quarter.)

Non-Commercial Webcasters (This classification includes webcasters operated by (a) a government entity or (b) an entity exempt from federal income taxation under Section 501(c) of the Internal Revenue Code, but it does ***NOT*** include webcasters affiliated with an accredited educational institution and substantially staffed by students of that institution. Note also that certain special requirements apply to certain public radio entities):

By February 1, 2016: File an Annual Minimum Fee Statement of Account form and $500 per channel fee.

Monthly, within 45 days of the end of the month: File a separate Monthly Statement of Account form for each channel. You will not pay any fees ***unless*** you exceed an "aggregate tuning hour" threshold of 159,140 ATH in any month, in which case you will pay the excess at the same $0.0017 per performance rate applicable to commercial webcasters.

Quarterly, within 45 days of the end of the month: File a "sample" Report of Use covering two separate seven day periods during the quarter, ***unless*** you exceeded the 159,140 ATH threshold in 2015 or expect to do so in 2016, in which case you must revert to "census" filing of these reports – the filing of reports on a monthly basis covering all songs played during the month.

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But the licensee didn't even sell the spots!

$500K+ Spanking for Sponsorship ID Miscue

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The Enforcement Bureau has scored another trophy for its burgeoning trophy room of extravagant penalties. This time, it's $540,000 extracted from Cumulus for a supposedly inadequate sponsorship identification on a number of spots run on a station Cumulus didn't own when the spots were purchased and didn't own when the Bureau imposed the penalty. And despite the fact that it's not entirely clear that any sponsorship ID violation actually occurred, Cumulus agreed to fork over half a million dollars and shoulder a number of other not insubstantial burdens as well.

The case raises a number of troubling questions.

The tale starts in May, 2011, when an FM station in scenic Dover, New Hampshire contracted to air a flight of spots promoting the Northern Pass Project, a controversial plan to build a 192-mile transmission line to bring power from Canada. The would-be builder: Northern Pass Transmission LLC (NPTLLC). The Consent Decree (CD) entered into by Cumulus and the Bureau isn't especially detailed, but it says that the spots were "initially purchased by an affiliate of" NPTLLC. While the spots may have been "initially purchased" by an NPTLLC affiliate, it appears that NPTLLC paid for them.

Since the original mistake was apparently made before Cumulus controlled the station, it's hard to see why Cumulus should be deemed to be at fault .

The station's staff was obviously aware that the spots had to include a sponsorship ID because, according to what Cumulus told the FCC, the staff "in fact inserted sponsorship identification information" when the spots were first ordered. And in so doing, the staff (according to Cumulus) "concluded in good faith and belief that the use of the phrase 'Northern Pass' in the announcements provided sufficient sponsorship identification".

The spot flight ran from May into October, 2011. Bear in mind that, in May, the station was owned by Citadel. In mid-September, as an element of Citadel's merger with Cumulus, Cumulus acquired control of the station's licensee. About two weeks later, the Bureau received a complaint alleging that the station had failed to include a sponsorship ID on one of the Northern Pass Project spots. An investigation ensued.

A couple of years later Cumulus sold the station, but the investigation carried on. And finally, in January, 2016, Cumulus entered into the CD in which it: (a) acknowledged that the spots had violated the sponsorship ID rule; (b) agreed to pay a "civil penalty" of $540,000; and (c) committed to a multi-component Compliance Plan and reporting obligations for the next three years.

Here are some questions you may be asking yourself.

How come Cumulus got stuck with the penalty when it didn't sell the spots originally? That's easy. The FCC has a longstanding policy that, when you acquire control of a licensee (as Cumulus did here through the Citadel merger), you are responsible for the sins of the seller. That's not necessarily so if you acquire the license of the station in an assets deal (in which case you become the new licensee), as opposed to acquiring control of the licensee through a stock deal (in which case the station's licensee remains the same but subject to the transferee's control).

How come Cumulus got stuck with the penalty when it didn't control the station when the CD was entered into? Again, that's probably easy. Cumulus was responsible for the licensee when the investigation started, so it was on the hook for any penalty. While the CD doesn't expressly say so, it's a pretty good guess that, when Cumulus sold the station a couple of years ago, the Enforcement Bureau probably required Cumulus to agree to stay on the hook as a condition to getting the deal through. In other words, the Enforcement Bureau could have imposed an "enforcement hold" which would have prevented the Media Bureau from processing the assignment application. When an enforcement hold is threatened, parties eager to move their transaction forward will often agree to remain potentially liable even after they have sold the station at which the violation(s) allegedly occurred. (Editor's Note: Whether such enforcement holds are technically legal is far from clear, particularly when the alleged violation would plainly not raise any question about the selling licensee's qualifications to remain a licensee. But for a number of reasons the Enforcement Bureau's practice has not been effectively challenged to date.)

