Fletcher, Heald & Hildreth®

Memorandum to Clients

April 2016

News and Analysis of Recent Developments in Communications Law

No. 16-04

Crunch time

The End is Near: Spectrum Auction Clearing Target, Schedule Announced

By Davina Sashkin
sashkin@fhhlaw.com
703-812-0458

At long last, the Commission has announced the Initial Clearing Target that it plans to shoot for in the Incentive Auction, and it has set the dates for the commencement of the reverse auction. These are developments of the utmost importance to would-be auction participants, all of whom should be sure to review the Commission's public notice carefully. Here's a summary of the highlights.

Clearing Target
Perhaps most importantly – because it could determine the ultimate success of the auction process – is the Clearing Target that the Commission's auction process software has determined, based on the spectrum relinquishment commitments made by broadcasters. And the target is (drum roll, please): ***126 MHz***. This means that the Commission thinks that, given the broadcasters who have committed to selling their channels (or moving to a VHF channel), a full 21 channels can be cleared in each market of the country. The 126 MHz Clearing Target also indicates that the Commission believes there is sufficient interest on the forward auction side that bidders for wireless licenses will pay enough to support the broadcast clearing necessary for success of the Auction overall.

While the Clearing Target may be revised during the course of the Auction as developments warrant, the initial target bodes well for the Auction's eventual success.

Final Confidential Status Letters
With the Clearing Target set, the Commission has determined which stations will be qualified to participate in the reverse auction and which won't. The Commission is sending to each reverse auction applicant a Final Confidential Status Letter (Final CSL) advising it of its status. Each letter is addressed to the contact representative identified in the applicant's Form 177 and must be signed for, although not necessarily by the contract rep him/herself. Because the Final CSL contains information essential to participation in further Auction preparation – as well as the Auction itself – the Commission has emphasized that

> **any applicant that has not received the Final Confidential Status Letter package by 12:00 noon Eastern Time (ET) on Wednesday, May 4, 2016, should contact the Auctions Hotline at (717) 338-2868.**

You have been warned.

In addition to notifying qualified applicants of the happy news that they've made the cut, the Final CSL will also provide those qualified applicants with instructions for participating in the mock auction (*see* below) and placing bids in the actual Auction, once it starts. The Final CSL will not, however, advise which of the applicant's previously specified relinquishment options will be the preferred option. That determination – made by the FCC based on the auction software's conclusions as to which relinquishment options could be accommodated – can be found only by logging into the bidding system once it becomes available for previews on May 23, 2016 at 10:00 a.m. ET (*see* below for more on that).

For applicants found not to be qualified to participate, the Final CSL will provide one of three explanations for the non-qualification: either the applicant made no initial commitment, or its initial commitment could not be accommodated, or the Commission determined that the station won't be needed to meet the Clearing Target. The Final CSL will advise non-qualified applicants how to return their SecurID® fobs.

Important Caveat: In its public notice the Commission

(Continued on page 10)

Inside this issue . . .

Looking ahead past the finish line

Pre-Auction Repack Expenses May Be Reimbursed

By Ashley Ludlow
ludlow@fhhlaw.com
703-812-0423

If you're a broadcaster thinking about getting a head start on the Incentive Auction's relocation process, you may be in luck. The FCC has announced that some repack-related expenses will be eligible for reimbursement even if they are incurred ***before*** the Auction wraps up.

We've known all along that "costs reasonably incurred" in the relocation process will be subject to reimbursement from the $1.75 billion TV Broadcaster Relocation Fund. But it remained unclear whether reimbursement would extend to costs incurred *prior* to the close of the Auction. Now we know: you can go ahead and start your planning. According to the FCC, the Spectrum Act's reimbursement mandate does indeed encompass costs incurred prior to the close of the Auction, although of course only if such expenses are otherwise reimbursement-eligible.

The Commission's announcement should help to resolve uncertainty that might otherwise have discouraged stations from undertaking pre-Auction work that could go a long way to expediting the post-Auction repack process. A "rapid, non-disruptive transition" is, after all, exactly what the FCC is striving for, so it makes a lot of sense to encourage – or, at least, not discourage – steps ***now*** that could smooth the repack down the line. (Concern about this particular uncertainty was brought to the FCC's attention by a number of parties, including one repped by FHH's own Paul Feldman.)

The reimbursement process for pre-Auction expenses will be the same as for post-Auction expenses. As we described the process generally last November, eligible entities (*i.e.,* stations that are reassigned to a new channel in their pre-auction band through the repacking process) will, following the close of the forward auction and the release of the *Channel Reassignment PN*, submit to the Commission an estimate of their eligible costs. The Media Bureau will then review the estimates based on the Catalog of Eligible Expenses the Commission has developed. The Catalog, which is technically embedded in FCC Form 2100, Schedule 399, sets forth categories of expenses most likely to be incurred by relocated broadcasters and MVPDs.

The Catalog is not a "definitive list of all reimbursable items", according to the Commission. Rather, it's a starting point. Items included on the list may not be reimbursable in some circumstances, while items not included on the list may be reimbursable. How will we know which is which? At this point, we don't. That will be up to the Bureau, which will review all claimed expenses to determine whether they're reasonable. (One cautionary note, though: the goal of reimbursement is to permit licensees to end up with facilities comparable to those they already have — *i.e.*, replacing like with like. So don't get fancy ideas about using reimbursement bucks to upgrade your current ho-hum transmission system with some new whiz-bang distributed transmission set-up.)

For those expenses that pass the test, the Bureau will allocate funds to each eligible entity, and reimbursement will be available from the allocated funds as expenses are incurred. Prior to the end of the three-year reimbursement period, eligible entities will be required to provide information regarding their actual and remaining estimated costs, following which each will be issued a final allocation that will cover (ideally) the remainder of their eligible costs.

As it has repeatedly made abundantly clear, the Commission is determined to do everything it can to ensure the success of the Incentive Auction and repack. The announcement concerning the potential reimbursability of at least some pre-Auction expenses is yet another step in that direction.

FLETCHER, HEALD & HILDRETH P.L.C.

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
Tel: (703) 812-0400
Fax: (703) 812-0486
E-Mail: Office@fhhlaw.com
Website: fhhlaw.com
Blog site: www.commlawblog.com

Editor
Harry F. Cole

Assistant Editor
Steve Lovelady

Contributing Writers
Anne Goodwin Crump,
Kevin M. Goldberg, Ashley Ludlow
and Davina Sashkin

Memorandum to Clients is published on a regular basis by Fletcher, Heald & Hildreth, P.L.C. This publication contains general legal information which is not intended to be deemed legal advice or solicitation of clients. Readers should not act upon information presented herein without professional legal counseling addressing the facts and circumstances specific to them.

Distribution of this publication does not create or extend an attorney-client relationship.

Ranks of minimum wage/time-and-a-half eligibles expanding?

