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Memorandum to Clients

March 2016

News and Analysis of Recent Developments in Communications Law

No. 16-03

Let the games begin

Reverse Auction Now In Gear

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And they're off!

After years of build-up and a final month with some quasi-drama thrown in, the reverse auction table has been set, the bidding lists have been finalized, and an anxious TV industry awaits the next step in the reverse auction process. As of 6:00 p.m. (ET) on March 29, all "initial commitments" from broadcast participants were etched in digital stone in the FCC's computers, and those computers set in on the chore of crunching numbers. The eventual result: a spectrum clearing target from which the "real" reverse auction bids will begin to be calculated.

But let's not get ahead of ourselves. Instead, we'll pick up where we left off last month.

Stay? What stay?

When last we left the reverse auction, it was in something of a cliffhanger moment: a number of LPTV licensees, believing themselves entitled to inclusion in the auction as Class A licensees, were making noises about getting a stay of the auction until their appeals were heard – and the U.S. Court of Appeals for the D.C. Circuit seemed sympathetic to their plight.

Inside this issue . . .

As of the end of February one stay request had already been filed with the D.C. Circuit – by Latina Broadcasters of Daytona Beach, LLC. Latina asked the Court either to order the FCC to let Latina into the auction on a provisional basis (*i.e.*, if Latina's appeal of the FCC's decision to exclude it is eventually rejected, Latina would be removed from the auction); in the alternative, Latina asked the Court simply to stay the auction. A week or so later, Latina was joined by the Videohouse Three (about whom we reported last month), who asked for a stay of the whole shebang. The Court ordered the FCC to respond on an expedited basis.

In relatively short order, though, Latina was in the door, the Videohouse Three were on the outside looking in, and the auction was still on track. The D.C. Circuit granted that portion of Latina's stay request that put Latina in the auction on a provisional basis. In a second order, the Court denied the Videohouse Three stay request entirely.

Editorial aside: Latina's success was to a significant degree attributable to smart lawyering on their part. By giving the Court two options – Plan A, which merely meant that the FCC had to squeeze Latina into the auction, or Plan B, which would have shut the whole auction down – Latina made things easy for the Court. While a blanket stay of the auction would have solved Latina's problems, it would also have messed up a whole boatload of other folks who really, really want the auction to happen sooner rather than later. The Court might have been sympathetic to Latina's plight, but it might not have been so sympathetic as to warrant disappointing that boatload of folks. So the narrower alternative – just letting Latina in – was an easy way for the Court to help out somebody who needed help while not causing problems for everybody else. Also helping the Court: as it turned out, the FCC had included Latina in its underlying database of "included" stations, which meant that, technically, Latina was already part of the necessary calculations, and requiring its formal inclusion would not disrupt the process.

Note, however, that Latina is not entirely out of the woods yet; if it loses its merits appeal, it will presumably not be permitted to enjoy whatever rewards it might get from its provisional participation in the auction. Look for a merits decision sometime in the fall, probably.

The Court's willingness to grant Latina any relief at all might have signaled good things for the Videohouse Three ... or

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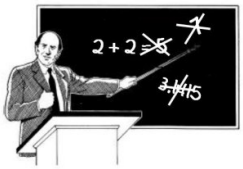

Not an art, and definitely not a science

New Math, Enforcement Bureau Style

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[*Editor's note: While we generally try to stick to broadcast-related material in the Memo to Clients, this piece struck us as relevant even if it doesn't involve broadcasters. The Enforcement Bureau, after all, issues forfeitures to all FCC regulatees, and its, um, quirky approach to the calculation of the amounts of those forfeitures should be of interest to anyone potentially subject to an NAL.*]

Maybe we're just not very smart, but we can't figure out the FCC's rationale for penalizing certain categories of wrongdoers. Take, for example, the case of Taylor Oilfield Manufacturing, Inc., located in Broussard, Louisiana, a short drive from the Gulf Coast. Its website says Taylor specializes in the manufacture and repair of equipment used in oil drilling.

In the spring of 2012, the company purchased five cell-phone jammers from overseas and installed four of them in the rafters. The purpose was to prevent employees from using their cell phones while at work, following a near-miss accident that might have involved a cell phone. As our regular readers know, all cell phone jammers are illegal, with exceptions only for the federal government. Someone complained to the FCC, which investigated. The company admitted it had bought and installed the jammers. A manager told the FCC they had been in use for a few months and handed them over. In a Notice of Apparent Liability a year later, the FCC proposed a fine of $126,000.