Did the spots in question really violate the sponsorship ID rule? This one's not so easy. As noted above, the CD indicates that the spots did include some sponsorship ID language referring, apparently, to "Northern Pass".

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Since (also as noted above) the spots had been "initially purchased" by an "affiliate" of NPTLLP, that ID may have been a reasonable effort to notify listeners that the spots had been purchased by proponents of the Northern Pass Project, a universe which presumably would have included NPTLLP. But the Enforcement Bureau's position is that the ID "did not clearly identify Northern Pass Transmission LLC as the sponsor of the announcements". That seems to indicate that, in the Enforcement Bureau's eyes, the "sponsor of the announcement" is the source of the payment for the spots, and that source must be "expressly disclosed". That's not a far-fetched notion by any means; in fact, it's generally consistent with one of the latest Media Bureau decisions in this area. But even if the term "Northern Pass" did not "expressly disclose" the precise source of the payments, it at least reflected an effort by the station to notify listeners about who arranged for the spot. Is that a real violation and, if so, did it merit a half-million dollar penalty? We might have been inclined to think not on both counts, but the Enforcement Bureau obviously disagreed.

Given the Bureau's propensity for "headline-grabbing" multi-million dollar penalties galore, Cumulus have felt lucky to get off with a mere $540K whack.

How come Cumulus had to agree to a compliance plan involving a bunch of stations that had not been involved with this spot? Another good question. Since the original mistake relative to the ID was apparently made before Cumulus controlled the station, it's hard to see why Cumulus should be deemed to be at fault here. (Sure, Cumulus continued to run the spot for about a month after it took over the station, but come on: having acquired a slug of stations through its merger with Citadel, during that first post-closing month Cumulus presumably had a lot of things to worry about other than one particular spot on one station in Dover, New Hampshire.) And if it wasn't really at fault, why should Cumulus be saddled with developing, implementing and documenting a relatively onerous compliance plan affecting nearly 200 stations – none of which happened to be involved in the supposed violation? This really doesn't seem to make much sense. But it appears that the Enforcement Bureau's SOP when it comes to CDs is to impose some such compliance plan obligation, presumably on the theory that, since the target licensee has admitted violating the rule, it should be subjected to some remedial educational effort to prevent a recurrence. That might make sense if the underlying facts suggested that the sponsorship ID violation had occurred through some internal flaw in Cumulus's operational systems. But that doesn't appear to have been the case here.

Why did the Enforcement Bureau handle this case and not the Media Bureau? This is another poser. Historically, questions (and complaints) relating to political programming have been handled by the Media folks. And the Enforcement Bureau's own functions – as defined in the Commission's rules – expressly state that Media has "primary responsibility" for such complaints. So how did this case happen to fall into Enforcement's lap? We don't know. (We do know that the Media Bureau was not involved in the matter, though: during our recent webinar featuring Bobby Baker, the Media Bureau's political broadcasting guru, Bobby disclaimed any involvement at all in the CD.)

As a bottom line, it's probably most likely that, regardless of whether it felt the penalty here was called for, Cumulus simply wanted to put an end to the investigation and was willing to live with the terms which it was able to negotiate with the Enforcement Bureau. Given the Bureau's recent propensity for imposing "headline-grabbing" multi-million dollar penalties galore (a propensity to which Commissioner Pai, for one, has taken exception), Cumulus may have felt lucky to get off with a mere $540K whack. But for the rest of us, this case does not bode well. At a minimum, it signals that, when it comes to sponsorship IDs on issue-related spots, it's important to identify, "expressly", the precise source of the payments for the spots. We have all been warned.

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the $ 150.00 entry fee. While you may initially be inclined to take a pass, one lesson learned from the *Webcasting IV* proceeding is that if you don't pay, you can't play and if you don't play, you leave your fate entirely in the hands of others: the CRB's eventual ruling can be based only on the evidence and arguments contained in the record compiled in the proceeding. No matter how sensible a particular solution may seem (like continuing the previously existing category for small webcasters or microcasters), the CRB cannot include it in the final rates and terms *sua sponte* (a fancy Latin term for "of its own volition").

