

Memorandum to Clients

February 2016

NEWS AND ANALYSIS OF RECENT DEVELOPMENTS IN COMMUNICATIONS LAW

No. 16-02



Class A wannabes make progress in the D.C. Circuit

Does the FCC Want to Postpone the Incentive Auction?

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Pretty much since the FCC set out on its headlong race to design and implement the upcoming Incentive Auction, one of the Prime Directives appears to have been to get the thing done as quickly as possible. [Initially mapped out to kick off](#) sometime toward the end of 2015, it was then pushed off to [the first quarter of 2016](#). And there the target date has remained, with deadlines for reverse and forward auction applications due by January 12 and February 10, 2016, respectively, and final elections for participating in the reverse auction due by March 29.

So it may come as a surprise to many that, in two pleadings recently filed with the U.S. Court of Appeals for the District of Columbia Circuit, counsel for the FCC has created the impression that the court may have to stay the auction. While the Commission will doubtless deny that it has been angling for a stay, the circumstances in which its pleadings were filed and the positions articulated in them suggest otherwise.

To lay this out, we're going to have to crawl into one of the more esoteric corners of appellate law: mandamus. But stick

with us – we'll try not to make it too painful. (And please bear in mind that this is totally a glimpse of mandamus from the 30,000-foot level, sans much detail or nuance. Don't try this at home.)

What is mandamus anyway?

Normally, the federal courts of appeals are available only to review an agency's decisions. Unless and until the FCC has released a decision in a matter, it's premature to try to bring the court in. But there exists a special – technically, it's called an "extraordinary" – writ that you can ask for in very limited circumstances. Most often, those circumstances involve "unreasonable delay" by the agency, but they can also include situations where the agency (a) has failed to take some ministerial action which it is required to take or (b) has taken some action that the law plainly prohibits it from taking. A party asking the court for a writ of mandamus is effectively asking the court to step in and make the agency do something, the general goal being to force the agency to issue a decision that can then be appealed.

Courts are notoriously reluctant to issue such writs. Federal judges are loathe to impose their will on an agency's control of its own docket, reasoning that an agency generally has a broad range of matters pending before it, and the agency should be permitted to set its own priorities for dealing with those matters.

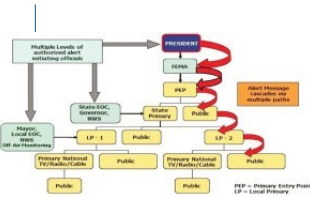
But when an agency has delayed too long, and a party's interests are, as a result, being severely and adversely affected, the court may step in. And even if a party seeking a writ of mandamus is eventually denied the writ, the fact that the FCC may be forced to explain its delay to the court can have a salutary effect on the complaining party's situation: in order to deflect any judicial concern that maybe, just maybe, the Commission is not entirely in the right, occasionally the Commission will, in responding to a request for the writ, commit to getting the long-awaited decision out within a particular time frame. In the face of such a commitment, the court will usually dismiss the mandamus petition, but the petitioner will still be in a better position for having sought the writ in the first place, because it now has in hand the commitment, made by the FCC to the court, that the FCC will be cranking out a decision reasonably promptly.



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This is only a test ...

FEMA Test Drives NPTs in ISSRTs

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This month the Federal Emergency Management Agency (FEMA) conducted its biggest ISSRT yet, covering 25 (count 'em, 25!) jurisdictions: Alabama, Arkansas, Delaware, D.C., Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, Puerto Rico, South Carolina, Texas, the U.S. Virgin Islands and Virginia. If you haven't yet experienced an ISSRT, you can probably expect to in the not too distant future.

What's an ISSRT? That would be an IPAWS Supported State/Regional Test (IPAWS, of course, standing for Integrated Public Alert and Warning System). The test in this case was ([in FEMA-speak](#)) "a distribution of the National Periodic Test (NPT) code, originated by the FEMA IPAWS Lab, geo-targeted to participating states". In real-world language, FEMA was testing the use of the NPT header code through the Emergency Alert System – most recently in a single test that included the 22 states, two territories and one District of Columbia listed above – to make sure that it works, and to give participating broadcasters the opportunity to either (a) confirm that their gear is properly configured to deal with NPT-coded messages or, if it isn't, (b) fix the problem.

Essentially, stations in the areas in which the test has been and will be conducted receive an NPT-coded EAS alert at the prescribed time. Participating stations then automatically relay the alert and associated audio message to the public and to other stations downstream from them under their respective State EAS Plans. This is a purely voluntary exercise, and – here's some good news – ISSRT's are "conducted in a no-fault environment". That means that the FCC will **not** be taking any enforcement actions as a result of participation in the test, even if a station's EAS gear failed to respond correctly to the EAN code. (Note also that ISSRT's generally do **not** replace any required weekly tests (RWT) or required monthly tests (RMT).)

What's this all about? [Readers will recall](#) that when, five years ago, the FCC and FEMA conducted the first ever test of the national alerting system, things didn't go so well. Since then, efforts have been made to address the various problems that cropped up. Just last year, for example, the FCC adopted a number of changes to its EAS rules in light of the lessons learned during the 2011 test.

Among the problems that popped up in 2011: while the FCC's list of EAS header codes – the signals included in EAS transmissions that cause stations' EAS gear to respond in certain ways – already included an NPT option, the national test instead used the Emergency Action Notification (EAN) code, which EAS receivers were programmed to recognize as signaling a real emergency, not a test. This led to a number of less than happy results. So, as [we reported last summer](#), the FCC decided that the NPT code would be used for future nationwide EAS tests.

The trouble with that is that, because the NPT code hadn't been used before, it's not clear that all stations' EAS equipment is currently configured to respond to the NPT code correctly. [According to the FCC](#) (which got its information from EAS equipment manufacturers), the NPT code is already recognized in "virtually all existing EAS devices" or, at least, it can be "easily enabled ... through simple re-configurations of the code filters on [stations'] encoder devices". Ideally, stations have checked their gear since then and made any necessary adjustments. The recent test was supposed to allow everybody to confirm that the system is set up to react properly to NPT-coded messages. (FEMA also provides instruction to assist operators in the proper manual configuration so that their equipment will properly support such messages.)

If you're in a jurisdiction scheduled for an ISSRT, you will presumably hear about

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Not necessarily as easy as you might expect.