Labor Looking to Lift "Exempt Employee" Dollar Limits

By Kevin M. Goldberg
goldberg@fhhlaw.com
703-812-0462

If you're an employer or an employee, you'll want to read this. The Department of Labor is in the process of reviewing its definition of "exempt employee" for purposes of the Fair Labor Standards Act (FLSA). Since this affects whether or not some or all employees are entitled to minimum wage and overtime, you'll probably be interested, especially when you hear that the DoL's proposals, if adopted, could substantially increase the number of employees subject to those entitlements.

The DoL proposed the changes in question in a Proposed Rule and Request for Comments issued on July 6, 2015. We didn't report on the proposals back then because we're primarily communications lawyers, ***not*** employment lawyers. But we've received enough inquiries about this from clients and at conferences hosted by various state broadcaster associations and others since last July that we decided it's probably a good idea to give our readers a heads-up about the changes that are in the works (although, as indicated below, they're not likely to take effect for at least several months, and maybe longer – but it's always good to be ahead of the curve).

Unless an FLSA-covered employee happens to fall within a specific exemption, he or she is subject to minimum wage and overtime provisions.

Which ***employers***, exactly, are involved here? First, under the concept of "Enterprise Coverage", the FLSA applies to all employees of any company that (a) has more than $500,000 in annual revenues and (b) is engaged in interstate commerce. The DoL interprets "interstate commerce" very broadly to include not only those who physically travel state-to-state, but also those who, for example, load or unload products going from state to state or those who are part of the interstate infrastructure – which is basically anyone working for an FCC-licensed broadcast station. Thus, any of you who are FCC licensees and have more than $500,000 in annual revenues are, thanks to Enterprise Coverage, subject to the FLSA company-wide. Beyond broadcasting, this could be a newspaper reporter who travels or even just makes calls across state lines in newsgathering.

But even some employees of companies that don't meet the $500,000 annual revenue criterion may be subject to the FLSA under the "Individual Coverage" test, which applies with respect to any employee engaged in interstate commerce in a given week, whether or not the employing company reaches the $500,000 mark. Since, again, broadcasting is generally viewed as an interstate commerce activity, pretty much every employee at a station is likely to be viewed as routinely engaged in interstate commerce, so each would be individually covered by the FLSA on a week-to-week basis even if the licensee fetches less than $500K in annual revenues.

And what, exactly, is involved here? Unless an FLSA-covered employee happens to fall within a specific exemption, he or she is subject to minimum wage and overtime provisions. Under those provisions, anyone working more than 40 hours in a week is entitled to overtime pay at not less than 1.5 times his/her regular pay rate. (Note that the particular shift an employee works – *e.g.*, nights or weekends or holidays – does not factor into this; the question is simply whether the employee in question exceeds 40 hours in the relevant workweek.)

And which ***employees***, exactly, are involved here? For the past 12 years, at least, an employee's status as exempt or non-exempt under the FLSA has been determined by a test consisting of three elements: duties, salary basis and salary level. Under the test, an employee is "exempt" from minimum wage/overtime if he/she is:

- primarily performing executive, administrative, or professional duties as provided in the DoL's regulations. This is the *duties* component;
- salaried in some way, meaning that he/she is paid a predetermined and fixed salary not subject to reduction because of variations in the quality or quantity of work performed. This is the *salary basis* component; and
- paid more than a specified salary threshold, ***currently $455 per week or $23,660 annually***. This is the *salary level* component.

(There's also a separate higher threshold for exemption that applies when the employee: (1) is paid total annual compensation of at least $100,000 per year; (2) receives at least $455 per week paid on a salary or fee basis; (3) performs office or non-manual work, and

(Continued on page 12)

Lots of upside, minimal downside? It may depend.

The New Future of OTA TV? Media Bureau Seeks Comment on Proposed Next Generation TV Standard

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

The broadcast television industry is resilient. Its core over-the-air technology was fundamentally changed with the transition from analog to digital transmission in 2009 and its spectrum habitat is about to shrink dramatically thanks to the Incentive Spectrum Auction. And despite, or perhaps because of, the obvious threats posed by the demands of others seeking increasing amounts of spectrum, TV broadcasters – along with (among others) the Consumer Technology Association (CTA, formerly the Consumer Electronics Association) – have come up with a proposal to re-vamp, again, their basic transmission standard in ways that promise considerable advantages to broadcasters and, more importantly, their audiences.

Beyond the purely technical aspects of the new standard, its resourceful proponents have come up with a couple of potentially persuasive selling points with which to convince the FCC to get behind – or at least not get in the way of – that standard, selling points that may already be working: Less than two weeks after the proposal walked in the doors at the Portals, the Media Bureau had already begun soliciting comments on it.

It will do all those cool things while using the same amount of spectrum currently used by TV stations, but doing so more efficiently.

The new transmission standard, familiarly dubbed "ATSC 3.0" or "Next Generation TV" — and by us, at least, "Next Gen TV" (and less familiarly known to the true cognoscenti as "ATSC Standard: A/321, System Discovery and Signaling"), is the brainchild of the Advanced Television Systems Committee (ATSC). ATSC is composed of representatives of the broadcast, broadcast equipment, motion picture, consumer electronics, computer, cable, satellite and semiconductor industries. These are the same folks who developed the standards for DTV that have been in use nationwide since the DTV transition.

You can read the nitty-gritty technical details of how ATSC works in the 27-page ATSC document laying it all out; that document is included as Attachment A to the joint proposal submitted to the FCC. (The proponents are the NAB, the CTA, America's Public Television Stations and the AWARN Alliance.) Hint: the standard involves use of (1) Orthogonal Frequency Division Multiplexing, described as "an efficient, flexible, and robust scheme", and (2) Layered Division Multiplexing that "combines two data streams at different power levels with independent modulation and channel coding configurations in one RF channel".

According to the proponents, Next Gen TV will allow broadcasters to provide viewers with ultra-high definition video, immersive audio and the potential for extensive content personalization – all in the home and on mobile devices of all sorts. It will enhance the delivery of effective, targeted emergency alerts and provide datacasting capability. It will allow the integration of broadcast programming with Internet Protocol services.

And it will do all those cool things while using the same amount of spectrum currently used by TV stations, but doing so more efficiently. Importantly, broadcast signals using the proposed system will have essentially the same propagation and interference characteristics as currently-authorized broadcast signals. In other words, the Commission would not have to develop new channel allotment standards or revise its current DTV table of allotments.

What's not to like?

There is a significant disadvantage to ATSC 3.0: As it turns out, the new system is "not backward compatible with existing television receivers". So all those consumers who tossed out all their analog TV sets seven years ago when DTV arrived will have to go through the same exercise to be able to watch Next Gen TV. And until they do so, the available audience for Next Gen TV stations will be minimal if not non-existent – which would obviously put into question the extent to which stations operating in that mode could be said to be serving the public.

No problem, according to the proponents. The marketplace can take of that, as long as the FCC allows TV licensees to cooperate for the ultimate benefit of their industry (and, of course, the public). The proponents are confident that if stations start to use ATSC 3.0, audiences will embrace it. The question is how to give stations a chance to get it started.