A $150.00 ante may seem like a lot now, and these are neither simple nor quick proceedings: there are several different phases potentially involving a considerable amount of effort, and the whole thing will play out over the next two (or more) years. So there are obvious disincentives to participation. But sitting on the sidelines and hoping someone else carries the water for you comes with the risk of bigger expense later if the rates and terms the CRB eventually adopts prove to be more burdensome than you might like.

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the online system will be available so that those in the first batch of folks newly subject to the rule can start their uploading. That first batch of folks will consist of (a) all cable systems with 1,000 or more subscribers (although some such systems do get a break of sorts, as discussed below); (b) DBS (*i.e.*, satellite TV) providers; (c) SDARS (*i.e.*, satellite radio) licensees; and (d) large market commercial radio stations with five or more full-time employees. In this context "large market stations" refers to stations located in any of the Nielsen Audio-defined Top 50 Markets.

Importantly, the "five or more full-time employees" factor is to be determined on the basis of employment units, not stations. So where a station in a Top 50 Market is commonly-owned with one or more other broadcast stations in the same market that share at least one employee, and the station employment unit has five or more full-time employees, each radio station in the group will be deemed to be in the "five or more" category and, therefore, subject to the new requirements at the earliest time.

By moving the public file to the Internet, the Commission is removing any pretense of "localism".

In the FCC's view, regulatees in this first batch can be expected to have the resources necessary to handle the upload burden. These folks will have a total of six months from the effective date to complete the uploading of the necessary materials to the online file. Note, however, that the six-month get-up-to-speed period does ***not*** include newly-created political materials. Once the effective date arrives, all newly-created political materials will have to be uploaded as soon as possible (*i.e.*, immediately).

The second batch of folks consists of all NCE radio broadcasters and all remaining commercial radio stations, *i.e.*, (a) all commercial stations which are located outside any of the Top 50 Markets ***and*** (b) all commercial stations which are located in any of the Top 50 Markets and have fewer than five full-time employees. This second batch isn't off the hook entirely – they just get a bit more time: these entities are not required to start uploading "new" political materials and have the rest of their legacy public file materials uploaded to the FCC's system until ***March 1, 2018***. And one subset of cable operators also enjoys some leniency along these lines. Cable systems with at least 1,000 subscribers but fewer than 5,000 need not start uploading "new" political materials until March 1, 2018. With that one exception, though, cable systems with 1,000 or more subscribers will be required to have their public files uploaded within six months of the effective date of the new rules.

So large entities (*i.e.*, those in the first batch) won't have to start uploading "new" political materials until the effective date, which will be 30 days after the FCC announces that OMB has approved the rules, which isn't likely to happen for another three months, at least. So they can probably figure that that chore will kick in sometime this summer or early fall, barring any unforeseen problems. And the first batch will then have a total of six months *after* the effective date – which probably puts us sometime in early 2017 – to get all of their legacy files uploaded.

By contrast, smaller entities won't have to start uploading "new" political materials until March 1, 2018, but by that date they will have to have the rest of their files already uploaded to the FCC's system.

There are various niceties that apply in various circumstances outlined in the Commission's Report and Order. Example: Everyone will have to identify one individual to be listed in the online public file as the contact person for that file. Another example: broadcast stations will still have to provide on their websites (if they have a website) a separate link to their EEO materials. Going forward, it will be permissible for that link to direct to the specific page in the online file containing the relevant EEO materials. And yet another example: the Commission imposes some back-up obligations on regulatees so that the information in the public files will still be available should the Commission's system tank at any point.

On a more general note, the Commission indicates that waivers of the online public file requirement may be granted – but if we were you, we wouldn't be getting our hopes up on that front.

We recommend that you review the decision carefully to see which of those niceties may apply to you. We also suspect that, as the effective date approaches, the Commission will provide additional guidance and reminders. Check back here for updates.

Anyone interested in getting ahead of the curve may want to take a look at some of our posts on CommLawBlog.com, vintage 2012, describing the upload process for TV stations. (You can find two of them here and here.) Since the upload process is not necessarily intuitively obvious, you may find it useful to be able to see screen grabs of the system in operation. While it's possible that the Commission may have tweaked the process some by the time the next wave of uploading has to get started, we're reasonably confident that our descriptions will nevertheless help the uninitiated get used to the drill.