AM Update: How to File Form 338

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In last month's *Memo to Clients* [we reported that the effective date](#) for revised Section 73.1560 and the new Form 338— had been announced in the Federal Register. (Short term memory problems? That date is March 3, 2016.) The FCC has now reconfirmed the date in [a public notice providing directions on how to file Form 338](#) when the time comes. Pay attention because, as it turns out, this is **not** your standard CDBS filing.

Form 338, of course, is the new form for AM licensees who choose to use Modulation Dependent Carrier Level (MDCL) control technology. As of March 3, those licensees will, without prior FCC approval, be able to operate with MDCL gear, **provided that**, within 10 days of commencement of such operation, they file Form 338 (full name: "FCC Form 338, AM Station MDCL Notification").

To get that form filed, first you will have to download a hard copy of the form. It will be [available on the FCC's website](#). Don't bother to try finding it right now – we just did (while we were preparing this article for publication on February 27), and the link provided by the FCC didn't work ... yet. We're reasonably confident that it'll be available by the effective date. If you want to see what the form looks like before it shows up on the FCC's website, you can find [a copy through the OMB website](#) (since OMB had to approve the form in the first place). The form is pretty straightforward: you provide routine identification information, the date MDCL operation started and the transmitter gear you're using, you make a couple of routine certifications, you sign and date it, and voilà, a completed form!

Well, not quite. Once you're this far, you'll also have to scan it so that you can upload it to the FCC.

With the form filled out, signed and scanned, you're going to need to go to the FCC's [ECFS filing site](#) – **NOT** CDBS. According to the FCC, here's what to do next:

- On left side of page, select "Submit a Non-Docketed Filing"
- Using the dropdown box for "Inbox" select "Form 338: AM Station MDCL Notification"
- Complete "Contact Info"
- For "Filing Type" select "Other"
- Complete "Address"
- For "Document" attach a completed FCC Form 338
- Select "Continue"
- Select "Confirm"

No filing fee is necessary. Once you have completed the last step, ECFS should give you a "confirmation" screen indicating that you have navigated the process successfully. We strongly recommend that you make a screen grab of that page and keep it available to demonstrate that you did what you were supposed to do. You will also want to put a copy of the completed Form 338 as filed in your local public inspection file.

The Media Bureau staff must be sensitive to the fact that this is one of the very few broadcast forms not filed through CDBS. We know this because the public notice expressly warns that:

Only FCC Form 338 may be filed using this procedure. If any other filings are submitted to this ECFS Inbox using this procedure, they will be deleted from ECFS without staff review or action.

We're not sure why the Bureau thinks that warning is necessary, but we pass it along to you, just in case.

In this day and age of online functionality, you might wonder why the Bureau is kicking it old school with this particular form.

In this day and age of increasing online functionality, you might wonder why the Bureau is kicking it old school with this particular form, requiring the cumbersome print-out, fill-in, scan, upload process when a simple fill-it-in-online-and-push-the-button to file would be so much easier for all around. And we *do* mean all around – because, as it turns out, once the scanned copy of the form is submitted to the Commission, FCC staffers must then transcribe the information from the form into the Commission's computer system, creating just about twice as much work as would normally be the case for this process.

As with many things, we understand, the answer comes down to money and the inexorable creep of obsolescence. As to the latter, CDBS – the old warhorse of an online filing system used for the submission of broadcasting forms for about two decades already – is not being modified any more. [As we have reported](#), the Commission is moving toward a unified e-filing system (dubbed the "Licensing and Management System", or LMS) for all services, and there is no interest in spending any time or effort to modify the outmoded-and-destined-for-the-scrapheap CDBS in the meantime. And that includes adding a new Form 338 to CDBS's existing menu o' forms.

But creating LMS costs money, more money, it seems, than the FCC has available for the project. As a result,

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Now may not be the best time ...

Drones and Newsgathering?

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It seems like everybody's been talking about drones and the myriad ways that they will make our lives better. Even [we here in the Memo to Clients bunker have devoted considerable attention to the topic](#) (although we're trying to get our readers used to the proper terminology: as far as the FAA is concerned, we should refer to "Unmanned Aircraft Systems", or "UASs", not to "drones").

But at the risk of sounding like a total fun sponge, I have to admit that I'm not all that bullish about the use of UASs by the media, at least for the foreseeable future.

That's because it's still really hard to meet the FAA's requirements for using a UAS for newsgathering purposes. While the FAA has (as [my colleague Laura Stefani outlined in useful detail here last September](#)) adjusted its policies to help facilitate UAS use, those policies still impose significant obstacles for media wishing to take advantage of UAS technology.

First and foremost, the FAA deems journalism to be a "commercial" activity. To get the FAA's blessing for UAS use in such activity, you've got to jump through three hoops. In particular, you must:

- ✈ obtain an exemption from the FAA. Such exemptions, issued pursuant to Section 333 of the FAA Modernization and Reform Act of 2012, come with a limited Certificate of Waiver or Authorization (COA) and can obviate the need for a separate FAA-issued Airworthiness Certificate;
- ✈ arrange to have an authorized pilot (*i.e.*, someone with an FAA-issued Airman Certificate) available to fly your UAS whenever you want to use it; and
- ✈ properly register your UAS (check out [this recap of the current registration process by another FHH colleague, Jon Markman](#)).

Second, even if you take care of those three chores, your Section 333 COA will let you fly **only**:

- ✈ up to 200 feet above ground level (*i.e.*, about as high as a 20-story building). (You could go higher, but before you could do so you'd have to apply for and receive a separate, stand-alone COA authorizing such specific exceptions.);
- ✈ during daylight hours, with total drone weight of less

than 55 pounds;

- ✈ over areas certain distances away from airports/heliports, otherwise restricted airspace and certain densely populated places;
- ✈ while maintaining a visual line of sight with the UAS at all times (*i.e.*, within direct eyeshot of the UAS); and
- ✈ at least 500 feet away from (and *not* over) "nonparticipating" persons *unless* those persons (a) are protected by adequate barriers or structures or (b) have given their consent and the operation

doesn't constitute an undue hazard to them (a condition that dramatically limits one's ability to capture images of many activities likely to be newsworthy).

So where does all this get you? Not very far.