Get out the calculator. The FCC found three separate violations: operation without a license, use of unauthorized equipment, and interference to authorized communications. For each of the first two, it imposed the statutory maximum of $16,000, making the total fine for the "operation" and "use" components $32,000. For the interference violation, the FCC started with the maximum of $7,000 and added $3,000 "to reflect the duration of the misconduct." (We'll come back to this.) That made $10,000 for the interference, which, when added to the $32,000, brought the total to $42,000. The FCC then multiplied that total by four, reasoning that the four operational jammers had each violated all of those rules: $42,000 x 4 = $168,000. Finally, the FCC knocked off 25 percent in recognition of Taylor having voluntarily relinquished the jammers, giving the end result of $126,000.

The FCC could have, but did not, impose a separate penalty for importing the jammers. It also has the authority to impose a separate penalty for each day of a continuing violation, up to a maximum, but it hardly ever does, at least in equipment cases. (This jammer case is a rare exception.) Here the FCC calculated that per-day penalties could exceed $1.3 million, and declined to impose them. (We'll come back to this, too.)

On balance the proposed $126,000 fine strikes us as being within a reasonable ballpark, for an established company. The interference was deliberate. Depending on how strong the jammers were – the FCC does not say – the interference could have extended beyond Taylor's premises to the street, and possibly to buildings nearby, where it could block not only casual conversations but also 911 calls.

(Ironically, though, the jammers could not have worked very well. They covered the 850-900 MHz frequency range, which is home to traditional, 1980s-vintage base-to-mobile cell communications. Although those frequencies are still used, especially in rural areas, most voice calls today go over the so-called PCS frequencies at 1.9 GHz, well outside the jammers' band of operation. Chances are the Taylor employees' phone calls went through just fine.)

As can often happen in such cases, after issuance of the Notice of Apparent Liability (NAL) in 2013, discussions occurred between the FCC and the Apparent Violator. The result was a consent decree (three years in the making) in which the FCC

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Congress Puts Kibosh on Certain State and Local Internet-Related Taxes

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For nearly 20 years most of you have been free from state and local taxes on your Internet access – and also from multiple or discriminatory state/local taxes on e-commerce. You've got Congress to thank for that. You may not have realized, however, that that freedom has been at most temporary, initially set to expire in 2001 but extended several times since.

Until now.

On February 24, President Obama signed into law the Trade Facilitation and Trade Enforcement Act (Public Law No. 114-125), which includes language making permanent limitations first imposed in 1998 on state and local taxation of certain Internet-related activities. Specifically, the new law removes the sunsetting provision to which those limitations had been subject ***and*** it provides that some such state taxes, previously grandfathered, will themselves sunset no later than June 30, 2020. (States with such taxes reportedly include Hawaii, New Mexico, North Dakota, Ohio, South Dakota, Texas and Wisconsin.)

In other words, Congress has permanently barred states and localities from imposing (a) taxes on your Internet access and (b) multiple or discriminatory taxes on e-commerce.

The ITFA has been controversial from the get-go.

Background

The expansion of the World Wide Web in the 1990s brought an ever-increasing number of people and businesses online. The bad news: Many opportunistic state and local taxing jurisdictions were quick to recognize the revenue potential presented by the phenomenon of the Internet. The good news: Congress, having recently passed the Telecommunications Act of 1996 encouraging Internet development, was concerned that new taxes on Internet activity would inhibit that development. As a result, included in the massive Omnibus Consolidated Appropriations Act passed in October, 1998, was a section (Title XI, if you're looking) entitled the Internet Tax Freedom Act (ITFA). It established a three-year moratorium on state and local "[t]axes on Internet access" and "[m]ultiple or discriminatory taxes on electronic commerce".

What exactly did this ban reach?

First, taxes on "Internet access", which was clunkily defined as "a service that enables users to connect to the Internet …" including "the purchase, use or sale of telecommunications … to the extent such telecommunications are purchased, used or sold … to provide [a] service" that "enable[s] users to access content, information or other services offered over the Internet".Such services include not only the full range of access arrangements (*e.g.*, dial-up, private line, DSL, and other broadband technologies), but also incidental features (*e.g.*, browsers, home pages, and email) typically bundled with access offerings. (They do not include, however, voice, audio or video programming.)

And as for "discriminatory" and "multiple" taxes? The IFTA banned state/local taxes on e-commerce (a) that are greater than or not correspondingly imposed on comparable non-online transactions (*i.e.*, "discriminatory" taxes) and (b) for which a similar tax is imposed by another jurisdiction without offsetting credits (*i.e.*, "multiple" taxes). Notably, the ITFA does ***not*** otherwise exempt from taxation the online sales of goods, so long as any such taxes do not run afoul of these prohibitions.

Originally set to sunset in 2001, the 1998 moratorium has been extended a number of times, with some clarifications and modifications. Also adopted in 1998 and continued in effect since then was a grandfathering provision that allowed 13 states that already had such taxes in place before the IFTA moratorium to continue to impose those taxes. (That number has now dwindled to the seven states identified above.)