The expanded universe of online public filers will increase more than seven-fold the amount of material the Commission's system will have to accommodate; there are, after all, more than 15,000 radio stations that will

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(Continued from page 5)

Non-Commercial Educational Webcasters (This classification includes webcasters which are operated by (a) a government entity or (b) an entity exempt from federal income taxation under Section 501(c) of the Internal Revenue Code, and which ***ARE*** affiliated with an accredited educational institution and substantially staffed by students of that institution):

> ***By February 1, 2016***: File an Annual Minimum Fee Statement of Account form and $500 per channel fee.
>
> ***Monthly, within 45 days of the end of the month***: File a separate Monthly Statement of Account form for each channel. However, you will not pay any fees ***unless*** you exceed an "aggregate tuning hour" threshold of 159,140 ATH in any month, in which case you will pay the excess at the same $0.0017 per performance rate applicable to commercial webcasters.
>
> ***Quarterly, within 45 days of the end of the month***: File a "sample" Report of Use covering two separate seven day periods during the quarter, unless (1) you averaged fewer than 80,000 ATH in every month of 2015 and expect to do so again in 2016, in which case you can pay a $100 "proxy fee" with your annual minimum fee in order to be completely exempt from this requirement or (2) you exceeded the 159,140 ATH threshold in 2015 or expect to do so in 2016, in which case you must revert to "census" filing of these reports – the filing of reports on a monthly basis covering all songs played during the month.

SoundExchange prefers that webcasters use their somewhat new "SoundExchange Licensee Direct" website that allows for submissions and payments online. They are more than willing to help you set that up and may answer other questions for you. However, quite often they will tell you that they can't offer legal advice to webcasting services and will suggest that you consult an attorney – always good advice when uncertain of any legal requirements or obligations.

(Continued from page 8)

now have to be given their own online file space, as opposed to the 2,000 or so TV stations … and that's not counting cable systems and satellite operators. In anticipation of that, the Commission has already transitioned to "cloud-based computing solutions" to manage the online public file database. Presumably its several years' experience with the TV online public file has provided the Commission insight into the process, insight that gives the FCC confidence that this massive expansion can be handled without much risk of epic failure. Let's keep our fingers crossed.

Two closing observations.

First, in its decision the Commission effectively acknowledges that the "local public inspection file" really is no longer "local" by any stretch of the imagination. Originally, the file was intended to promote interaction between a broadcast station and its audience by giving interested audience members the opportunity and incentive to visit the station, review its public file materials, and possibly even speak with station officials. The conventional wisdom throughout the broadcast industry – conventional wisdom borne of decades of experience – is that the public file never came close to achieving that fanciful goal. To the contrary, local public inspection files have for the most part gone totally (or nearly so) uninspected year after year.

By moving the public file to the Internet, the Commission is removing any pretense of "localism" and is, instead, assuring the files' availability to anybody anywhere. The Commission continues to intone the traditional notion that "the public file is first and foremost a tool for community members", notwithstanding half a century of experience to the contrary. But now, possibly recognizing the implausibility of that traditional notion, the FCC is shifting gears: it advises that the public file is also a tool for the "larger media policy community", a community consisting of "public advocacy groups, journalists, and researchers [who] act in part as surrogates for a portion of the viewing public in evaluating and reporting on broadcast stations' performance".

In other words, the audience members who were the intended beneficiaries of the public file need "surrogates". Why that may be is not indicated. Broadcast audience members, after all, seem highly capable of evaluating a station's performance by choosing to tune into the station or not. The need for surrogates therefore seems, at best, dubious, and certainly inconsistent with the original goal of the public file requirement. But that original goal now seems to have quietly faded away.

Second, the Commission's decision here is the culmination of a proceeding that was commenced by a petition for rulemaking filed on July 31, 2014 – exactly 18 months ago. It's difficult to recall any other rulemaking that went from initial petition to final decision that fast. On the one hand, this reflects an admirable ability on the FCC's part to get things done speedily. On the other, it raises a question: why did the FCC happen to accord, in effect, same-day service to the petition for rulemaking in this case, while the agency allows so many other matters of seemingly equal, if not greater, practical importance to languish, ignored, for years?

We'll keep an eye out for developments that may be of interest on this front, and we'll report on them as they arise.