As a media company you would need to align with a licensed pilot. And even if you have the budget to hire a licensed pilot to fly your UAS (who knows, maybe the ace who flies your station's news chopper could step in when needed?), look at those restrictions and ask yourself "what does this get me?" You can fly your UAS only at relatively low altitudes in pretty remote, unpopulated areas that would still have to be accessible otherwise (since your pilot would have to be able to see the UAS in operation). That means some of the cooler uses for UAS are probably out: no flying over active volcanoes (unless your pilot is willing to walk pretty much right up to the edge); no bird's eye views of emergency crews dealing with disasters, whether natural (earthquakes, floods, wildfires, etc.) or man-made (train wrecks, crime scenes, etc.); no sweeping shots from above traffic jams, festivals, protests or other large gatherings of people.

In other words, don't count on a steady stream of endlessly gripping visuals from your UAS.

And don't think that you can count on freelancers to provide such visuals on a regular basis, either. In the FAA's view, freelancers are subject to the constraints imposed on commercial UAS use unless the freelancer happens to be a recreational (or "hobbyist") UAS operator. If your go-to freelancer happens to be in the business of selling UAS-obtained content to media companies, he or she is not a hobbyist, as far as the FAA is concerned. Sure, it may be possible, even likely, that you can find a friendly

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Don't count on a steady stream of endlessly gripping visuals from your UAS.



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hobbyist who is willing to provide you with some useful material, but if you go back to that hobbyist again and again, he or she will almost certainly fall out of the “hobbyist” category.

But don’t despair. All of this is the way things are *now*. There is at least a glimmer of hope that things will get better. Earlier this month, Rep. Earl Blumenauer (D-OR) introduced the [Commercial UAS Modernization Act, H.R. 4432](#), in the U.S. House of Representatives. (A similar bill, labeled [S. 1314](#), was introduced in the Senate last year by Senator Cory Booker (D-NJ).) Rep. Blumenauer’s bill would make it much easier to operate so-called “Micro UASs”, *i.e.*, a UAS weighing less than 4.4 pounds, including payload.

How? First, by eliminating the requirement that the UAS operator have a pilot’s license. That’s particularly important because it’s unclear whether the FAA currently has the authority to waive the pilot requirement on its own; some legislative provision expressly giving the FAA such authority may be necessary.

Second, by easing other restrictions as well. Micro UASs would be permitted to fly over people for both commercial and noncommercial purposes. Removing the commercial/noncommercial distinction is, in and of itself, important in terms of eliminating the need to obsess about a distinction that is confusing, at best (not to mention logically – [and legally](#) – dubious). But even more important is the prospect of using UASs in cities and other crowded places – exactly where they are most needed because use of a helicopter might be dangerous, impossible, or at best, not all that helpful because it will be so high above the focal point.

To my mind, the Commercial UAS Modernization Act would go a long way toward opening up UAS use for newsgathering and other journalistic purposes.

Sure, there would still be some restrictions over and above the 4.4 pound weight limit (including, *e.g.*, maximum operating height (400 feet), daytime-only opera-

tion, line-of-sight requirement, limited proximity to airports). But to me those seem relatively tolerable. And as to the 4.4 pound limit, that’s about the size of a bird, heavy enough to include an HD camera, small enough not to pose much risk to folks on the ground. According to [a recent op-ed by Brendan Schulman](#) (a honcho at DJI, the world’s largest consumer drone manufacturer) published in *The Hill* newspaper, there has never been a reported aviation fatality attributed to a small or medium bird at a low altitude away from an airport (where Micro UAS operation will be allowed) since data collection began in 1990.

The bill is supported by several influential associations and coalitions, such as: the Association for Unmanned Vehicle Systems International; NAB; Information Technology and Innovation Foundation; and the Small UAV Coalition (which includes such heavy hitters as Amazon Prime Air, DJI, Google[x], GoPro, Intel, Parrot, Verizon Ventures, and 3DR, among others). That range of support is good news.

And the better news is that it actually has a chance of going somewhere – though it may need some help. As it turns out, Blumenauer’s bill has been added as an amendment to [H.R. 4441, a/k/a the Aviation, Innovation, Reform and Reauthorization \(AIRR\) Act](#). (Note to Congress: Can’t you come up with better acronyms?) Of course, Congress hasn’t been in the business of legislating much in recent years (even though that *is* its business) and individual bills don’t have great prospects for passage. But because the AIRR Act is significantly broader in scope than most bills – it would authorize the FAA to undertake a number of reforms to the nation’s aviation system – *its* prospects for passage are much better. In fact, H.R. 4441 passed the House Committee on Transportation and Infrastructure. Next stop: the House Floor.

I, for one, want to see the AIRR Act pass (despite its terrible acronym). If you’re a media outlet looking to dip your toes into the world of UAS (and who wouldn’t want to?), then you may want to look into encouraging your elected representatives to make it happen.



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it locally. While the FCC and FEMA don’t appear inclined to issue nationwide public notices of upcoming tests, FEMA does organize ISSRT’s in coordination with state broadcaster associations and state emergency management agencies. If you have any

questions about any of this, you should probably contact the EAS guru(s) in your state association. You can also reach out to FEMA’s IPAWS National Test Technical Lead Al Kenyon, who has reportedly encouraged broadcasters to contact him at Alfred.Kenyon@fema.dhs.gov with any questions they might have.



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while LMS has already been configured to accept [a range of television-related filings](#), it is not yet set up to handle *any* radio filings. And, because of the lack of available funds, we hear that there are no current plans to expand LMS to include radio, which will have to limp along using CDBS for the

foreseeable future.

As a result, the new Form 338 – part of a streamlined process intended to increase convenience for all concerned – will ironically end up burdening all concerned. Such is progress at the FCC.



A new home for Form 398

KidVid Reports Moving to LMS

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Attention, all you Class A and commercial TV licensees. The [Commission has announced](#) that the next time you go to file a quarterly Children's Programming Report (that would be Form 398), you'll have to do it through the work-in-progress Licensing and Management System (LMS). LMS, of course, is the online system the [Commission has been developing for a couple of years now](#) as an upgrade – or at least a replacement – for CDBS.

This may not be a bad thing. Historically, KidVid reports have been filed through their own special portal on the FCC's website, a system which has periodically given users fits. The new format for the report is similar to other LMS forms – the system is set up to walk you through the upload process one step at a time; in fact, it prevents you from moving to the next step if it detects problems with the screen you're working on.