The Commission can make it happen with a minimum of regulatory muss and fuss, we are told.

First, the FCC should revise its rules to permit broadcasters to use ATSC 3.0 if they want to. Since ATSC 3.0 operation would not create interference potential or reduce or extend service areas, this would not be inconsistent with existing Commission rules.

Second, in order to insure that ATSC 3.0 broadcasters continue to provide effective service to the public while they're waiting for the public to upgrade their receivers, broadcast-

(Continued on page 15)

Proud to be New Jersey's full-service commercial VHF station

And the Emmys Go To …

Long-time readers will recall that, back in 2009, we reported on a mind-blowing proposal to take Station KVNV(TV), Channel 3, then licensed to Ely, Nevada, and relocate it about 2,500 miles east, to Middletown Township, New Jersey. The proposal was advanced by PMCM TV, LLC, with the assistance of a team of FHH lawyers behind them. It turned out to be a long haul – chronologically as well as geographically – since the FCC was less than enthusiastic about the whole idea. But with the help of the U.S. Court of Appeals for the D.C. Circuit along the way, in October, 2014 KVNV completed the long trek east and signed on as WJLP-DT in Middletown Township.

That was less than two years ago, and we're happy to report that the station is doing what it said it would do: serve the New Jersey audience with informational programming targeted to ***their*** needs and interests. Not New York. Not Philadelphia. ***New Jersey Channel 3***.

How do we know this?

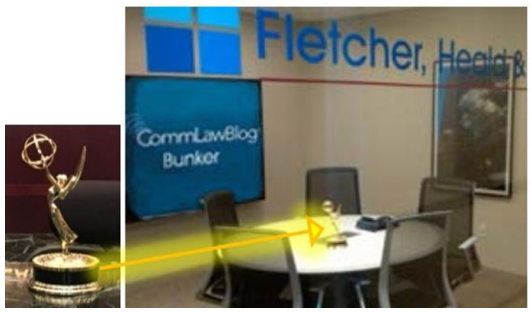
Don't ask us. Ask the New York Chapter of The National Academy of Television Arts and Sciences, which last month awarded WJLP not one, not two, but ***three*** Emmy® Awards in the categories of On-Camera Talent: Reporter – Specialty Assignment, On-Camera Talent: Commentator/Editorialist, and Writer: Commentary/Editorial. The New York Chapter of the Academy encompasses New York State and Northern New Jersey, so little old WJLP was competing against network flagship O&O's in nearby NYC as well as a boatload of other stations.

And we're not kidding when we refer to WJLP as "little". The photo above includes PMCM CEO Bob McAllan, PMCM Group VP Lee Leddy (hefting one of the trophies), and all but one or two staffers (somebody had to be running the station, for crying out loud) at a recent celebratory lunch. Also included in the photo are other PMCM execs and FHH's Don Evans and Harry Cole. The Emmys® were there, too. We've highlighted them in the photo. And attentive readers will note that several of the station's crew are sporting CommLawBlog sunglasses, as winners are wont to do.

We here at Fletcher Heald congratulate PMCM, WJLP – and its crack newsperson and commentator, Larry Mendte, whose name is on all three trophies. As Mr. Mendte graciously observed, credit for the prize goes not only to him, but also to the station's staff and owners who have accomplished a whole lot in little time with limited resources.

PMCM's accomplishments – both at WJLP and its sister station, KJWP-DT, Channel 2, Wilmington, Delaware (which made a similar cross-country move from Jackson, Wyoming along with WJLP) – demonstrate what good broadcasters can do. In addition to the three WJLP Emmys®, PMCM picked up a fourth Emmy® last year for Best Writer-News/Commentary/Short Form at KJWP (again thanks to Larry Mendte), as well as a number of other awards and accolades for both stations' programming. Both stations are, indeed, serving the public, and serving it well.

When Congress enacted Section 331(a) of the Communications Act in the early 1980s, its goal was to ensure that every state would have at least one commercial VHF TV station to serve the local audience. PMCM relied on that section to achieve the bold relocation of its stations. We're pleased to report that PMCM, WJLP and KJWP have provided, and are continuing to provide, precisely the type of solid, locally-oriented nonentertainment programming that Congress had in mind. Congratulations again on a job well done!



And we here in the *Memo to Clients* executive suite (which we sublet in the CommLawBlog bunker) would be remiss if we didn't toss in our own thanks to PMCM for allowing us temporary custody of one of the Emmys® to adorn our digs, however briefly. Since few visitors ever get past the multiple security checkpoints protecting us from the outside world, we figured we should provide readers a picture of the trophy as it sat in one of our several editorial conference rooms deep in the CommLawBlog bunker.

Coming soon: ETRS!

"This Is Only A(nother) Test …"

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

If you participate in the Emergency Alert System, it's time to get out your calendars and circle ***Wednesday, September 28, 2016*** – because we now know that that's the day on which our friends at the Federal Emergency Management Agency (FEMA) are planning on conducting the second-ever nationwide test of the EAS. We don't know the time of day yet or a number of other details that will certainly come into play, but at least the date has been announced.

And in connection with that test, the Commission wants you to know that it's putting the finishing touches on its brand new EAS Test Reporting System (ETRS). That system was first previewed last June, when the Commission adopted a number of revisions to the EAS. But at that point ETRS was more a theoretical concept than an actual set of forms. No more. ETRS has moved from the conceptual here's-what-we're-thinking-about stage to the drafted-and-almost-ready-for-prime-time stage.

The FCC is putting the finishing touches on its brand new EAS Test Reporting System (ETRS).

In an announcement previewing the system, the Commission has provided a walk-through of the ETRS, complete with screen grabs of the draft online form (and it's nice to have those grabs, because the online site isn't available yet to walk through). All EAS participants should be sure to take a gander at the FCC's public notice, because submitting the three separate tiers of the ETRS reports will be mandatory.

Before we get to the nitty-gritty, a quick refresher might help.

A primary purpose of the EAS (like its precursors, the Emergency Broadcasting System (1963-1997) and Conelrad (1951-1963)) is to afford the President the ability to notify the entire U.S. population, simultaneously, of nationwide emergencies. Since its establishment, of course, the EAS has also been used – very effectively – to permit regional, state and local officials to warn folks of regional, state-wide or local emergencies like weather conditions, hazardous circumstances (*e.g.*, train derailments possibly releasing harmful substances), and the like.

But whether or not the system would actually work on a nationwide level had never been tested prior to 2011.

In November, 2011, after a considerable amount of preparation, the first nationwide EAS test was performed. To assess the system's performance, the Commission devised a three-step reporting process. Step one required EAS participants to identify themselves (name, facility ID number, transmitter coordinates, nature of EAS participation, etc.). Step Two required all participants to report to the FCC, within 24 hours of the nationwide test, whether they had received and retransmitted the EAS alert. And Step Three was a follow-up report seeking more detail about any problems that any participant may have encountered in the test process.

