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News and Analysis of Recent Developments in Communications Law

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Three's the charm from the Third Circuit

The Quad Pulls A Sisyphus … Again

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We once described the FCC's quadrennial ownership review process as Sisyphean in nature. Keeping with that analogy, we can report that the rock has now rolled back down the hill … again. But this time the judicial gods appear ready to step in to make sure the job finally gets done. In the meantime, the media ownership limits that have been on the books for years remain in place **except for** the Commission's 2014 decision making certain joint sales agreements (JSAs) between TV stations "attributable" interests for purposes of the ownership rules. That decision has now been vacated, although perhaps not for long.

The quadrennial review process, mandated by Congress back in 1996, requires the Commission to review all of its media ownership rules every four years to determine if they remain "necessary in the public interest as a result of competition". The FCC's 2002 review, completed by the FCC in 2003, ended up in the U.S. Court of Appeals for the Third Circuit, which sent the decision back to the FCC in 2004 because, in the Court's view, the Commission had not adequately explained its decision. While the FCC was still working on that remand, 2006 rolled around, and another biennial review began. That one also went up to the Third Circuit which, in 2011, again sent it back to the FCC for a number of reasons. But before then, the 2010 review had begun, so the remanded issues from the 2006 review got folded into the 2010 review. But that proceeding had not been completed as of 2014, so it got folded into the 2014 review. At the same time the 2014 review got started, the Commission decided to expand the definition of "attributable interests" for TV licensees to include certain LMAs.

A number of broadcast folks appealed that last decision. At the same time, a number of groups that had been pressing for resolution of ownership issues still lingering from 2006 asked the Third Circuit to require the FCC to bring its multiple pending ownership reviews to a conclusion. And now the Third Circuit has issued its third case entitled Prometheus Radio Project v. FCC.

The decision is not a good one for the FCC.

With respect to the broadcasters' appeal of the JSA decision, the Court has concluded that the Commission could not permissibly expand its ownership limitations (by making JSAs attributable) before it had first determined that the underlying ownership rules are in the public interest. Since the Commission has yet to make such a determination, the FCC's JSA ruling has been tossed, at least for the time being.

The FCC had attempted to justify its expansion of "attributable interests" to include JSAs by arguing that changes to its attribution rules were separate and distinct from the ownership limits themselves, which could not be expanded without a finding that they remain "necessary in the public interest". The Court disagreed. It held that the attribution rules, which determine who is subject to the ownership rules, could not be expanded without the Commission first finding that the underlying rules themselves remained justified. Since the FCC had not resolved a quadrennial review within the prior four years (which it clearly hadn't – and still hasn't), the Commission was (and remains) precluded from expanding its attribution policies. As a result, television JSAs are once more non-attributable.

In the separate appeal brought by non-broadcasters (dubbed "Citizen Petitioners" by the Court), the petitioners were complaining about the FCC's overall delay, but a primary focus was the FCC's failure to come up with a suitable definition of the term "eligible entity".

The Court had perhaps the harshest words for the Commis-

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"Local" no more

Time to Test Drive the New and Improved Online Public File System!

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Last January we reported on the FCC's decision to expand its online public inspection file (now officially referred to as "OPIF") requirement to include radio broadcasters, cable operators and satellite radio and TV operators, too. And now, according to the Commission, the system is ready for prime time: it's officially available for testing now, and ***as of June 24, 2016***, the first group subject to the expanded requirements will have to start to upload items. If you're in that group and you haven't had to deal with the joys of maintaining an online public inspection file up to now, be prepared: it takes some getting used to.

And all you TV licensees who may think that you already know the ropes – you've got another think coming. As of June 24, you'll have to use the OPIF, and not the "online broadcast public inspection file" (or, as the FCC refers to it, the "BPIF") that you've been using (although the FCC will take care of transferring your existing BPIF materials over the OPIF as of June 24). The Commission's new OPIF system is a considerable expansion of the old BPIF. According to the FCC, the BPIF is "virtually identical" to the new and improved OPIF – BUT the FCC concedes that there are "some differences in the look and feel of the OPIF database". In other words, even if it performs the same functions as the BPIF, the OPIF is a different animal in a number of respects.