The new filing approach appears reasonably easy and intuitive to navigate through, but we won't know for sure until the next set of reports are filed, *i.e.*, no later than April 10 of this year. One noticeable, and welcome, feature: the first item to be completed on the first screen calls for the filer to identify the period covered by the report. This may make it harder (but not impossible) to specify the wrong period. Historically, that mistake was relatively easy to make, and filing a report that specified the wrong period would result in any other report for that specified period being overwritten in the FCC's system. That could then lead to unpleasant complications. It's not clear how the new system will deal with situations in which more than one report is filed for a given period, but ideally LMS will be more user-friendly than the old way.

From an initial look through the form, it appears that it pre-fills information from the most recent filed report, although it may still ask for some additional information about some previously-reported programming. It also provides a checklist/progress report indication showing where you are in the form and what part(s) of it still need to be completed or corrected.

The FCC's announcement provides a helpful step-by-step listing of how to access the form. For those of you unfamiliar with LMS, we'll go a step further and provide illustrations.

Step One: Go to LMS (which you can get to by [clicking on this link](#)). Enter the licensee's FRN and FRN password and click on the Log In button. (See Figure 1, next page.)

Step Two: Click on the Facilities tab. (See Figure 2.)

Step Three: Click on the Facility ID number of the station for which the report is being filed. (See Figure 3.)

Step Four: Click on "File an Application" button. (See Figure 4.)

Step Five: Select "Children's Programming Report" from the drop-down menu. (See Figure 5.)

Step Six: Fill out the form.

The FCC's public notice also reminds one and all of the deadlines for filing the quarterly reports (*i.e.*, April 10, July 10, October 10 and January 10), and of the need to publicize the existence and location of the reports.

LMS is supposed to link a copy of the report automatically in the station's online public inspection file. BUT, the public notice warns that, if the system has not automatically created that link by the "tenth day of the succeeding calendar quarter", the licensee must manually upload a copy of the report to the online public file.

This last admonition is troubling. Since the form isn't required to be filed until the tenth day after the quarter covered by the report, it's not exactly clear what the Commission is looking for: are licensees expected to file prior to the tenth day (even though the rules provide that they can file up to that day)? And if they do file on the tenth day (as they're permitted to do), does this mean that they must manually post a copy if LMS does not provide a public file link more or less instantaneously? Ideally, the Commission will provide further guidance about the precise point at which the licensee will be under an obligation to manually upload. For the time being, though, you should probably be checking your online public file immediately after you file and, if the link doesn't show up right away, check the next day as well. If no link has appeared within 24 hours of your filing, it would probably be a good idea to take care of the upload yourself – although, ideally, the FCC will provide us all more guidance on this front between now and April 10.

And one last thing: when you have completed the filing, the FCC's system will give you a confirmation screen. It is a good idea to get into the habit of making a screen grab of that message so that, should any questions arise down the line, you will be able to demonstrate when you filed the form.

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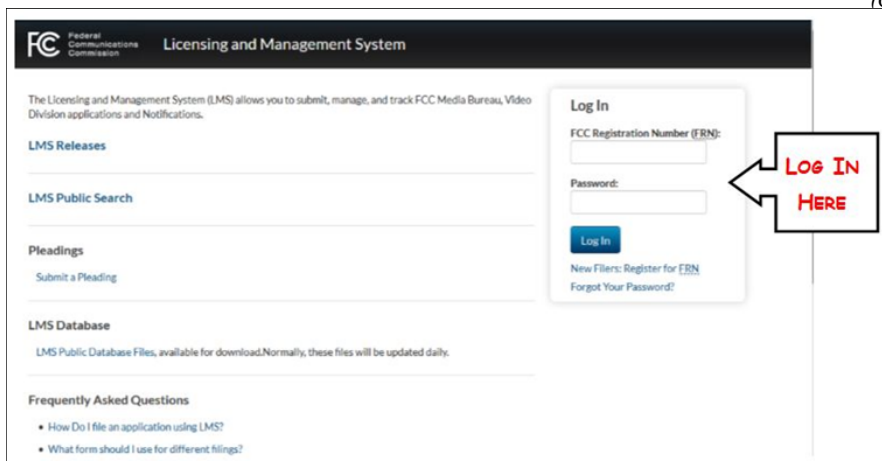