The 2011 test turned up a few problems with the EAS which the FCC then set about correcting. Last June it revised a number of the EAS's technical provisions.

By then, the Commission had concluded that the approach it had taken to follow-up reporting in 2011 was the way to go for future tests. But, in lieu of the somewhat ad hoc forms used in 2011 (which included the option of using either a hard-copy or an online version), the FCC decided that a more sophisticated, totally electronic system should be used to (a) facilitate the process for EAS participants and (b) make the collected data more useful to the Commission.

Which brings us to ETRS.

Unlike the 2011 system, and seemingly contrary to the Commission's ongoing efforts to consolidate electronic filing functions, ETRS has been given a separate status that requires participants to set up their own separate ETRS accounts. To access an ETRS account, a reporting participant will need its own ETRS username and ETRS password. And it appears that those will be assigned by the ETRS registration system.

To get the registration process started, an EAS participant will have to go to the ETRS registration form, which will be somewhere on the FCC's website. (Where exactly? We can't say for sure just now: The Commission hasn't announced the URL, but plans to do so in a "forthcoming public notice".) Once you're at the registration page, you'll need to enter the following information:

(Continued on page 8)

As strange way of granting a request

¿Es Esta Una Prueba?

Ashley Ludlow
ludlow@fhhlaw.com
703-812-0423

Harry F. Cole
cole@fhhlaw.com
703-812-0483

How do you say EAS *en español*? Apparently, that's something EAS participants won't need to worry about anytime soon. The FCC has rejected a proposal that would have mandated the availability of emergency announcements in Spanish (and, in some places, other languages as well). But, presumably not wishing to seem like they were totally turning their back on the not insubstantial non-English speaking populations of our great country, the Commission did make a concession of sorts to the proponents – but not one that's likely to make them *muy feliz*.

This all started when the proponents – Independent Spanish Broadcasters Association, the Office of Communication of the United Church of Christ, Inc., and the Minority Media and Telecommunications Council – asked the Commission to modify its Emergency Alert System rules to help non-English speakers. The proposals were set out in a "Petition for Immediate Interim Relief" filed in 2005, just over a decade ago. (So much for any notion of "emergency" or "immediate"…) Specifically, they proposed that:

- all Presidential level messages would have to be broadcast in both English and Spanish on the 34 stations designated as "Primary Entry Point" stations in the EAS system;
- state and local EAS plans would have to designate both a Spanish-language station to serve as a primary EAS station (to be designated "LP-S") in every area where a station has been assigned primary EAS status, ***and*** a separate primary multilingual station (proposed designation: "LP-M") in areas where a substantial portion of the audience speaks a language other than English or Spanish;
- at least one station in every market would have to monitor and rebroadcast those LP-S and LP-M stations; and
- should those LP-S and/or LP-M stations go off the air in the event of an emergency, stations still on the air would have to carry those multilingual and Spanish-language alerts.

This was, to say the least, an ambitious ask. Probably not surprisingly, the Commission really couldn't give them everything they asked for. As it turned out, it didn't give them pretty much *anything* they asked for.

But don't get the wrong impression. The FCC's heart really is in the right place – just ask them. The Commission opened its decision expressing its commitment to promoting the delivery of Emergency Alert System (EAS) alerts to as wide an audience as technically feasible, including to those who communicate in a language other than English or may have a limited understanding of the English language.

Don't get the wrong impression. The FCC's heart really is in the right place – just ask them.

And then it got down to business, implementing the "spirit" of the petitioners' request. Instead of doing anything the petitioners asked for, the FCC came up with its own Plan B. We'll let you be the judge of how that worked out.

First, the Commission acknowledged (along with the majority of commenters) that EAS messages originate *not* from broadcast stations or other EAS participants, but from the federal, state and local authorities who initiate EAS messages. So logically, the provision of foreign language versions of those messages could best be dealt with in the first instance at that level. But there are a wide range of variables (*e.g.*, local population, topography, available resources) that weigh against imposing any "one-size-fits-all" approach to all markets nationwide. So requiring all alert originators to adopt a common foreign language messaging protocol was not in the cards.

Still, under the current EAS, each state has to have its own State EAS Plan, subject to FCC approval. That being the case, the Commission has decided to require that each such Plan include a description of what actions, if any, EAS participants in the geographic area covered by the Plan have taken – or plan to take – to make EAS content available for non-English speaking audience(s). Also to be included in State Plans: "[a]ny other relevant information that the EAS Participant may wish to provide, including state-specific demographics on languages other than English spoken within the state, and identification of resources used or necessary to originate current or proposed multilingual EAS alert content".

But these new requirements mean that the various State Emergency Communications Committees (SECCs) responsible for preparing State Plans must have access to the necessary underlying information. So the Commission is also requiring all EAS participants to provide that information to their respective SECCs.

Timing-wise, EAS participants will have to give their SECCs the required information within one year of the effective date of the new rules, and the SECCs in turn will

(Continued on page 9)

FHH - On the Job, On the Go

On April 25 **Cheng Liu**, **Tony Lee** and **Peter Tannenwald** trekked down Route 95 to Richmond for the VSB Techshow, a seven-hour confab on software and cybersecurity issues presented by Virginia State Bar.

Speakers? We've got 'em all over the place in May and June.

On May 9, **Frank Montero** will be speaking to the Puerto Rico Broadcasters Association about the impending requirement that radio broadcasters move their public inspection files online.

After that, it's off to Denver for Media Finance Focus 2016, the annual conference of the Media Financial Management Association. On May 24, **Frank M** will speak on structuring loans to and investments in FCC-regulated entities. And he won't be alone there. The same day **Kevin Goldberg** will be making a presentation on "Intellectual Property – Landmines in the Law" at the same conference.

On May 17, **Mitchell Lazarus** and **Cheng Liu** will speak at the annual meeting of the National Spectrum Management Association in Arlington, Virginia.

And on June 2-3, **Frank Jazzo** will be a traveling, and speaking, man as well. On June 2, he'll be in New Orleans, speaking on a Legal/Regulatory Update panel at the Joint Annual Convention of the Louisiana Association of Broadcasters and the Mississippi Association of Broadcasters. Next day, next town: Albuquerque, where **Frank J** will be doing double duty. First, he'll be reviewing new and continuing FCC rules for the Society of Broadcast Engineers Summer Conference. Following that, he'll be fielding questions about the full range of broadcast-related legal questions at the Summer Convention of the New Mexico Broadcasters Association.

In addition to their speaking appearances, both **Franks** have other irons in the fire. **Frank M** has been named to the George Washington University Law School Alumni Board. He already serves as the Chair of the GW Law School Barristers Society. (He'll be attending the Society's luncheon on May 4.) And he's been named to the Executive Committee for the NAB/NABEF Minority and Women Ownership Initiative, whose inaugural meeting is set for May 10.