All of which should encourage everyone who will eventually have to use the OPIF to get out to the test site the FCC is making available and start kicking the tires. At some point in the next month or so the Commission plans to present a webinar on the new OPIF, but our hunch is that that webinar will be most useful to folks who have already taken a lap or two through the test site first. (Check back here for updates on just when that webinar might happen.)

Importantly, the test site is just that – a ***temporary*** site where one and all can upload, delete, revise, etc. to their hearts' content without having to fear that it will affect anything else, because it won't. In fact, the whole demo site – and anything that might get uploaded to it – will be deleted once OPIF goes live on June 24. So if you're a TV station that already has an ongoing obligation to maintain a BPIF, you should keep doing so even while you play, separately, with the OPIF.

Who needs to worry about this right away? All TV licensees who currently have a BPIF and everybody in the first group of regulatees newly subject to the online public file requirement. They're the ones who will have to start using the OPIF For Real next month. Those include:

- all cable systems with 1,000 or more subscribers (although some such systems do get a break of sorts, as discussed below);
- DBS (*i.e.*, satellite TV) providers;
- SDARS (*i.e.*, satellite radio) licensees; and
- large market commercial radio stations with five or more full-time employees. In this context "large market stations" refers to stations located in any of the Nielsen Audio-defined Top 50 Markets . Importantly, the "five or more full-time employees" is to be determined on the basis of employment units, not stations. So where a station in a Top 50 Market is commonly-owned with one or more other broadcast stations in the same market that share at least one employee, and the station employment unit has five or more full-time employees, each radio station in the group will be deemed to be in the "five or more" category and, therefore, subject to the new requirements at the earliest time.

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News from the drone front

Stakeholders Reach Consensus on "Best Practices" for Commercial UAS

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As we reported last year, at the request of the President, the National Telecommunications and Information Administration (NTIA) has been overseeing a multistakeholder process looking toward the development of a set of "best practices" for the commercial and private use of unmanned aircraft systems (known to the *cognoscenti* as "UAS", but to others as "drones"). On the table were a set of three broad UAS-related issues: privacy concerns, transparency and accountability. And we now have the product of that process: a document entitled Voluntary Best Practices for UAS Privacy, Transparency, and Accountability (a/k/a the "Best Practices").

Of course, the average UAS operator probably views the FAA as the main source of UAS regulation. And the FAA has, indeed, flexed its regulatory muscles, as we've recorded in multiple posts on CommLawBlog (for example, here and here) and also in a webinar devoted to the subject. But the FAA has so far limited its efforts to matters relating strictly to air safety; it has declined to address the average citizen's concern about personal privacy, a concern born of visions of the creepy neighbor hovering a camera-laden UAS outside a bedroom window or over the pool. The FCC has explicitly stated in its proposed small UAS rules that privacy issues are "beyond the scope of this rulemaking". But it has hedged on that slightly, if not entirely credibly, advising at least one party interested in privacy regulation that it "will consider [that party's] comments and argument" in its ongoing consideration of small UAS rules. (To protect their privacy, some people have taken matters into their own hands, but that's actually a Federal crime and not something we recommend.)

> *It's a testament to the UAS community and to NTIA that a final document exists at all.*

Meanwhile, a hodgepodge of state and local laws has popped up with respect to UAS operation (some of which the FAA has indicated it believes are preempted by its regulations), creating an extra layer of legal review and complexity for those seeking to operate lawfully.

And to this tangle of considerations we now add the NTIA-sponsored Best Practices.

It's important to recognize that the "Best Practices" are ***not*** binding rules or regulations. Rather, they are voluntary guidelines, the creation of a range of private sector participants – trade associations, public interest groups, vendors and others – who came together at the NTIA's invitation. While NTIA played the role of host and facilitator, it was ***not*** part of the decision-making process. Instead, NTIA merely helped the participants arrive to a consensus through discourse in various forms, from big, open meetings to one-on-one discussions. (For a complete overview of the multistakeholder process, check out this page on the NTIA's website.) In view of the wide range of views represented by the participants, it's a testament to the community and to the folks at NTIA that a final, comprehensive document exists at all, let alone so soon after the process began. The guidelines strike a balance between (a) parties who sought broad privacy rights and (b) others concerned about overly intrusive – and difficult to meet – restrictions on the collection of personal data. (Note: The end result was not embraced by all participants, including some on both sides of that divide.)