Federal Registration notices signal the final steps

Last Pieces of AM Revitalization Puzzle Now in Place

By Harry F. Cole
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It's been nearly three months since the FCC released its long-awaited AM Revitalization Order. And while the Audio Division staff has done what it could in terms of moving things along, the full range of regulatory changes adopted by the Commission have not taken effect yet because the FCC's Order had not yet been published in the Federal Register. Frustrating as it may be for both affected industry participants and the Audio Division staff who are keen on getting the new rules working, this niggling detail is a necessary predicate to the effectiveness of the rules. (The problem, it appears, involved some delay in bureaucratic processes outside the control of the Audio Division.)

But wait no more! Both the adopted and the proposed rules have now been published in the Federal Register. While the FCC technically adopted and released a single document encompassing both, the separate components of the order have (as is customary for Federal Register purposes) been split up. You can find the Report and Order (discussing the adopted changes) here, and the proposed changes here.

As a result, we now know that the effective date of the new and revised rules will be **February 18, 2016**. The one exception: revised Section 73.1560 (as to which, keep reading below). February 18 will also be the deadline for any petitions for reconsideration that anybody might be inclined to file with the Commission. And the Federal Register publication also starts the clock running on the judicial appeal process. If you're thinking about taking the new rules to court, you've got until March 21 (unless you're hoping to get your appeal heard in a particular Federal Circuit, in which case – as with the LPTV/TV translator proceeding mentioned above – you should take a look at the process for trying to make that happen).

As for the proposed rules, you've got until **March 21, 2016** to file comments and **April 18** for replies. Comments and replies can be filed electronically through the FCC's ECFS webpage: refer to Proceeding Number 13-249.

And as for Section 73.1560 (and the related Form 338, a/k/a the AM Station Modulation Dependent Carrier Level (MDCL) Notification Form), here's the scoop. When last we checked, those were still awaiting OMB approval … BUT the FCC has since announced that the OMB gave the thumbs up on January 19. This means that, **as of March 3, 2016**, AM stations wishing to use MDCL control technologies will be able to do so without prior Commission authority, provided that they notify the Commission on Form 338 within 10 days after beginning MDCL operation.

MDCL gear senses a station's modulation levels continually and automatically adjusts transmitter power down and up.

What's MDCL? It generally refers to transmitter-control technology which has been in use internationally for some time, mainly by high-powered AM stations. As best as we can decipher things – there's a reason that we went to law school, after all – MDCL gear senses a station's modulation levels on a continual basis and automatically adjusts transmitter power down (and up again) depending on modulation. With increases both in energy costs and in the ease of implementing MDCL algorithms, use of such technology has become more attractive in the U.S.

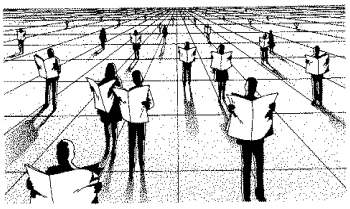
AM stations have been permitted to use MDCL since 2011, but only with prior Commission approval. During that time, 33 permanent waivers and 20 experimental authorizations have been granted. The stations using MDCL have reported "significant" electrical power cost savings with few, if any, perceptible effects on station coverage area and audio quality. Now that prior approval will no longer be required, the smart money figures that more stations will be jumping on the MDCL bandwagon.

And on another AM Revitalization front, according to Commissioner Pai, over 400 applications were filed by AM licensees looking to move a translator to rebroadcast their station on the first day of the open window for such applications.

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

Updates On The News

LPTV/TV translator rule revisions, proposals hit the Federal Register – In the closing days of 2015 we reported on the FCC's long-awaited decision on how it plans to deal with LPTV and TV translator stations as it works its way through the post-auction repack process. The Commission's decision has now been published in the Federal Register in two separate chunks: the first includes the Report and Order portion of the decision in which new or revised rules were adopted; the second includes the Notice of Proposed Rulemaking portion in which the FCC put out for comment a number of additional rule changes it has in mind.



The publication of the Report and Order serves to establish a number of dates. First, the new rules will take effect on ***March 2, 2016*** (except for Section 74.800, which will have to be reviewed and approved by the Office of Management and Budget first). Second, anyone who wants to ask the FCC to reconsider any aspect of the new rules will have until ***March 2*** to file a petition for reconsideration with the Commission. Third, if you're inclined to seek judicial review of the new rules, you've got until ***April 1*** to do so (unless you've got your heart set on having your appeal heard in a particular Federal Circuit, in which case you'd best brush up on the steps you'll have to take, soon).