Meanwhile, **Frank J** is a member of the Rockefeller College Advisory Board. He'll be attending a Board meeting (as well as the College's Alumni Dinner and Awards Ceremony) in Albany, NY, on May 13.

(Continued from page 6)

- your name;
- your contact information;
- the legal name of the EAS participant for which you are filing; and
- the EAS participant's FRN and the password associated with that FRN.

With that, the FCC will email you your ETRS username, an ETRS password, and instructions for accessing ETRS. And that's what you'll need to get in the door to complete the mandatory report. (As with any password, be sure to keep it in a safe place where you'll know where to find it.)

As in 2011, EAS participants will be required to file three eparate components:

"***Form One – Identifying and Background Information***". This will have to be filed ***within 60 days of the "official launch" of ETRS***; the Commission will be letting us know that date when the time comes.

As the name indicates, here's where you'll have to provide detailed information about the station(s) that will be reporting, their transmitter location(s), EAS assignments and related equipment, etc., etc. Because the ETRS will be linked to other Commission databases, when you enter a station's call sign, its facility ID number and transmitter coordinates should prepopulate. (But heads up: the ETRS requires coordinates in NAD83, ***not*** NAD27. This is important because CDBS generally uses NAD27, unlike virtually all other FCC databases. That being the case, it would probably be prudent to doublecheck the numbers ETRS pops into the coordinates box, just to be sure.)

You'll also need to provide contact information for the person completing the form. That particular set of questions will prepopulate with the information provided during the initial registration process; if the person filing the form will be different from the one who took care of the registration, you'll be able to change that. Additionally, you'll need to provide separate contact info for the person who will serve as the "emergency contact" during any nationwide test (if that person is different from the normal contact person).

Of course, when any of this information changes, you'll have to log on and upload the changes.

"***Form Two – Day of Test Reporting***". This form will have to be submitted ***within 24 hours of any nationwide EAS test*** (or as the Commission may otherwise speci-

(Continued on page 9)

(Continued from page 7)

have to submit amended State Plans incorporating the information within six months after that. (The effective date won't be set until the rules have been run through the Paperwork Reduction Act drill at OMB – which won't be wrapped up for several months, at least. Check back here for updates on that front.)

In other words, the FCC's "commitment to promoting the delivery of Emergency Alert System (EAS) alerts to as wide an audience as technically feasible" extends, in effect, only to gathering information a couple of years from now (and this after cogitating on the petitioners' original proposal for more than a decade). Sure, the FCC is requiring EAS participants and SECCs upstream in the system to provide reports on what, if anything, they've done or may plan to do to provide non-English emergency alerts. But that reporting requirement expressly contemplates that the reports may reflect simply that no steps have been taken at all – and that's apparently OK with the Commission. In fact, that's what the Commission seems to expect will happen:

> Based on the fact that virtually no parties responding to our various requests for comment on this matter have identified multilingual EAS activities currently in progress, we suspect that few EAS Participants are actually engaged in multilingual EAS activities. It therefore seems likely that the vast majority of EAS Participants will need to submit nothing more than a very brief statement to their SECC explaining their decision to plan or not plan future actions to provide EAS alert content in languages other than English to their non-English speaking audience(s).

So how exactly does this Order promote the delivery of non-English EAS announcements?

On the one hand, the FCC could be trying to shame EAS participants into getting on board voluntarily. The theory could be that, rather than report no efforts – and thereby appear to be leaving the non-English audience in the lurch when emergencies are imminent – EAS participants might be inclined at least to start to think about what they might do so that they won't look like a bunch of callous xenoglossophobics.

On another hand, this new information-gathering requirement could just be a precursor to further regulation. That's at least what Commissioner O'Rielly seems to think. In a partial dissent, he observed that "today's reporting requirements tend to miraculously morph into tomorrow's regulations". His concern is that, if the now-mandatory reports concerning multilingual EAS activities reflect that EAS participants are not engaging in any such activities (regardless of the justification for such non-activity), the Commission could then use that information as the "sole basis for costly, burdensome rules". And should that occur, O'Rielly has put everybody on notice that he is "unlikely to support" such an effort.

To summarize, then, acting in response to a request for "immediate" action in connection with its Emergency Alert System, the Commission took 11 years only to reject the proposals (notwithstanding its protestations of genuine concern for the non-English speaking audience). The petitioners are likely to be a bit surprised, then, when they get to the antepenultimate paragraph of the Commission's order and find that, in the FCC's view, the petition has been "GRANTED" at least to some extent. How can the Commission rationalize that assertion? As it sees things, the new reporting requirements "are consistent with [the petition's] stated purpose of facilitating the dissemination of multilingual local, state and national emergency information via the EAS".

If that strikes you as something of a distortion of the conventional meaning of "granted", that's the way it looks to us, too. Perhaps something got lost in translation.

(Continued from page 8)

fy). Much of the information (reporting entity, contact information, etc.) should prepopulate from the registration information. The two new questions here are simple yes/no items: did the station receive the EAS alert, and did the station retransmit the EAS alert. (Before you log out you'll also be required to confirm the accuracy of the contact information on file.)

"***Form Three – Detailed Test Reporting***". This form, due to be filed ***within 45 days of the nationwide EAS test***, calls for a more granular report about what happened during the test. In addition to prepopulated items, the form asks whether: (a) the alert was received and, if so, from what source, when, and whether there were any complications; and (b) the alert was retransmitted and, if so, when and, again, whether there were complications. The Commission helpfully provides drop-down menus of generic types of complications, plus a box in which details of any complications can be provided. (Of course, "no complications" is also an option.)

All submissions will have to be certified by the responding participant under penalty of perjury.

There are other bells and whistles involved in the system – batch filing capability, "feature tabs" on the interface, etc. – but for now, at least, we just want to make sure that all EAS participants have an idea of what they can expect to deal with in the next five months or so. Check back with CommLawBlog for updates.

(Continued from page 1)

reminds all full-power and Class A TV licensees – ***including those not qualified for the reverse auction*** – that they remain subject to the prohibition against certain auction-related communications. That prohibition is currently in effect and will remain in effect until further notice from the FCC (which notice will not in any event occur until after the close of the forward auction). In particular, the Commission expressly notes that "communicating that a party 'is not bidding' in the auction could constitute an apparent violation that needs to be reported". That could include disclosure by a non-qualified applicant of its non-qualified status, regardless of the reason for that status.

Commencement of Reverse Auction

Bidding in the reverse auction is set to start on ***May 31, 2016*** and continue on the following schedule:

May 31, 2016 (All times are ET)
Bidding Round 10:00 a.m.–4:00 p.m.

June 1, 2016 (All times are ET)
Bidding Round 10:00 a.m.–2:00 p.m.

June 2, 2016 and after (All times are ET)
Bidding Round 10:00 a.m. – 12N
Bidding Round 3:00 p.m.–5:00 p.m.

The timing and duration of rounds may be adjusted by the Commission during the Auction based on the Auction's progress. Any changes will be announced through the online Auction System.