Figure 1

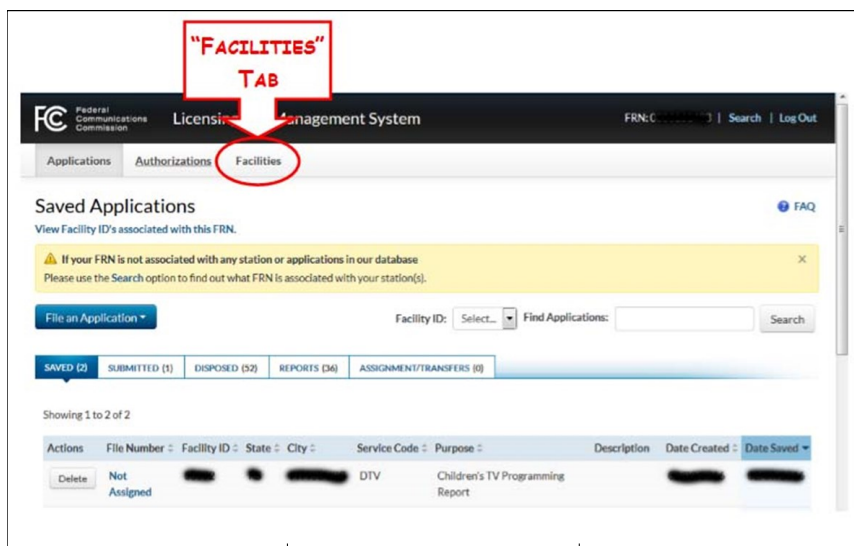


Figure 2

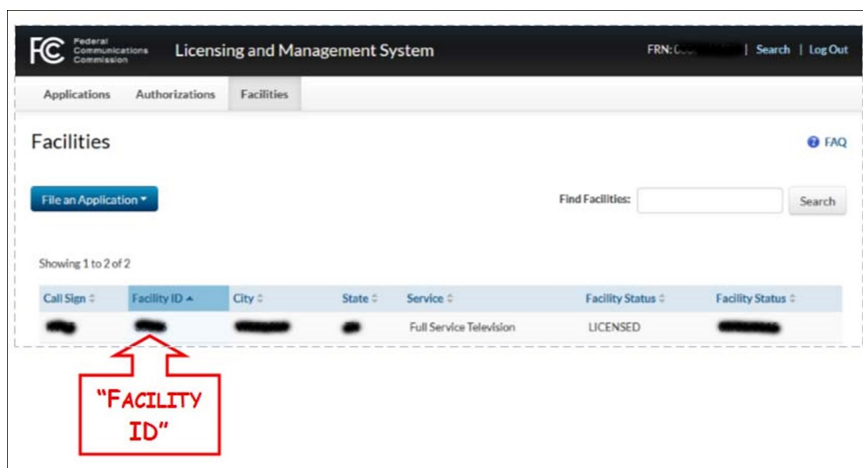


Figure 3



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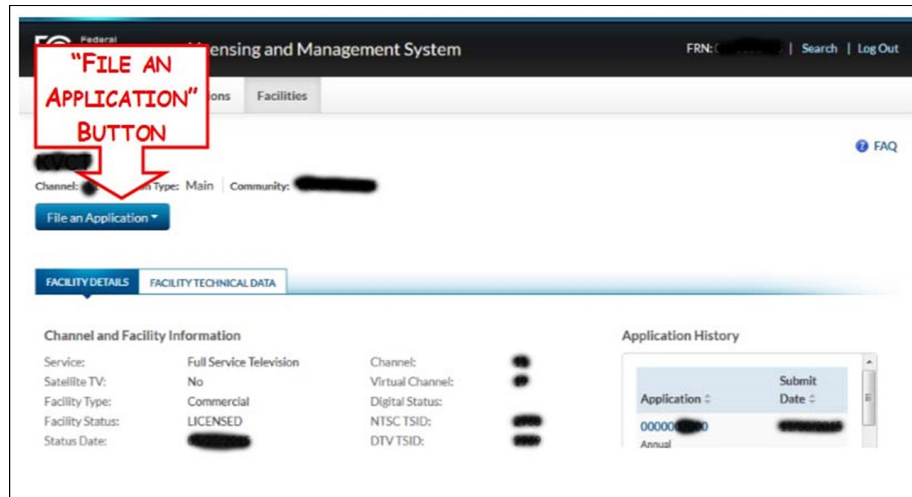


Figure 4

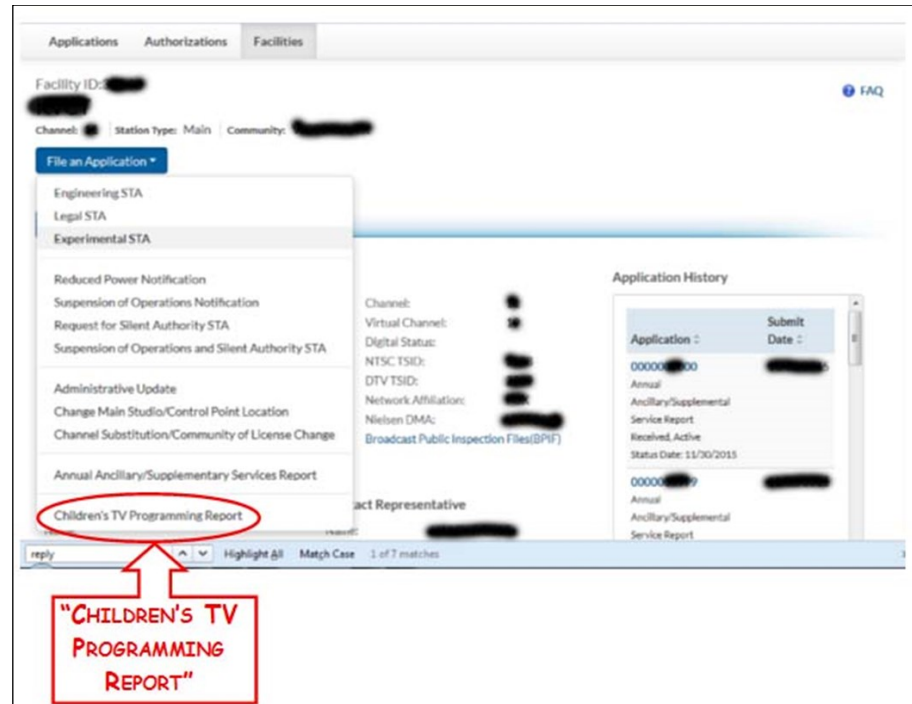


Figure 5



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Bear in mind that even getting to the point where the FCC is required to respond to a mandamus petition isn't easy. Because of the extraordinary nature of the writ, an agency is not required to respond to such a petition until the court has reviewed the petition and determined that a response is called for. In other words, mandamus efforts can, and often are, rejected without the FCC filing any response at all. Indeed, the mere fact that the court does order such a response can be viewed as a very significant victory for the mandamus petitioner.

Which brings us to the cases of Latina and the Videohouse Three.

Latina and the Videohouse Three

As you may recall, while the Incentive Auction will eventually involve a repack of the entire portion of the spectrum used for broadcast television, the Spectrum Act afforded post-repack protection only for full-power TV stations and LPTV stations that had been accorded primary status as Class A licensees. Because of that latter category – and because lack of post-repack protection threatens a station's existence – it is of overriding importance to many stations that their status as Class A licensees be confirmed.

The trouble is that the road from mere LPTV license status to Class A status has been complicated and frustrating for a number of stations. In [its June, 2014 order](#) finalizing (for the most part) many of the nitty-gritty details of the Incentive Auction process, the Commission announced certain standards by which it would determine whether a station claiming protected Class A status would be given that status. And it indicated some willingness to accord such status even if a station did not precisely meet the announced criteria.

But when it came to most stations that fell short of the specified standards, the Commission refused to deem them protected. "Approximately 100" such stations existed, according to the FCC, and giving them post-repack protection would have a "significant detrimental impact on repacking flexibility". However, one such station – KHTV-CD – **was** given the coveted protection.

Three would-be Class A licensees that didn't make the cut sought reconsideration, arguing that they, too, should be entitled to protection. Those licensees were The Videohouse, Inc., Abacus Television (the predecessor in interest to Fifth Street Enterprises, LLC) and Latina Broadcasters of Daytona Beach, LLC. In June, 2015, the Commission rejected those three petitions for reconsideration. But even though it didn't seem inclined to let those three licensees in, the Commission nevertheless expanded the universe of would-be Class A licensees entitled to

protection, as a result of which a small number of additional stations gained protected status. (Irony Alert: Unlike Videohouse, Abacus and Latina, none of those newly-protected stations had themselves sought reconsideration.)