So what's in the "Best Practices"? They consist of broad guidelines for commercial UAS operators' management of "covered data," which is defined as "information collected by a UAS that identifies a particular person." Under the Best Practices, commercial UAS operators should:

- Inform people whose covered data will be collected by UAS (note, the guidance uses the term "inform," not "obtain consent");
- If covered data is collected, create internal policies governing what will be done with any data collected, and inform the public of those policies. Those policies would describe the kind of data to be collected and how the data will be used, retained and shared, especially when it comes to law enforcement requests for information;
- Avoid operation over private property without consent (though the guidelines recognize that some such operation may sometimes be necessary);
- Not engage in "persistent continuous collection" of specific individuals' covered data (in other words, don't use UAS for unconsented surveillance);
- Not retain covered data longer than necessary and allow requests from people whose data has been collected to have it deleted or modified to remove the personally identifiable information (for example, blurring faces or license plates);
- Keep covered data safe by developing and following good data security policies (that was a major concern of privacy advocates).

The Best Practices also include an appendix – "Guidelines for Neighborly Drone Use" – addressed to hobbyists. These track the guidelines for commercial use, with the added helpful suggestion: "Don't harass people with your drone."

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Just in time for Christmas!

New Federal Minimum Wage/Overtime Rules To Take Effect as of December 1

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[*Editor's Note: To re-state an obvious but important point that our author, Kevin, has previously made, neither he nor we are "employment" lawyers. But readers and others have expressed enough interest in the coming changes to the federal minimum wage and overtime rules that he thought it a good idea to take a look at what's in store. The following overview is intended to provide useful background information; it should not be take nas a comprehensive explanation or exhaustive history of the subject, and certainly not "legal advice". If you have questions about the coming changes, be sure to contact an employment lawyer.*]

Last month, in anticipation of a proposed-but-not-yet-formally-adopted set of changes likely to have far-reaching effects on U.S. businesses, I reviewed the general area of minimum wage and overtime rules adopted pursuant to the Fair Labor Standards Act (FLSA). And sure enough, a month and a half after my post, the announcement was made: in a 162-page item published in the Federal Register (the day after considerable related publicity), the Wage and Hour Division of the Department of Labor (DoL) laid it all out. So with last month's post as background, we can now take a look at what actual changes are looming (and when I say looming, I mean it: the new rules are set to take effect as of ***December 1, 2016***).

Federal minimum wage and overtime rules apply to some, but not all, businesses and some, but not, all employees.

If you haven't read my post from last month, I recommend that you go do that now. It will provide important information that will make understanding the changes, and their potential effect on you, considerably easier.

As I explained, federal minimum wage and overtime rules apply to some, but not all, businesses and some, but not, all employees. As I mentioned in my earlier post (and address briefly below), not all employers are subject to the FLSA. But that doesn't change. The changes emanating from these rules all relate to an employee's exempt/non-exempt status (and his or her eligibility to make the minimum wage and earn overtime pay for hours worked beyond 40 hours in a week).

Recall that the requirements are intended to benefit many hourly and salaried workers, but not other, primarily "white collar", workers who are deemed "exempt". The purpose behind the exempt/nonexempt distinction is simple: white collar workers, with their higher salaries and benefits (not to mention better opportunities for advancement) don't need the protection of the FLSA, while their blue collar compatriots do.

The distinction between the exempt and the nonexempt employees is based on three separate sets of considerations, *i.e.*, the worker's 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 which is not hourly in nature and which is 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 governmentally-specified weekly or annual threshold amount, ***currently $455 per week or $23,660 annually***. This is the *salary level* component.

You can think of it this way: In general, an employee is "nonexempt" and, therefore, eligible for minimum wage and overtime protections, if he/she is paid:

- on an hourly basis;
- on a weekly or less frequent basis but earns less than the weekly or annual threshold set by the DoL; or
- weekly or less frequently and is above the threshold, but fails to meet any of the duties tests.

The new rules alter ***only*** the "salary level" test, but in three separate respects. First, the DoL is increasing the weekly and annual threshold amounts that distinguish the exempt from the nonexempt. And it's a major increase: the weekly level will shoot from $455 to $913, and the annual level will also double, from $23,660 to $47,476. Since the current rates have been in effect since 2004, the DoL is clearly making up for lost time.

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Second, looking ahead, DoL plans to readjust the rates automatically every three years according to a formula set in the new rules.