Pre-Auction Instructional Opportunities

Just because the Auction won't technically begin until May 31 doesn't mean that there will be nothing to do in the meantime. *Au contraire*, recognizing the unprecedented nature of the Incentive Auction and the crucial importance of insuring that participants are comfortably familiar with the process, the Commission is making a number of educational opportunities available, including:

FCC Incentive Auction Reverse Auction Bidding System User Guide. An "FCC Incentive Auction Reverse Auction Bidding System User Guide" will be emailed to each authorized bidder on ***May 5, 2016***. A PDF copy will also be posted on the Auction 1001 web page (you can find the link in the "Education" section). The Guide will "describe the features of the Auction System that will be used to bid in the clock phase of the reverse auction".

Online Bidding Tutorial. Also available in the Education section of the Auction 1001 web page as of ***May 18 2016***, an online tutorial regarding bidding in the clock phase of the reverse auction.

Bidding Preview Period. The curtain will finally be pulled back on the Auction System on ***May 23, 2016 at 10:00 a.m. ET***, which will mark the start of the "preview period". (The preview period will close at 6:00 p.m. ET on ***May 24, 2016***.) This preview will provide authorized bidders the opportunity to log in and:

- check out which stations they can make bids on once the Auction starts;
- determine each station's bidding status;
- learn the initial relinquishment option assigned to the station; and,
- where applicable, available bid options with associated vacancy ranges and next round clock price offers.

> *"[C]ommunicating that a party 'is not bidding' in the auction could constitute an apparent violation [of the anti-collusion rules] that needs to be reported".*

Clock Phase Workshop. On ***May 24, 2016, from 10:00 a.m. to 1:00 p.m. ET***, the Incentive Auction Task Force will present a public workshop on the reverse auction bidding system. (Details about the workshop and remote viewing will be released at a later date.) Don't worry if you can't attend: a recording of the workshop will be posted in Education section of the Auction 1001 web page.

Mock Auction and Mock Auction Preview Period. One mock auction for all qualified bidders will be held on ***May 25-26, 2016***. The goal is to let bidders familiarize themselves with the clock phase bidding system by working through as many as five simulated rounds involving purely hypothetical situations similar to what bidders will encounter once the bidding starts for real. Commission staffers will be available to answer questions about the auction system and the conduct of the

(Continued on page 11)

Now Available: Recording of UAS Webinar

Many readers will recall our promotional posts about the webinar on the current status of UAS regulation set for early April. (Wait a minute – UAS? You may be more used to hearing about "drones", but you'd better get used to referring to them as "Unmanned Aircraft Systems", because that's how the FAA refers to them.) The webinar took off on schedule, flew smoothly and landed safely, as more than 100 attendees can attest.

If you missed the show and are kicking yourself, kick no more. We've got you covered. You can get to a recording of the entire webinar here, so it'll almost be like you were there in the first place. To access the recording, you'll be asked to provide your name and email address, but you would have had to do that to sign up for the webinar anyway.

If you've got any questions on the UAS front, don't hesitate to call on the FHH UAS team. (Oh, OK, you can call it the Drone Team if you must, but don't tell them we told you to.)

(Continued from page 10)
auction generally. The mock auction schedule is:

May 25, 2016 (All times are ET)
Mock Bidding Round 1 10:00 a.m.–12N
Mock Bidding Round 2 3:00 p.m.–5:00 p.m.

May 26, 2016 (All times are ET)
Mock Bidding Round 3 10:00 a.m.–11:00 a.m.
Mock Bidding Round 4 1:00 p.m.–2:00 p.m.
Mock Bidding Round 5 4:00 p.m.–5:00 p.m.

The Commission is obviously making elaborate efforts to allow all reverse auction participants to get comfortable with the bidding process before the Auction kicks off. We strongly recommend that anyone planning on bidding in the Auction take advantage of all these opportunities.

Other Important Information
In addition to the scheduling information above, the Commission's public notice also sheds useful light on a number of questions that will eventually loom large.

Limit of Repacked UHF Band. Broadcasters who will be repacked, and the vendors and third parties implicated in the post-Auction repack, will be interested to learn that the new UHF band will extend only through Channel 29. That provides a starting point for assessing a station's likelihood of repack and the capabilities of current equipment. For example, many stations have so-called broadband antennas capable of operating across several channels of the UHF band. Prior to the release of the Clearing Target, however, attempting to assess whether a station's particular antenna would be reuseable in the post-auction landscape was a fool's errand.

Forward Auction Band Plan. The FCC's public notice includes not only the band plan framework but the allocation of paired spectrum blocks in every PEA. Of particular interest to wireless bidders is the announcement that 97% of all spectrum blocks to be auctioned will be Category 1 blocks, of which, 99% will be zero-percent impaired.

Mexican Border Considerations. Of interest to both broadcasters and wireless bidders is the impact of Mexican coordination and interference protections on the clearance of paired blocks in the southern border areas. Because the FCC will implement a nationwide band plan, broadcast stations in southern border cities – including LA, San Diego, Phoenix, and cities along Texas's Rio Grande – will see the same band clearance in the reverse auction as in all other markets. However, the FCC will be limited in what it can reallocate for wireless because Mexico requires ongoing inter-service interference protections below Channel 37 – ***not*** Channel 30, as will be the case in the rest of the country. It's not clear whether this is potentially good news for LPTVs in those areas, who in theory might be able to take advantage of the unallocated spectrum between Channels 29 and 37.

The long-awaited Incentive Auction is now upon us. While the fun won't start for real until May 31, there is much to be done in the next few weeks to prepare. All would-be reverse auction participants should be sure to review carefully the FCC's public notice and the Final CSL they receive (and if they don't receive one, be sure to contact the FCC pronto). This is crunch time, and attention to detail is important.

(Continued from page 3)
(4) customarily and regularly performs at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee.)

The proposed changes would affect the *salary level* component by increasing, considerably, the threshold weekly and annual limits necessary to trigger the exemption. And that is likely to alter the status of an equally considerable number of employees; there will be fewer exempt employees and, therefore, more employees now eligible for overtime pay.

As matters now stand, it looks like the DoL plans to increase the minimum threshold salary triggers for the exemption to ***$970 per week***, or ***$50,440 annually***, starting as early as later this year. The proposal also provides for annual increases in the triggers thereafter. (Part of the reason for such a significant increase is that the minimum thresholds have not been changed since 2004.)

The proposal has proven controversial, and not just for employers.

Because many employees of broadcast stations and newspapers tend to meet the *salary basis* and *duties* criteria ***and*** are paid a fixed salary above $455 per week or $23,600 per year, those employees are not currently eligible for overtime pay, no matter how much they work in a given pay period. But under the DoL's proposals, we can expect many of the currently exempt employees suddenly to lose that exemption – *i.e.*, anybody who now makes (a) more than $455 weekly or $23,660 annually but (b) less than $970 weekly or $50,440 annually. We're guessing that a lot of broadcast and newspaper employees fall in that category.