The Debate

Despite enjoying widespread support, the ITFA has been controversial from the get-go.

Proponents argue that taxation-increased costs should not be allowed to undercut the myriad benefits (commercial, educational, etc.) of the Internet. Moreover, the costs of such state/local taxation could discourage low-income individuals from using the Internet, thereby exacerbating the so-called Digital Divide. And what about the adverse impact on Internet service providers who would have to bear the costs and administrative burdens of complying with taxes imposed by the thousands of state and local tax jurisdictions?

Opponents counter that the tax exemption deprives states and localities of necessary revenues and unfairly discriminates against services not delivered via the Internet. As for low-income users, carefully tailored subsidies could be targeted more directly to such folks.

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Amber waves of grain in the white (open) spaces?

FCC OK's TVWS Down on the Farm

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It happened again.

Just when the lawyers thought they finally had a regulatory scheme that works, the engineers came up with a new idea that doesn't fit.

We recently wrote about this phenomenon in ultra-wideband technology, in an agricultural context. This time it's TV White Space (TVWS) technology, once again on the farm. Historians and anthropologists tell us agriculture has been a major driver in technological innovation for the last 10,000 years of human history, so we should not be surprised that this remains true into the digital age.

TVWS devices (a/k/a TV Band Devices, or TVBDs) are unlicensed data transmitters that operate in locally vacant TV channels. (On a map of frequency usage, regions of non-use are typically shown in white – hence the name "white spaces".) The regulatory challenge is to protect TV reception, wireless microphones, and other authorized TV band activity by making sure a TVWS device operates only on channels which, at its location, in fact are not being used by others.

Grant of the waiver is subject to 14 specific conditions.

To this end, the FCC has mandated a nationwide database of the locations of licensed and otherwise authorized users of TV spectrum. From that database, a device can determine which channels are available for TVWS use at any latitude and longitude in the country.

The rules authorize three kinds of TVWS equipment. First, you've got your fixed devices, which must operate at fixed locations (no surprise) and have Internet access to the TVWS database. Allowed relatively high power, up to 10 watts, they must either have built-in geolocation (such as GPS) or be professionally installed by someone who programs in the location. (Attentive readers will recall that the FCC is considering dropping the professional installation option.)

Second, you've got your personal/portable devices, which are limited to one-tenth of a watt and must either: (a) use geolocation and database access, or (b) get channel information from a nearby device that has these capabilities. The third alternative, which is not relevant here, comprises devices that avoid protected users by sensing activity in candidate TV channels; these are limited to 50 milliwatts and subject to stringent testing.

Developing these rules took the FCC more than a decade, with a lot of adjustments along the way, powered by huge amounts of work from FCC staff and interested parties. Now Deere & Company (brand name John Deere), which makes farm equipment, among other things, and electronics company Koos Technical Services (KTS) want to bend those rules.

Deere and KTS think TVWS is the right answer for data-driven farming applications that can transmit information about equipment operations and agronomic data (pertaining to, *e.g.*, soil, planting, harvest, fertilizer, insecticide application, and moisture levels). Their waiver request seeks permission to use TVWS devices on board moving farm equipment to exchange these kinds of data both with other moving farm gear and with a stationary location they quaintly call "the farmhouse," which we suspect looks more like the NORAD command center, if not the ultra-high-tech *Memo to Clients* bunker.

The FCC has responded with an order that waives the rules for Deere and KTS in several respects. They can use "fixed"-type TVWS on moving machinery in order to benefit from the higher permitted power levels (but only up to four watts), so long as the device re-registers with the TVWS database whenever it moves 50 meters after its last registration. (In contrast, personal/portable devices can travel up to 100 meters without a database recheck.) Rather than incorporate geolocation into the devices, as the rules require for "fixed" devices, Deere and KTS have permission to plug into the GPS-enabled system built into Deere farm machinery. Finally, where the rules require a fixed TVWS device to access the Internet either directly or through another fixed TVWS device, the Deere and KTS system may take multiple "hops" from one piece of farm machinery to another before reaching the Internet connection.

Grant of the waiver is subject to 14 specific conditions, and is premised in part on the common-sense observation that waivered devices will be used in rural areas and in large agricultural fields having few broadcasters and widely dispersed TV receivers. To make sure of this, the waiver is effective only in places where at least half the TV channels are available for TVWS device use – *i.e.*, unused

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Homing in on geolocation

White Space Database Clean-up

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Everybody interested in 600 MHz – whether broadcasters sweating the repacking process, carriers planning to bid on new spectrum, or one of the many other current spectrum users wondering what the future will look like – share a common concern: How will the FCC ensure that the millions of unlicensed wireless devices expected to operate in the band won't cause havoc? In a Notice of Proposed Rulemaking and Order (*NPRM*) the FCC is proposing a number of measures aimed at reducing the likelihood of any problems.