Meanwhile, the publication of the Notice of Proposed Rulemaking (actually, it's the "Fourth Notice of Proposed Rulemaking", but really, who's counting?) sets the deadlines for comments and reply comments on the proposed changes. Comments are due by ***February 22, 2016*** and replies by ***March 3***. All interested folks should note the relatively abbreviated comment periods – the FCC doesn't appear to be wasting any time. Comments and replies can be filed electronically through the FCC's ECFS webpage: refer to Proceeding Numbers 03-185, 12-268, 14-175 and 15-175.

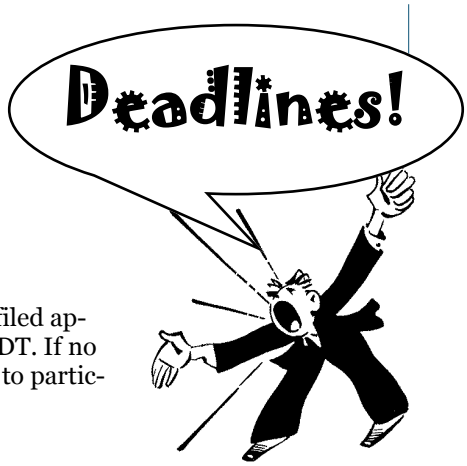
Mum's the word: New anti-collusion rules have the OMB stamp of approval – The FCC's Incentive Auction Report and Order, released June 2, 2014, included anti-collusion provisions forbidding – as of the close of the reverse auction application window (*i.e.*, January 12, 2016) – communications relating to incentive auction participation and bidding strategies between or among pretty much anybody. (The limited exceptions involve communications between any two or more full power TV or Class A TV licensees that share common ownership, officers, or directors or have a channel-sharing agreement in place – but even folks who think that they fall within the exception would be wise to doublecheck ***before*** they open the conversation.) The new anti-collusion prohibitions, spelled out in Section 1.2205(c) and (d) of the FCC's rules, not only forbid certain communications but also require parties who violate the prohibition to squeal on themselves by promptly reporting their transgression to the FCC.

Since those reporting requirements constitute "information collections", they of course had to be run past the Office of Management and Budget, thanks to the Paperwork Reduction Act (PRA). And sure enough, in the 2014 Incentive Auction Report and Order, the FCC expressly said that it would get on that process and let us all know once OMB gave it the thumbs-up. And, according to a notice in the New Year's Eve edition of the Federal Register, OMB did indeed approve the new rules on December 10, 2015.

But the New Year's Eve notice of that approval indicates that the approval was issued on an "emergency" basis. Why the "emergency" if the rules were adopted a year and a half ago? A little digging through the OMB website indicates that, while the rules may have been released back in June, 2014, the FCC didn't get around to asking for OMB approval until (wait for it …) November 10, 2015. Since the PRA process by law requires at least 90 days (consisting of one 60-day comment period and a further 30-day comment period), plus whatever time OMB might need to review any incoming comments, cogitate on the proposed "information collection", resolve any possible questions with the FCC, and then make its decision, it's obvious that a process initiated on November 10, 2015 could not (absent a time machine in good working order) have been completed by January 12, 2016, when reverse auction applications were due and the Cone of Silence descended on all of us.

That explains the FCC's request for "emergency" treatment (which, we can all agree, OMB managed to process in a mere 30 days). But it does ***not*** explain what took the FCC so long to get the ball rolling in the first place. That's especially so in view of the fact that the 2014 Report and Order expressly acknowledged the need for OMB approval.

In any case, when it comes to bids and/or bidding strategies in the Incentive Auction, your mouth should have been buttoned starting at 6:00 p.m. (ET) on January 12, 2016, and it should stay that way until further notice.



March 21, 2016

AM Revitalization – Comments are due with regard to the FCC's *First Report and Order, Further Notice of Proposed Rulemaking, and Notice of Inquiry* with regard to the new policies and proposals it announced for AM broadcasters.

March 29, 2016

Television Incentive Auction – All *television* and *Class A television* stations wishing to participate in the spectrum incentive auction and that have filed applications on FCC Form 177 must submit an initial commitment by 6:00 p.m. EDT. If no initial commitment is received by this deadline, the station will not be qualified to participate in the incentive auction, even if an application has been filed.