Not surprisingly, the proposal has proven controversial, and not just for employers who fear having to pay a large swath of employees overtime pay.

Employers, of course, should be concerned. If they want to maintain the salary-but-not-overtime status of currently exempt employees, they may now be faced with the possibly difficult choice of: (a) increasing the salaries of those currently-exempt employees or (b) somehow reclassifying them/minimizing their hours. Other steps would also be useful to ensure compliance with the FLSA. For instance, before deciding how to deal with the new limits, employers would probably want to undertake an audit of all employees and positions to identify those who would have to be reclassified. This would require looking at each employee's actual job descriptions to make sure those descriptions match up with the actual duties of each job. (Tip: Employers should probably do this periodically no matter what. To assist, we're providing more details about the "*duties test*" below.) Employers would be well-advised to hire an attorney specialized in employment law to help them through this.

Once newly non-exempt employees have been identified, they will have to be retrained on things like timekeeping procedures, complying with meal and break policies, and company restrictions on working outside normal work hours and other compensable time issues. Their access to computers, work databases and even smartphones may have to be restricted in order to maintain compliance with overtime rules. (Fun question: what do you do when an employee has a work email account on a personal smartphone?) And don't forget about the PR side of things: an employee could feel like this is a demotion; to avoid this, clear explanation to all employees about the changes in the law and the effect of those changes on their status should be provided well ahead of those changes.

But employers will likely not be the only ones concerned. Even employees may not be happy. Some may miss the flexibility that comes with being an exempt employee. Employees – especially reporters – may resent being told when to start and stop working, when to take breaks, how long those breaks can last and when they can and cannot take partial days in order to maintain compliance with the FLSA. (Imagine telling a reporter to stop in the middle of a call with a source because he or she has already worked 40 hours that week.) And, as noted, some may view the change of status from exempt to non-exempt to be a demotion.

There is still some hope that this won't be a complete HR headache. In announcing its proposals last July, the DoL asked for comment on some related issues, including:

? Whether there should be changes to the *duties test*. (As noted above, we're providing a more

(Continued on page 13)

(Continued from page 12)
detailed look at the elements of the *duties test* below);

? Whether employers should be able to include non-discretionary bonuses when determining an employee's salary level, since some employers rely on these bonuses as part of their compensation package and believe it would be unfair to exclude them from the calculation; and

? Just how the use of devices at home might affect the 40 hour/week calculation.

Since we have not yet seen the full text of the DoL's final decision in this proceeding, we can't be sure how these and similar questions may be resolved. We understand that a set of final rule revisions was submitted to the Office of Management and Budget (OMB) in mid-March for its review and approval, after which they will be published in the Federal Register. OMB has at least 90 days within which to approve the final rules (although it could take less time if it moves fast). Once the rules have been published, it's likely that they won't take effect for 30 or 60 days after publication. So even if things move really fast – never a given when it comes to the federal bureaucracy – it's unlikely (although theoretically possible) that the new rules will be in effect before mid-July, 2016. We suspect it's more likely that they will be taking effect in late summer or early fall, but your guess if probably just as good as ours on that score. We will provide updates on that front as warranted.

It is reasonably certain that the DoL will be revising its triggers for FLSA exemption.

The bottom line, though, is that it does look reasonably certain that the DoL will be revising its triggers for FLSA exemption in the coming months. Those changes could have a significant impact on many employers. Now would be a good time to look over your employment rolls to see whether you may be among them.

One further cautionary note: Don't forget that state laws may apply as well. Some states impose thresholds corresponding to the DoL's, so they may jump when the DoL's jump. Other states may have separate triggers. This is another reason for consulting with a real live employment law specialist, which we urge you to do as you figure out how all this may affect you (and, if you are affected, what steps you may want or need to take as a result). As always, check back here for updates.

A quick sidebar/postscript on the *duties test*. Recall that the FLSA exemption applies to employees who (in addition to satisfying the two salary-related tests) work in jobs that fall into one of three categories: executive, administrative or professional. This aspect of the exemption is ***not*** proposed to be changed by the DoL at this time, but to help orient readers in this area, here's a short summary (trust me, there is a lot of precedent in this area) of how each category is interpreted:

***Executive*:** To be deemed to be in an "executive" position, the employee must:

- manage the enterprise, or manage a customarily recognized department or subdivision of the enterprise, as a primary aspect of his/her employment;
- customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- have the authority to hire or fire other employees (or, at least, the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight).

***Administrative*:** To be deemed to be in an "administrative" position, the employee must perform, as a primary aspect of the job, office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. That work must include the exercise of discretion and independent judgment with respect to matters of significance.

***Professional*:** To be deemed to be in a "professional" position, the employee must perform, as a primary aspect of the job, work requiring advanced knowledge, *i.e.*, work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment. In this context, "advance knowledge" must be in a field of science or learning and must be customarily acquired by a prolonged course of specialized intellectual instruction.

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.

May 24, 2016

Television Incentive Auction – The Commission will host a public workshop on the bidding system that will be used for bidding in the clock phase of the Spectrum Incentive Auction. Details about the workshop and remote viewing will be released by the Commission at a later date.

May 25 – 26, 2016

Television Incentive Auction – The Commission will conduct one mock auction for all bidders qualified to bid in the clock phase of the Spectrum Incentive Auction beginning on May 25, 2016, and ending on May 26, 2016.

May 31, 2016

Television Incentive Auction – Bidding in the clock phase of the Spectrum Incentive Auction will begin at 10:00 a.m. There will be one round that day and one also beginning at 10:00 a.m. on June 1, 2016. Starting on June 2, 2016, the pace will pick up to two rounds a day, and will be adjusted at the discretion of the Commission thereafter.

June 1, 2016

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in the **Arizona**, **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** and **Ohio** and all *television* stations with five or more full-time *employees* in the **District of Columbia**, **Maryland**, **Virginia** and **West Virginia** must electronically file a mid-term EEO report on FCC Form 397, with the last two annual EEO public file reports attached.

Noncommercial Television Ownership Reports – All *noncommercial television* stations located in 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 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.

July 11, 2016

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the second 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 as was the case last quarter, use of the Licensing and Management System for the children's reports is mandatory, 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.

(Continued on page 15)

(Continued from page 4)

ers should be permitted to cooperate with one another by sharing channels. In other words, a Next Gen TV station would be required to provide not only one free, over-the-air program service in Next Gen mode, but also the same programming in current DTV mode as a signal piggy-backing on another station serving essentially the same audience. Next Gen stations would be subject to all of the routine regulatory requirements that stations currently face – EAS, captioning, video description, etc.

Even if the FCC were to permit this – and there's no obvious reason it shouldn't – this plan would require much broadcaster cooperation. Stations would work out among themselves which would be Next Gen TV broadcasters and which would stick (at least for the time being) with standard DTV. A standard DTV station would agree to carry, in addition to its own programming, the programming of the ATSC 3.0 station, while the ATSC 3.0 station would return the favor by carrying the standard DTV station's programming on the Next Gen TV signal. In this way everybody's programming would be available to all viewers in the market – those sticking with their DTV receivers as well as those upgrading to Next Gen TV.