The Commission devised a plan in 2008 to allow unlicensed wireless devices to operate on spectrum referred to as "white spaces" – that is, available channels in the television bands where television stations are not operating. (Those in need of a refresher can consult my colleague Peter Tannenwald's 2010 blog post here.) Fearing interference, broadcasters challenged this idea, but after much-publicized testing by the FCC's Office of Engineering and Technology, the Commission eventually adopted Part 15 rules for white space device operations. A key requirement is that devices send their geographic location to an FCC-authorized database administrator, which will look at the spectral environment and tell the devices which channels they may use to operate at that location. (Go here for a description of how that works, and here to see how the rules were tweaked in 2012.)

"Accurate location information is the linchpin for minimizing the risk of harmful interference in the white space spectrum sharing scheme."

As the Commission says, "Accurate location information is the linchpin for minimizing the risk of harmful interference in the white space spectrum sharing scheme." The Commission authorized a number of administrators to operate the database that will do this work. However, the technology never became well established. To date, the only unlicensed transmitters authorized to operate in the white space bands are fixed stations, and few are actually installed and in operation.

Meanwhile, as part of its Incentive Auction work, last year the Commission again tweaked the rules, looking toward a future where manufacturers could develop white space devices for indoor use (connecting products for the Internet of Things) or for outdoor use (to provide wireless broadband in less populated outdoor locations). A number of parties raised concerns, including the National Association of Broadcasters (NAB), which filed an Emergency Petition and Request for Rulemaking challenging the accuracy, integrity and continued use of the database system.

The Commission now says that it has worked with the database administrators to clean up errors and misunderstandings in the system. And it is further addressing the NAB's concerns by proposing a number of measures, including some first advanced in a joint plan developed by NAB and some device manufacturers. The proposals, all designed to reduce the potential for introduction of inaccurate data into the system, would:

- Eliminate the "professional installer" option for fixed white space devices, which presently allows the manual input of a device's location into a database;
- Require that fixed devices re-establish their position and re-register with the databases if they are moved;
- Require daily database "recheck" only for fixed devices that are in operation;
- Require that all fixed white space devices incorporate geolocation capability either within the device or by connecting to an external geo-location source; and
- Have the Commission seek comment on what party should be responsible for ensuring the accuracy of information in the databases.

As always, those interested in the proceeding should review the *NPRM* closely to consider the fine print. Comments on those proposals are due by ***May 6, 2016*** and replies by ***June 6***. Comments and replies can be filed electronically through the FCC's ECFS webpage: refer to Proceeding Number 16-56.

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for TV and other protected services.

That last is bad news because, personally, we were hoping to use the waiver and some TVWS gear to stream the HGTV Channel across the lawn to our suburban John Deere riding mower. Maybe it's just as well. The popcorn would bounce all over the place.

Irony Alert!

Government Honors Recording Government Criminalizes

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You may want to strap yourself in for this one – to avoid the intellectual whiplash that might otherwise result.

Every year, the National Recording Preservation Board – a federal organization comprised of esteemed composers, musicians, musicologists, librarians, archivists, and representatives of the recording industry – undertakes a duty assigned to it by our elected Congress (with the further endorsement of the Executive Branch). That duty: To recommend for inclusion in the National Recording Registry sound recordings that are "culturally, historically, or aesthetically significant". The recommendation is made to the Librarian of Congress, who then decides what's in and what's out.

Getting included in the Registry (which itself is a creation of Congress) is no small potatoes. So far fewer than 500 recordings have made it – and that's out of the approximately 50 squadrillion recordings that have ever been made. Recordings already in the Registry include: cylinders from the birth of recorded sound in the 19th Century; the live coverage of the crash of the Hindenburg; Sister Rosetta Tharp singing "Down by the Riverside"; Flatt and Scruggs picking "Foggy Mountain Breakdown"; "Rumble" by Link Wray and His Raymen (a personal favorite – essentially, the birth of the power chord); "Who's on First" by Abbot and Costello; speeches by FDR, Woodrow Wilson, Booker T. Washington, Martin Luther King, Jr. (and many others). The hits, as they say, just keep on coming.

As dictated by Congress, the purpose of the Registry is to "maintain[ ] and preserv[e] sound recordings that are culturally, historically, or aesthetically significant".

This year, one of the 25 recordings selected for inclusion in the Registry has been hailed by the Board as "a discourse not only on [certain] words and their power to offend, but also on the varieties and vagaries of the English language itself". Heady stuff, no? Certainly something that's "culturally, historically, or aesthetically significant", maybe even all three.