Curiously, though, when the formal list of protected (and, therefore, auction-eligible) stations was released two weeks later, Latina's station **was**, without explanation, included, allowing its station to join the protected ranks with KHTV-CD.

Back in for reconsideration went Videohouse and Fifth Street in September, 2015, joined this time by WMTM, LLC and KMYA, LLC. A month later, the Commission announced the deadlines for reverse auction applications – December 18 (later pushed back to January 12) – with final reverse auction participation elections due

March 29. Obviously, Videohouse *et al.* needed to have their petition for reconsideration acted on quickly if they wanted to participate in the auction. In their view, they needed to be declared eligible for the auction in time to file applications by January 12.

By December 22, however, with the application deadline less than three weeks away, the FCC had done nothing. So Videohouse, Fifth Street and WMTM (we've dubbed them the "Videohouse Three" for the sake of convenience) asked the D.C. Circuit to issue a writ of mandamus compelling the Commission to rule on their pending reconsideration petition no later than January 4, 2016, which (in theory, at least) would give them time to file their applications – if the FCC were to deem them eligible – or, if not, to get an appeal filed. In their petition, the Videohouse Three argued (among other things) that it was plainly arbitrary for the FCC to exclude them while including Latina because all were similarly situated. (For the moment Latina, which had been given protection back in June, 2015, stood pat, happy with its lot in life – but read on.)

On December 23 – the day after the petition walked in the door – the court ordered the FCC to respond no later than December 28, the Monday after the three-day Christmas weekend.

Now if you were paying attention in our quick review of mandamus law, above, you should know that getting such an order at all is pretty remarkable, getting it essentially overnight even more so. To many observers, such a quick and favorable order suggests that the court sees at least some merit in the petitioners' arguments.

The FCC's Response to Mandamus

The [FCC's answer](#) is where things started to get interesting.

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Getting such an order at all is pretty remarkable, getting it essentially overnight even more so.



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As is customary when the FCC responds in a mandamus proceeding, its answer emphasized the extraordinary nature of the writ and generally poo-hooped the Videohouse Three's various claims. To do that, though, the Commission had to ignore at least one of its own prior admonitions. While the petitioners argued that the deadline for filing reverse auction applications marked their Absolute Last Chance to get themselves into the auction, the Commission said, *au contraire*,

[i]f either the Commission or the Court rules before March 29 that petitioners are eligible to participate in the reverse auction, the Commission will have the ability to ensure that petitioners "have an opportunity to submit an application to participate in the reverse auction" before the agency commences the auction.

OK, good to know – especially since the Commission had not made that clear previously. In fact, [it had said pretty much the opposite](#): "**Each** licensee seeking to relinquish spectrum usage rights in Auction 1001 **must** file an auction application" by the January 12 deadline. (We added those emphases.)

The FCC's response then went on to say that

[r]egardless of when the agency acts on the reconsideration petition, petitioners will have an adequate opportunity to petition this Court for any appropriate relief concerning their eligibility to participate in the reverse auction and to receive repacking protection...

And that, according to the Commission, is because

[e]ven assuming that the FCC does not issue a reconsideration order before the filing window for the reverse auction closes on January 12, 2016, **petitioners remain free to petition the Court for a stay of the auction...**

(Again, those are our emphases.)

So in answering the mandamus petition, the Commission reversed its earlier admonition that eligible applicants **had** to file by the January 12 deadline to maintain their eligibility. And it clearly suggested to the petitioners that, in order to protect their interests, they might want to consider filing for a stay.

One more thing in the FCC's response. In a footnote describing one aspect of the June, 2015 decision, the Commission explained that Latina had been deemed to be entitled to protection and was, therefore, "not 'similarly situated to Videohouse'".

Two days later – on December 30 – [the court issued an](#)

[order dismissing the mandamus petition](#). Again, if you were paying attention above, you should be thinking that dismissal may not be a bad thing, depending on what the court said. And sure enough, even though the court technically tossed the mandamus petition, in doing so it included this caveat:

Based on the agency's representations, ... the Court expects the Commission to rule on the pending reconsideration petition promptly, so as to allow petitioners to seek judicial review with an opportunity for meaningful relief before the incentive auction commences on March 29, 2016.

In other words, the court wasn't going to specify a date by which the pending petition for reconsideration would have to be resolved, but it **did** make clear that that would have to happen soon enough to let the Videohouse Three get to court for "meaningful relief" before March 29. In other words, the Videohouse Three pretty much got what they had been asking for.

Back to the Commission

In its response to the court, the Commission also indicated that a draft order resolving the petitions for reconsideration was already circulating around the Eighth Floor. (This is another standard FCC mandamus response – an effort to convince the court that extraordinary judicial intervention isn't necessary because the agency's already close to getting the job done.) So you might think that, given the urgency apparent in the court's order, the FCC would have finished up its work *tout de suite*, to make good on its tacit assurance to the court that the reconsideration order would likely be out shortly.

And that's exactly what happened ... if you view six weeks to be "shortly". The [FCC's reconsideration order didn't come out until February 12](#), six weeks after the court's order and less than seven weeks before the March 29 deadline. In its order, the FCC again rejected the Videohouse Three's claims to eligibility. But it handed them a present by deciding that, contrary to what it had concluded in June, 2015, Latina should **not** be deemed eligible – a re-reversal that seems to underscore the inherent arbitrariness of the FCC's approach here. Recall, after all, that just six weeks earlier the FCC had seemed pretty confident in assuring the court that Latina was properly entitled to protection and, thus, different from the Videohouse Three.

The February 12 decision triggered a couple of strong dissents from Commissioners [Pai](#) and [O'Rielly](#), both of whom gave the Videohouse Three – and, now, Latina – plenty of arguments with which to challenge the decision (as if the Videohouse Three needed the help).

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Back to Court

Back to court went the Videohouse Three, this time with a petition seeking review of the various Incentive Auction orders, including the February 12, 2016 decision. And, given the fast-approaching March 29 deadline, they filed a [separate motion asking the court to adopt an expedited briefing schedule](#) that would wrap up by March 7; they also offered to forgo oral argument, if that would help move things along. Their goal, obviously, was to get a decision in advance of the March 29 deadline and thereby avoid the irreparable injury that would befall them should they miss that deadline.