April 1, 2016

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee** and **Texas** must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

EEO Mid-Term Reports – All *radio* stations *with eleven or more full-time employees* in **Indiana**, **Kentucky** and **Tennessee** must electronically file a mid-term EEO report on FCC Form 397, with the last two annual EEO public file reports attached.

Noncommercial Television Ownership Reports – All *noncommercial television* stations located in **Texas** 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 **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania** and **Tennessee** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

April 10, 2016

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the first quarter 2016 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 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.

Political Broadcasting Webinar Recording Now Available

If you missed our recent webinar (featuring FCC political broadcasting guru Bobby Baker) covering All Things Political Broadcasting, don't worry. You can attend *ex post facto, in absentia* (if that's such a thing), by listening to the whole two-hour production online. Just click on this link. As with folks who attended the live event, you'll need to provide your name and email address (and, optionally, the station(s) you're affiliated with). But with those few keystrokes, you'll be watching and listening to Bobby – along with FHH experts Dan Kirkpatrick, Frank Jazzo, Matt McCormick and Justin Faulb – expound on the full range of issues likely to face broadcasters during the 2016 political season.

The recording is also available to those who did attend, of course – just click on the link above. And if anyone just wants to have a copy of the PowerPoint slides *sans* audio commentary, you can click here. (While the slides provide a comprehensive summary of what you need to know, you'll miss out on a wealth of nuance, anecdote and insight if you take a pass on the recording. Just saying.)

We want to extend a big *Memo to Clients* thanks to Bobby for making his time and expertise available to one and all, and also to our State Association friends for helping to make the webinar a rousing success!

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

According to SNL Kagan, recognized as one of the preeminent sources of financial analysis in the media business, in 2015 Fletcher, Heald and Hildreth served as legal adviser in more media/entertainment/new media transactions than any other law firm – ***by a long shot*** ... ***again***. Hey, isn't this the same article we put up last year ... and the year before ... and the year before ... and the year before that ... AND the year before that? Yes, indeed. And again, the total number of 2015 transactions that brought FHH back to the top of the charts for the sixth year in a row – 143 – was nearly three times the number of the First Runner Up.

Through the worst of some very rugged economic times and since, our clients continued to thrive and remain active on the transactions front. And they have consistently continued to call on us to provide guidance and counsel in structuring their deals and navigating them through the regulatory process.

As we have in past years, we congratulate our clients for their successes, we thank them for the confidence they have placed in us, and we look forward to providing the same quality representation to clients, old and new, that we have been providing for some 80 years.

FHH - On the Job, On the Go

The Blizzard of 2016 may have shut down Washington for a day or two, but it didn't stop the annual State of the Net Conference (motto: "It's never not awesome!") on January 25. And slated to make the rounds this year was FHH's Internet guru, **Kathy Kleiman**, ready to hobnob with Internet folks foreign and domestic. (Let **Kathy** know if you'd like to chat with her about the themes of the day.)

Pundit, professor, party animal – **Frank Montero** does it all. A panelist at the MMTC Broadband Conference in D.C. and interviewed by Bloomberg and the Wall Street Journal about the removal of Cuba from the Telecom Restricted List in January. This month, his dance card puts him at the Library of Congress for an event celebrating the 20th anniversary of the 1996 Telecommunications Act and – *on the same day* (that would be February 11) – at the National Press Foundation Awards dinner. Then he dons his professorial robes to lecture some University of Miami law students on FCC regulatory process and practice on February 18, followed by attendance – along with **Frank Jazzo**, **Scott Johnson** and **Matt McCormick** – at the annual NAB Leadership Conference from February 22-24 in D.C. Next month? The professor returns, as **Frank M** joins forces with **Dan Kirkpatrick** to teach a class on "Negotiating a Broadcast Acquisition Transaction" for the NAB's Broadcast Leadership Training Class in March.

By the way, if you're planning on attending the NAB Leadership Conference, be sure to stop by the reception on February 21 (the night before the conference cranks up). FHH will be co-sponsoring, along with NASBA. Look for **Frank J**, **Frank M**, **Scott** and/or **Matt**, all of whom will be there.

And on February 25, **Davina Sashkin** will be appearing (along with, among others, the FCC's **Parul Desai**) on the panel for the FCC Session at the Annual NRB International Christian Media Convention in Nashville.