That recording, of course, is George Carlin's *Class Clown*, and the particular words alluded to in the Board's description are the notorious "seven dirty words you can never say on television". The broadcast of that track – on Pacifica Foundation's Station WBAI(FM) in New York in 1973 – set in motion the FCC's enforcement action that resulted in the 1978 Supreme Court decision *FCC v. Pacifica Foundation*, in which the Court concluded that the FCC could penalize WBAI for having aired that "indecent" track. And to this day the FCC continues to wield the authority established in that decision (although the precise metes and bounds of what might constitute punishable "indecency" have never been quite clear, and are currently completely up in the air).

Ideally, you can see the problem here.

Congress, through Section 1464 of Title 18 of the U.S. Code (*i.e.*, the criminal portion of the code) has made it a crime to broadcast "indecency", and Congress's enforcer in such matters – the FCC – has for nearly 40 years used Carlin's monologue as the touchstone for defining "indecency". But now, doing what Congress told it to do, the Federal Recording Preservation Board has declared that very recording to be of such cultural, historic or aesthetic significance as to warrant inclusion (and preservation) in a rarefied universe of recordings deemed to "showcas[e] the range and diversity of American recorded sound heritage".

Criminal Indecency or National Treasure? The government has made the call, and that call is, um, "both". If that hurts your head, you're not alone.

Maybe the selection of *Class Clown* reflects both an awareness by the government of the validity of Carlin's observations about language and culture, and a greater tolerance for use of language that might be deemed "offensive" by some. Maybe the selection of *Class Clown* will cause Congress to re-think criminalizing the broadcast of particular language, and the FCC to re-think its policies on so-called "indecent" programming.

As if. More likely, Congress and the FCC will ignore the disconnect inherent in the government's Hyde and Jekyll treatment of Carlin's work. Nothing in recent memory suggests that the government will get the message. More's the pity.

But regardless of what Congress and the FCC do or don't do, the inclusion of Carlin in the Registry deserves attention. Speaking as the most junior member of the team that represented Pacifica in the Supremes way back when, this writer sees more than a little vindication in the Board's selection of *Class Clown*. The Board has officially recognized what we understood back in 1978: Carlin's monologue is a serious work that addresses important questions in a creative (and for many, highly entertaining) way. The broadcast of such thought-provoking commentary (whether or not it might "offend" some) should be encouraged. It's the First Amendment way of doing things. At a minimum, the broadcast of such commentary should not be penalized.

Criminal Indecency or National Treasure? I personally am with the Librarian of Congress on this one.

Who's That Behind Those CommLawBlog Shades? It's Tomorrow's Broadcast Leaders!

If you're going to learn, you're best off learning from the best. That's why, each year, a class of aspiring broadcast executives makes the pilgrimage to NAB's D.C. HQ to participate in the 10-month Executive MBA-style program created by the National Association of Broadcasters Educational Fund (NABEF). The Broadcast Leadership Program trains the best and brightest in the knowledge and skills they'll need when it comes time for them to assess, buy, own and operate radio and television stations. It provides "a blueprint for talented businesspeople to become a greater part of the industry and increase the diversity of voices available to the public", according to the BLT website. (Check out this page of the website for information on how to apply for next year's program; applications are due by May 31, 2016.)

So who's teaching these up-and-comers? A wide range of professionals who know what they're talking about because they've experienced it all first-hand. What kind of "professionals"? "Leading communications attorneys", according to the BLT site. Which describes, to a T, FHH mavens (and CommLawBlog contributors) Frank Montero and Dan Kirkpatrick, who recently led the BLT session on the ins and outs of closing on a broadcast acquisition. This isn't their first rodeo, either – Professors M and K have taught enough classes in the past to get them tenure (if there were such a thing).

FHH - On the Job, On the Go

All aboard for the Vegas Express! The NAB's annual confab always attracts pretty much anybody that's anybody, and this year is no exception. The FHH team set to descend on NAB 2016 includes **Kevin Goldberg**, **Frank Jazzo, Scott Johnson**, **Dan Kirkpatrick**, **Michelle McClure**, **Matt McCormick, Frank Montero**, **Davina Sashkin**, **Peter Tannenwald** and **Kathleen Victory**. FHH HQ will be at the Encore this year, but you should be able to catch them all over the convention.

To make tracking them down easier, three FHHers will be appearing on panels during the course of the festivities.

On April 17, **Kevin** will be speaking on the "Legal Webcasting in 2016" panel at the RAIN West Summit. (This is a meeting organized by *Radio and Internet News*, so it's technically not an NAB event, but it's scheduled for Vegas in conjunction with the NAB get-together, and should be of interest to any radio broadcaster who also webcasts.) **Kevin**'s show is set to kick off at the Westgate at 10:30 a.m. **Frank M** will be in the crowd at RAIN West, too. Then on April 19 (at 4:30 p.m.), **Davina** will be presenting on an NAB panel addressing "Consequences of the Incentive Auction: Planning & Problem Solving". And on April 20 (at 11:10 a.m.), **Matt** is scheduled to speak on "What You Need to Know in the FM Translator Race", a topic near and dear to many AM broadcasters these days.