The [Commission opposed that motion](#), essentially saying “March 7???? That’s crazy talk!” Such “breakneck speed” wouldn’t provide the FCC “adequate time to present [its] arguments” and would “strain [its] resources”. (Truth be told, the Commission said that the same concerns would apply to the Videohouse Three – but since the Videohouse Three had themselves proposed the expedited schedule, they presumably don’t share the FCC’s concerns.) In its opposition, the Commission also acknowledged that “[n]ormally, the timeframe for ... expedited consideration [by the D.C. Circuit] of a petition for review is measured in months”, indicating that even the FCC recognizes that completion of judicial review is unlikely to occur in the next seven weeks (*i.e.*, before the March 29 deadline).

The FCC went further. In its view,

the traditional vehicle for seeking relief [to avoid irreparable harm] is a stay pending judicial review. Petitioners have not requested such relief here.

Because of these considerations, according to the FCC, the court should not adopt the expedited briefing schedule proposed by the Videohouse Three.

The Videohouse Three held their ground. In a [reply to the FCC’s opposition](#), they speculated that the FCC’s seeming preference to have them file for a stay (as opposed to an expedited briefing schedule) is a devious tactic to avoid judicial review. Since the standards that must be met by a party seeking a stay are (at least in the view of the Videohouse Three) more rigorous than the standards to be met to get expedited briefing, the Videohouse Three suspected that the FCC is hoping that, by forcing them (and the court) to engage in a “stay” analysis, the FCC might be able to prevail in

that analysis. And, without a stay, the auction would come and go with the Videohouse Three on the outside looking in. Sure, they might continue to prosecute their appeal, but to what end? The likelihood of unwinding the completed auction is essentially nil.

The Videohouse Three’s speculation about the FCC’s litigation strategy may be correct, or not. But it seems that the FCC is playing with fire here. After all, the FCC has clearly indicated that, if the Videohouse Three aren’t in the auction by March 29, they’re not going to be; it has assured the court that the Videohouse Three “will have an adequate opportunity to petition this Court for any appropriate relief concerning their eligibility to participate in the reverse auction”; it has acknowledged that under normal circumstances, the court won’t be acting by March 29; and it has condescendingly counseled the petitioners and the court – not once, but twice – that the Videohouse Three should be asking for a stay.

The new schedule announced by the court may pose at least one big problem.

And let’s not forget that, in dismissing the mandamus petition, the court seemed to be pretty clear that it thinks the Videohouse Three are entitled to – how did the court say it? Oh yes – “judicial review with an opportunity for meaningful relief before the incentive auction commences on March 29, 2016”, an expectation “[b]ased on the [FCC’s] representations”.

The [court promptly acted on the motion to expedite](#) by, sure enough, expediting the briefing schedule – not as much as the Videohouse Three asked for, but certainly enough to indicate that the court is sympathetic to their plight.

BUT the new schedule announced by the court may pose at least one big problem. The court’s order provides considerably more time for the FCC’s brief (until March 28) and the petitioners’ reply brief (until April 1) than the Videohouse Three had asked for; it also indicates the oral argument won’t happen until sometime in May. That obviously means that the case won’t be resolved by the court until after the March 29 deadline. So to the extent the proposed schedule was designed to get the appeal wrapped up before March 29, that didn’t happen.

So now it looks like the Videohouse Three may have to file for a stay. But wait! Who’s that knocking on the courthouse door but Latina! Justifiably peeved that the FCC had flip-flopped again with respect to Latina’s entitlement to protection, Latina filed its own appeal

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Reverse Auction Update!

FCC Underscores Initial Commitment Deadline, Offers Workshop, Tutorial and User Guide to Introduce “Initial Commitment Module”

It’s “damn the stay requests (and appeals), full speed ahead” on the reverse auction front. Notwithstanding the [frenzy of activity down at the U.S. Court of Appeals for the D.C. Circuit](#), the Commission has issued further information underscoring its determination to close the reverse auction door as of 6:00 p.m. (ET) on March 29, 2016. And, to assist would-be auction participants, it has scheduled a workshop and prepared an online tutorial and user guide.

According to [a stern public notice](#), anyone eligible to participate in the reverse auction will have from 10:00 a.m. (ET) on March 28 to **6:00 p.m. (ET) on March 29, 2016**, to submit their “initial commitment” through the online “Initial Commitment Module”. And in case you had any doubts about how the Commission views that deadline, it provides this all-boldface admonition: **“Initial commitments must be submitted prior to 6:00 pm ET on March 29, 2016. Late initial commitments will not be accepted.”**

If you’re inclined to check out the Initial Commitment Module to (a) make sure that you can access it and, if you can, (b) see how it works, you won’t be able to do so until it becomes available for a “preview period”. The period will run from 10:00 a.m. on March 24 until the “Initial Commitment Window” opens on March 28. Why the Commission has chosen not to unveil its Module until two business days before the Module is supposed to go live is unclear.

While the availability of the preview opportunity may seem a bit, um, abbreviated to some (what with the closing of the Initial Commitment Window following so closely and all), never fear. The Commission has also prepared an online

tutorial **and** a user guide, both of which are “designed to assist applicants in navigating the initial commitment module and making an initial commitment”, according to the Commission. Somewhat ominously, the FCC also notes that the user guide includes “suggested troubleshooting tips”. (This is ominous because it suggests that the FCC anticipates that there may be some troubles that will need to be shot.) Both the tutorial and the guide are supposed to be available through the [FCC’s Auction 1001 webpage](#) (click on the “Education” tab on that page) as of February 29.

And over and above those online resources, the [Commission has also announced a workshop](#) on how to make an initial commitment in the reverse auction. Scheduled for **March 11, 2016 from 10:00 a.m. – 1:00 p.m. (ET)** in the Commission meeting room in Washington, it’ll be open to the public **and** available through online streaming, both live and recorded. If you’re interested in attending in person, you may want to register beforehand. That’s not required, but it might help speed you through the check-in process. (You can register by sending an email with your name and company to auCTION1001@fcc.gov; use “Initial Commitment Workshop” in the subject line.) And if you choose not to venture down to the Portals, you’ll still be able to submit questions through that same email address before, during and after the show.

While attendance at the workshop is **not** mandatory, the Commission “strongly encourage[s]” all would-be reverse auction participants to check it out, whether in person or online. In view of the importance of getting your commitment in before the window closes, we second that emotion.