As the proponents see it, none of this should affect MVPD carriage for anybody (as long as the Commission confirms that an ATSC 3.0 station remains a "television station" for overall carriage purposes). (Whether or not their confidence on this point is well-placed is unclear, given the precise language of the carriage requirements in the Communications Act – but let's not be negativists just now.)

So the proposal has a lot going for it: improved service to the audience (both in-home and mobile), increased compatibility with IP-based services, no major rule changes needed, greater efficiency in spectrum use, reliance on marketplace, rather than regulatory, forces. While the plan depends on acceptance of the new technology in the marketplace, don't forget that one of the proponents here is the CTA, whose members will be the ones designing – and selling – the TV sets necessary to receive ATSC 3.0 transmissions. The fact that CTA is onboard here indicates confidence on manufacturers' part that the plan will work. And perhaps most importantly, Next Gen TV was designed by the same folks who gave us the DTV system that has worked, and worked well.

The Commission's initial response has been favorable. Chairman Wheeler spoke promisingly about the proposal at the NAB Convention in Las Vegas and shortly after, as noted, the Media Bureau requested comment on it. That latter step, however, while encouraging for the proponents, is not a guaranteed trip to the fast lane to the finish line. The Commission will still have to commence and complete a formal rulemaking proceeding, which would normally take a year at least, often longer. But you never know – this proposal could present so much apparent upside and so little apparent downside that it will move through the process lickety-split. In any event, the journey down that road has started.

Comments on the proposal are due by ***May 26, 2016***; reply comments may be filed by ***June 27***. You can submit comment and replies through the FCC's ECFS online filing system; refer to Proceeding No. 16-142.

(Continued from page 14)

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.

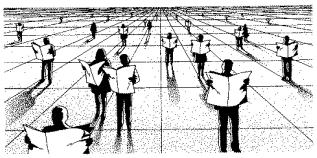
Issues/Programs Lists – For all *radio*, *television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues during the past quarter must be placed in the station's public inspection file. Radio stations will continue to place hard copies in the 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.

Class A Television Continuing Eligibility Documentation – The Commission requires that all Class A Television maintain in their online public inspection files documentation sufficient to demonstrate that the station is continuing to meet the eligibility requirements of broadcasting at least 18 hours per day and broadcasting an average of at least three hours per week of locally produced programming. While the Commission has given no guidance as to what this documentation must include or when it must be added to the public file, we believe that a quarterly certification which states that the station continues to broadcast at least 18 hours per day, that it broadcasts on average at least three hours per week of locally produced programming, and lists the titles of such locally produced programs should be sufficient.

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

Updates On The News

Effective date of Ownership Report revisions set, sort of – Back in January we reported on the FCC's latest attempt to craft the Perfect Broadcast Ownership Report for both the commercial and noncommercial industries. As a result, the RUFRN replaced the SUFRN; NCE licensees will be required to provide a "unique identifier" – that would be a RUFRN or full-fledged FRN – for each attributable principal; NCE licensees will, like their commercial counterparts, all have to file their biennial Ownership Reports on December 1 of each odd-numbered year; and various other revisions to the ownership-reporting process were made. Now the Commission's action – technical name: "Report and Order, Second Report and Order, and Order on Reconsideration" – has made it into the Federal Register. As a result, some of the changes wrought by the Commission will become effective as of ***May 4, 2016*** ... or not.



Which changes exactly? We'll get to that in a minute, because in our view the most immediate concern here is that this Federal Register publication establishes the deadlines for seeking reconsideration and/or judicial review of the FCC's order (regardless of when any of the rule changes eventually become effective). So if you're thinking about filing a petition for reconsideration (with the Commission) or a petition for review (with the U.S. Court of Appeals of your choice), heads up and get your calendars out: petitions for reconsideration must be filed by ***May 4, 2016***. And petitions for judicial review must be filed not later than ***June 3, 2016***.

Appellate aficionados will also recall that, if you're planning on getting into court and you have your heart set on having your appeal heard in a particular Circuit, you'll have to jump through the "judicial lottery" hoops. Those hoops require (among other things) that you file your petition for review in your Circuit *au choix* by ***May 16, 2016*** and then get a copy of your petition, stamped "received" by the court, hand-delivered to the FCC's General Counsel by that same deadline. Read all about the judicial lottery here.

Meanwhile, back to the practical question: Exactly which (if any) of the changes will take effect on May 4? That's not clear.

In the "Dates" section at the beginning of the notice, the Federal Register publication says that the order is "[e]ffective May 4, 2016". But then it goes on to say, somewhat unhelpfully, that "[t]he amendments to §§ 73.3615 and 74.797 contain new or revised information collection requirements that are not effective until approved by the Office of Management and Budget (OMB)". That's not especially surprising, since the changes involve, among other things, overhaul of Form 323-E (the noncommercial broadcasting Ownership Report form). Most form revisions have to be run past OMB, thanks to the Paperwork Reduction Act. And – and we're guessing here – the "unique identifier" requirement will impose new "information collection" chores on many if not most NCE attributable principals, so presumably that, too, will have to go through the PRA grinder.

But what about the end of rolling filing deadlines for NCE stations? That does technically involve the submission of information collections, *i.e.*, the report forms themselves, but arguably the date on which such collections are to be required is not itself technically an information collection subject to the PRA. So will NCE stations have to file their next Form 323-Es on December 1, 2017 (at the earliest), or will they still be having to file on the biennial anniversary of their renewal applications until some further date-to-be-announced?

Here it appears that you have to look way down in Paragraph 139 of the Federal Register notice (Paragraph 94 in the version of the order released by the FCC last January), where it says "the rule amendments attached hereto as Appendix B and ***the revised filing procedures*** and changes to FCC Form 323 and FCC Form 323–E adopted in this Report and Order will become effective upon publication of a notice in the Federal Register announcing approval by [OMB]". (Those are our emphases.) So it looks like NCE stations will remain on their current rolling schedule for the time being. In fact, it looks like nothing will be changing on the Ownership Report front until further notice, notwithstanding the fact that the order has supposedly become "effective" as of May 4. Ideally, the Commission will be clarifying this in the short term.

KidVid Reports now get filed through LMS – When the time comes to file your Children's Television Report (FCC Form 398), don't forget what we told you last February: the FCC has changed the filing portal for those reports, starting now. Instead of the old way (through a portal dedicated to KidVid), now you'll have to log onto the Commission's Licensing and Management System (LMS) and go from there. As we pointed out in our earlier post, filling out the new Form 398 should reasonably straightforward. But finding your way to the form in the first place, maybe not so much. So you might want to take a gander at our February post, which includes step-by-step directions for getting to the Form 398 in LMS, as well as some illustrative screen grabs to help get you oriented.