Before he heads off to Vegas, **Frank M** is set to attend the U.S. Chamber of Commerce Telecommunications & E-Commerce Committee Meeting on March 30 and a meeting of the Board of Directors of the New Jersey Broadcasters Association on April 12 (where he'll also be presenting).

On March 24, **Kathy Kleiman** spoke as part of the 9th Annual McGowan Forum on Women in Leadership: From the Computer Age to the Digital Age, an annual do presented by the National Archives and the National Archives Foundation. **Kathy** and her fellow panelists discussed "the women who made history and paved the way", as well as talking about their own personal journeys and the advice they would offer to young women entering the fields.

Don't forget: on April 7 at 3:00 p.m. (ET), we'll be presenting a one-hour webinar on "Broadcasters and Drones: Staying Street-Legal in the Sky". 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 overview 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 **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.

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not. Obviously, the Court seemed to think that exclusion of Latina from the auction would be akin to "irreparable harm", which is one element that must be shown by a party seeking a stay. Presumably, the Court would deem exclusion of the Videohouse Three to be similarly irreparable, which would be good for their stay chances. But the fact that the Court had gone with the narrower Option A – *i.e.*, letting only Latina in, and not staying the whole auction – suggested that the Court was reluctant to gum up the auction works entirely.

Within days we knew the answer, and talk about anti-climax! Well after the close of normal business hours on Friday, March 18, the U.S. Court of Appeals for the D.C. Circuit denied the Videohouse Three's motion for a stay of the Incentive Auction with a single opaque sentence: "Petitioner has not satisfied the stringent requirements for a stay pending court review." No explanation was given about precisely how the motion had fallen short of precisely which of the stringent requirements. (While such terseness is often par for the course in such matters, the history of this particular case suggested that we might have expected more explanation from the court. So much for suggestions.)

And with that, the final threat of a court-ordered stay of the auction was eliminated, clearing the way for the Commission to keep to its previously-announced schedule.

If this sounds complicated, that's because it is. And once the bidding starts, it probably won't get any less so.

The beat goes on

That schedule called for would-be participants in the reverse auction to make their "initial commitments" no later than 6:00 p.m. (ET) on March 29. But exactly how to make those commitments remained somewhat under wraps less than a month before that deadline. The Commission did provide an online tutorial about the process, but that consisted of a set of PowerPoint slides that included images of what the "initial commitment" screens would look like, along with some explanation of what would need to be done. And the Commission conducted a mid-March workshop on the commitment process. But the online "Initial Commitment Module" that would need to be accessed by auction participants was not opened up until less than a week before the deadline.

Meanwhile, less than two weeks before the deadline the FCC sent out its "Second Confidential Status Letter" to would-be participants – a/k/a their Golden Ticket into the auction. This letter was part of a packet that (a) advised the recipient of the status of its application, (b) providing instructions on the Initial Commitment process to those whose applications had been deemed "complete" and (c) included the all-important SecurID® fob that bidders must have to place their bids.

And then, on March 28, the Initial Commitment Module opened for 32 hours. When it closed, the reverse auction was technically underway.

This doesn't mean that participants will be hearing immediately about what the FCC is willing to offer them as a first round bid. *Au contraire*, the Commission has some work to do before it can come up with those numbers. First it has to make sure that its auction database accurately reflects the proper universe of stations that submitted initial commitments. Then it has to hit the button and wait to see what the complex algorithm, when fed that accurate database, spits out in the way of a "clearing target", *i.e.*, how much spectrum the system figures the FCC will be able to clear once the auction is over and done with. That target number will then be used to determine how much spectrum will be available to bidders in the forward auction so that they can formulate their bids. If this sounds complicated, that's because it is.

And once the bidding starts, it probably won't get any less complicated. To the contrary, the FCC has given us a glimpse of Reverse Auction Future by posting the "reverse auction file format specifications" that will be available to auction participants (and updated constantly) throughout the auction. As the auction progresses from round to round, the Commission will post each participating licensee's data for that licensee's review only. That, ideally, will help each participant in its bidding strategies.

The trouble is that the materials that the FCC has posted may be a bit difficult for the uninitiated to comprehend, at least in the abstract. Because of that, anyone planning to participate in the reverse auction should probably start now to get familiar with the data that will be available once the fun begins. The place to start on that will be to take a close look at this guide to the data. It walks the reader through each of the data files that will be posted and updated as the auction progresses, with explanations of the various data points included in those files (and trust us, there are more data points than we expected).