(Continued from page 11)

of the February 12 order on February 25. And the next day it followed up with [its own motion for a stay](#). Latina’s stay motion sought one of two alternative orders: Latina first asked that the effect of the 2/12 order essentially kicking it out of the reverse auction be stayed so that it can participate in the auction (subject to being kicked out later if the court eventually upholds the Commission’s 2/12 exclusion of Latina); and if the court isn’t willing to grant that relief, then Latina asks that the whole auction be stayed until the matter of its protection eligibility can be resolved.

Again demonstrating its obvious sensitivity to the urgency of getting these questions resolved quickly, on the same day that Latina’s motion was filed, [the court, acting on its own motion, ordered the FCC to respond](#) by noon on March 4.

As of this writing it’s not clear whether the Videohouse Three will file for their own stay, but we wouldn’t discount that possibility. Against the background of the grant of their motion for expedited briefing, the odds seem to be moving in their favor, notwithstanding the unusually high burden a party seeking a stay must meet. After all, it’s hard to imagine that the court would move this quickly and this favorably in response to the Videohouse Three’s emergency motion to hustle up the briefing (not to mention Latina’s motion), only to neuter that action by allowing the auction to go forward with the Videohouse Three on the outside looking in.

It may be time to get going with your office pool as to whether a stay is going to happen and, if so, when the Incentive Auction will eventually start.

Obviously, there’s more to come in this saga. Check back with CommLawBlog.com for updates.

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

Updates On The News

New contest rules now in effect – It’s official! Last fall’s [overhaul of the rules governing licensee-conducted broadcast contests](#) has finally become effective. According to a [notice in the Federal Register](#), our friends at the Office of Management and Budget gave the new rules the big thumbs up, and the rules officially took effect as of *February 12, 2016*. This means that, among other things, stations are now able to post their contest rules on their websites and avoid the hassle of extended on-air announcements of those rules. Note, though, that there are still some on-air requirements for those who choose to move their contest rules online. For a recap of all the revised rules, check out [our CommLawBlog post from last September](#).

Last of STELAR market mod revisions now in effect, too! – Last October [we reported on a number of changes](#) in the Commission’s market modification processes, changes made at the direction of Congress (in the [STE-LA Reauthorization Act](#) (STELAR) back in 2014). But as we pointed out when most of those changes took effect, a couple of the revisions could not kick in until OMB had given them the once-over and declared them OK (pursuant to the hilariously-named Paperwork Reduction Act). We opined then that the OMB review process would likely take several months. That was several months ago ... and check it out: according to a [notice in the Federal Register](#), OMB has now signed off on revised [Sections 76.59\(a\) and \(b\)](#). As a result, as of *February 25, 2016*, those sections became effective.

Upcoming Webinar:

“Broadcasters and Drones – Staying Street-Legal in the Sky”



Notwithstanding the reservations of our colleague, Kevin Goldberg (*see page 4*), many reasonable folks think drones (a/k/a “unmanned aircraft systems” or “UASs”) and newsgathering are a match made in heaven. But questions abound: Can broadcasters legally operate their own drones? If so, what steps do they need to take? And can broadcasters legally use video or other images obtained from drones operated by others?

To help guide you through those questions – and to provide a glimpse of what may be in the offing at the FAA – we are pleased to offer a one-hour webinar on “Broadcasters and Drones: Staying Street-Legal in the Sky” on Thursday, April 7, 2016, at 3:00 p.m. (ET). The webinar is free, and we encourage your station employees to attend. You can register by [clicking on this link](#). (You’ll need to provide your name and email address.) The webinar will provide an over-

view of current FAA requirements for commercial operations of UASs, including the latest registration requirements. It will also preview how proposed new FAA rules and pending legislation are likely to alter the regulatory flightpath. And we will address the ins and outs of the use of video or images obtained from others, whether commercial or hobbyist users.

The webinar will be presented by Fletcher, Heald & Hildreth’s Laura Stefani and Jonathan Markman, in cooperation with our friends at a number of state broadcasters’ associations, including those in Alabama, Alaska, Arizona, Arkansas, Colorado, Hawaii, Maryland/District of Columbia/Delaware, Louisiana, Missouri, Mississippi, Nebraska, New Jersey, New Mexico, Oregon, Puerto Rico, South Carolina, Tennessee, Texas and Washington.



FHH - On the Job, On the Go

President of Strategy & Business Development of Lockheed Martin’s Information System and Global Solutions reports that the house was packed for the show and her film truly resonated with the audience. She also stayed for a post-showing Q&A. The screening was arranged with the help of our own **Kathleen Victory**, who happens to serve as AFCEA International’s General Counsel.

On February 18, during a Women’s Appreciation Event at the AFCEA International meeting in San Diego, **Kathy Kleiman** presented a showing of her documentary about the ENIAC Programmers’ WWII story. The event was hosted by Women in AFCEA and honored outstanding members of the association. **Kathy** (who was introduced at the affair by Jay Dragone, Vice

Frank Jazzo will be attending “Satellite 2016” from March 7-10 at National Harbor, Maryland.

On March 18, **Dan Kirkpatrick** and **Frank Montero** will again be teaching a class on “*Negotiating a Broadcast Acquisition Transaction*” for the NAB’s Broadcast Leadership Training Class. The following week, **Frank M** will be attending the Radio Ink Hispanic Radio Conference in Fort Lauderdale where he’ll be speaking on a panel entitled “*How the 2016 Election Will Impact Hispanic Radio’s Bottom Line*” and (get this!) introducing **FCC Commissioner Pai**. Sweet gig – but not surprising, since **Frank’s** on the Advisory Board for the conference. And on March 30, he’ll be back in D.C., attending the Spring Meeting of the U.S. Chamber of Commerce’s Telecommunications & E-Commerce Committee.

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 25, 2016

Television Incentive Auction/White Spaces – Reply comments are due regarding ten petitions for reconsideration of the August 11, 2015 Report and Order (FCC-15-99A1) adopting technical and operational rules to permit unlicensed services, including white space devices and unlicensed wireless microphone operations, to use channels in the broadcast TV bands and in the post-incentive auction 600 MHz band.

March 28-29, 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 between March 28 at 10:00 a.m. and March 29 at 6:00 p.m. EDT. If no initial commitment is received by the March 29 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 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.