Once you've got a handle on that, you can then take a look at a sample of each of the data files that will be available. To get to those samples, go to this page on the FCC website and click on the "Reverse Auction Sample Data Files" link there. You should then see a message allowing you to open a .ZIP file that contains five separate CSV files. (They can be opened in various spreadsheet programs, like Excel.) The samples are populated with fictitious data for illustrative purposes only. As the FCC emphasizes, these data "do not reflect any predictions or assumptions about the actual bidding in the auction, the number of rounds, or the outcome of the auction".

Reverse auction participants who did make timely initial commitments can look forward to yet another letter from the FCC. That is, the technical "auction" does not start as

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Most controversially, although not directly addressed by the ITFA itself, a number of interest groups complain that any action on Internet taxation should include a resolution of the debate over taxation of online purchases. There is currently a patchwork of such taxes in effect in some, but far from all, jurisdictions. The ability of a state or locality to tax an online vendor depends on whether or not the vendor has sufficient connections with the given jurisdiction to render its products taxable there and, as a practical matter, whether the vendor has established mechanisms to collect any taxes owed. "Brick-and-mortar" businesses competing with online retailers see themselves at a substantial disadvantage because of this differing tax treatment.

In the end, the proponents prevailed: the once-temporary 1998 moratorium is now permanent, and the handful of remaining states whose pre-ITFA taxes had been grandfathered in 1998 will be required to eliminate those taxes before July, 2020.

The decision to make the ITFA moratorium permanent does not resolve the issue of state/local taxation of online purchases, however. Instead, proponents of the Marketplace Fairness Act (MFA) currently pending in the Senate – a bill that ***would*** address that issue head on – merely obtained a promise that the MFA would be considered in this Congressional session.

What Happens Now?

The legislation brings helpful stability to the pricing of Internet access offerings generally. As House Judiciary Committee Chairman Bob Goodlatte (R-VA) said, the new law

> is about giving every American unfettered access to the Internet, which is the modern gateway to the American dream. Internet access drives innovation and, increasingly, the success of our economy. A permanent ban on Internet access taxes will help prevent unreasonable cost increases that hurt consumers and slow job creation, innovation and the spread of knowledge.

For its part, the MFA will likely get its promised consideration later in this Congress, but many are skeptical about its chances for passage. Accordingly, states reportedly are already gearing up to find alternative means to impose taxes on Internet transactions by cutting deals with companies regarding sales of goods purchased from out-of-state online vendors, redefining sales and use taxes, including third party delivery services in the definition of "physical presence" for taxation purposes, and the like.

The FCC has also addressed the Internet taxation issue. In its "Net Neutrality" decision (at paragraphs 430-433, if you're interested), the Commission provided that the reclassification of Internet broadband services as "telecommunications services" would ***not*** remove those offerings from the moratorium protection of the ITFA. It remains to be seen if that conclusion as well will face challenges from states and localities, which already impose substantial taxes on other telecommunications offerings.

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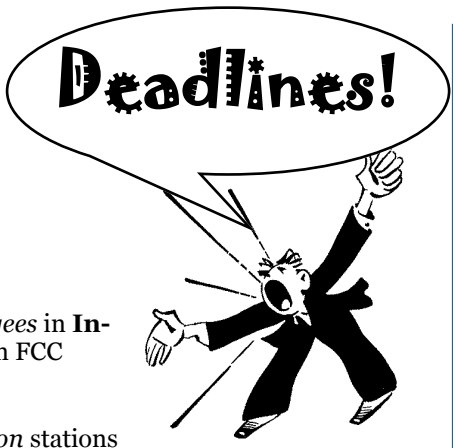
of March 29. Once the clearing target is announced, each reverse auction applicant that made an initial commitment will be sent a letter (technically, a "Final Confidential Status Letter") informing it of its status with respect to the clock rounds of the reverse auction. Qualified bidders will be automatically registered in the auction and will be sent instructions for participating in the clock rounds. (Educational information on the clock round process should also be released shortly.)

Looking beyond the auction

Once the auction has come and gone – and the FCC apparently expects the auction to have wrapped by the end of the third quarter of this year – the spectrum repack will begin, requiring many TV stations to modify their facilities as necessary to nestle the remaining TV stations into the reduced portion of the spectrum available post-auction. Last fall we reported that the Commission had released the form (official dubbed Form 2100, Schedule 399) to be used by repacked TV licensees seeking reimbursement for their relocation costs once the dust has settled on the Incentive Auction. While the FCC had declared the form it released to be the "final" version, that version still had to be vetted by the Office of Management and Budget before it could be officially unleashed on the public. According to a notice in the Federal Register, OMB has now signed off on the form, meaning that it's ready for prime time as of March 24, 2016. Of course, it's unlikely that anybody is going to be needing to worry about completing and submitting Schedule 399 for at least several months, but when that times does come, the form will be there, ready to be filled out. (If you want to see exactly what OMB approved, you can find links to both the form and its instructions at this link.)

As Tom Petty cogently observed, the waiting is the hardest part. But with the initial commitment process now in the rear view, the actual auction so long in coming is nearly in sight. Check back on CommLawBlog for updates.



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 11, 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.

April 18, 2016

AM Revitalization **–** Reply 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.

May 9, 2016

Emergency Alert System **–** Comments are due in response to the Commission's *Notice of Proposed Rulemaking* that proposes revisions intended to strengthen the Emergency Alert System (EAS) by facilitating state and local involvement, supporting greater testing and awareness of the system, leveraging technological advances, and enhancing EAS security.

June 1, 2016

EEO Public File Reports **–** All *radio* and *television* stations *with five (5) or more full-time employees* located in the **Ari-**

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reduced Taylor's fine by almost 80%, to $28,000.

That's the first thing we don't understand. Only one piece of information differed between the 2013 NAL and the 2016 consent decree: the company was able to prove its jammers had been in use for only two weeks rather than a period of months, as the FCC had thought in 2013. Of the original fine, $12,000 was earmarked for "duration of the misconduct," so that might reasonably have come off. But why the drop all the way to $28,000? One theory: the original fine, $126,000, over a nine-week violation is $2,000 per day; the reduced fine of $28,000 would exactly reflect a two-week violation at that same $2,000 per day. But the FCC expressly said the original fine was *not* calculated per day. It's as though the FCC found Taylor to be proportionately less culpable just because it was caught sooner.

This piece was still in the *Memo to Clients* bunker's old Smith-Corona manual when the FCC released another consent decree that could almost have been a carbon copy of Taylor's. This one concerned R&N Manufacturing of Houston, Texas, whose website is here (but doesn't work just now). The resemblance to the Taylor case is eerie. R&N, like Taylor, makes equipment for the oil and gas industries, is close to the Gulf Coast, and installed an illegal cell phone jammer to block employees' phone conversations. (R&N used only one jammer.) AT&T has a cell tower just a two-minute walk down the road that was getting interference. AT&T engineers stopped by R&N but did not receive much cooperation. They complained to the FCC, which paid its own visit to R&N and took the jammer away.

As in the Taylor case, although scaled down to one jammer and without the "duration of the misconduct" surcharge, the FCC proposed fines of $16,000 for each offense of operation without a license and use of unauthorized equipment, plus $7,000 for causing interference, less 25% for voluntarily giving up the jammer, which results in $29,250. In the later consent decree, however, on learning the jammer had been operation for only four days (rather than 10 days, as initially understood), it reduced the amount by 66%, to $9,750.

This is the second thing we don't understand. We thought the Taylor fine of $28,000 was low, considering the deliberate nature of the violation, but the R&N fine is almost two-thirds lower still. R&N's offense was arguably worse, as it continued to operate the jammer even after AT&T told it about the interference. Its lower fine mostly reflects the fact of one jammer, rather than Taylor's four, but we don't see why that should matter. The intent in both cases was the same – to disrupt employees' phone conversations – and the method of illegal jamming was the same. On Google Earth, the two facilities look roughly comparable in area. R&N may have been using a higher-powered device than Taylor's, or its jamming may have been less effective, but either way, we don't see why the smaller number of jammers makes it less culpable.

The final thing we don't understand are these light fines after the FCC's imposition of much steeper penalties for inadvertent paperwork violations that caused no actual trouble. In audio gear alone, these include guitar-maker Fender Musical Instruments ($265,000), amplifier-maker Peavey Electronics ($225,000), and studio-equipment-maker Behringer USA ($1,000,000). The rules these companies violated are intended to document compliance with technical rules. But there was no actual interference in any of these cases. There was not even an allegation that the products failed to comply with the technical rules. It seems to us that Taylor's and R&N's intentionally causing real interference is a much more serious offense calling for much more serious sanctions. But from the fines assessed, you would never know it.

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

EEO Mid-Term Reports – All *radio* stations *with eleven or more full-time employees* in **Michigan** or **Ohio** and all *television* stations *with five or more full-time employees* in the **District of Columbia**, **Maryland**, **Virginia** or **West Virginia** 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 the **Arizona**, **District of Columbia**, **Idaho**, **Maryland**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia** and **Wyoming** 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 **Michigan** and **Ohio** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

June 7, 2016

Emergency Alert System – Reply Comments are due in response to the *Notice of Proposed Rulemaking* that proposes revisions intended to strengthen the Emergency Alert System (EAS) by facilitating state and local involvement, supporting greater testing and awareness of the system, leveraging technological advances, and enhancing EAS security.