And third, DoL has modified the treatment of certain bonuses, incentive payments and commissions as those may affect employees' compensation for purposes of determining exempt/nonexempt status.

New Minimum Threshold

The DoL's decision to increase the threshold numbers is understandable. The current levels were set in 2004 and had, in DoL's view, fallen completely out of touch with the realities of the modern workplace. In fact, the minimum had been updated only once since the 1970s and, in the agency's view, the 2004 increase (which had tripled the previous minimum) set the bar too low, a deficiency that has only gotten worse over the past 12 years.

The threshold figures adopted by DoL are slightly lower than those that had been proposed in its [July 2015 Notice of Proposed Rulemaking](). The original proposal would have pegged the minimum thresholds at $970 weekly and $50,440 annually. As noted above, the thresholds that were finally adopted are $913 weekly/$47,476 annually. DoL chose these numbers because they are equal to the 40th percentile of weekly earnings for full-time salaried workers in lowest wage Census region.

The increase in threshold figures will have a significant effect: DoL estimates that, as a result of the change: (a) 4.1 million workers nationwide will move from exempt to nonexempt status and, thus, become eligible for overtime; and (b) about 100,000 will receive a salary increase. Overall, it should result in 35% of all full-time salaried workers staying below the threshold for the salary level test and, thus, being eligible for overtime pay, even if they meet the other two tests.

The new rules also affect certain employees considered "highly compensated employees" (HCEs), a category of employees exempt from the overtime rules if their annual salary is at least $100,000. Only a minimal duties test is applied once that salary threshold is met. (The employee needs only to customarily and regularly perform one of the duties of executive, administrative or professional, as opposed to having those duties be a primary part of the employee's job). The DoL increased the minimum threshold for HCE status from $100,000 per year to $134,004 per year, equal to the 90th percentile of all salaries. The employee must make at least $913 per week.

(DoL also made salary threshold adjustments in a couple of "special categories" – but unless you have employees in either (a) American Samoa or (b) the motion picture industry, you don't need to worry about them.)

Automatic readjustments every three years

As I noted above, the new minimum thresholds of $913 per week/$47,476 per year equate to the 40th percentile of salaried workers around the country (with the HCE threshold equating to the 90th percentile).

While these are the first increases in 12 years, we won't be waiting that long for the next changes. The thresholds will be automatically readjusted every three years to correspond to the 40th and 90th percentile salary levels in the lowest range Census region at the time of each adjustment. (The current adjustment is based on salaries in the South; that could change for future adjustments.) Changes will be announced 150 days in advance. Mark your calendar: the next announcement is set for August 1, 2019, ahead of a January 1, 2020 change in the threshold amounts. The triennial approach differs slightly from DoL's original proposal, which would have adjusted the thresholds every year.

Going forward, the thresholds will be automatically readjusted every three years.

A NEW policy regarding treatment of nondiscretionary bonuses, incentive payments and commissions

While the threshold adjustments appear designed to increase the universe of nonexempt employees eligible for federal minimum wage/overtime protection, DoL has also added a new consideration that could undercut that some while still allowing employers to classify some employees as exempt. Now, for the first time, employers will be able to count some compensation (*e.g.*, some bonuses, incentive payments, commissions) beyond straight salary against the threshold. Specifically, an employer can include these amounts as up to 10% of the threshold amount. In other words, an employee earning at least $42,728.40 in annual salary could be categorized as an exempt employee if he or she also makes more than $4,747.60 in nondiscretionary bonuses, incentive payments, and commissions.

Not all non-salary compensation can be counted in this fashion. "Discretionary" bonuses, *i.e.*, amounts unilaterally determined by the employer in its sole discretion, don't count. But portions of payments for meeting a pre-established goal (*e.g.*, production goals), fixed formula commissions or retention bonuses can be factored into the calculation of an employee's threshold salary for purposes of minimum wage/overtime eligibility. Additionally, nondiscretionary bonuses and incentive payments can be credited toward a portion of the standard salary level test only if the payment is made on a *quarterly or more frequent basis*. The employer can make a "catch-up" payment if employee does not reach minimum with the bonus, but this catch-up payment must be paid within the next quar-

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The annual spring ritual

2016 Reg Fees Proposed: Larger Market TV Fees Going Up, Most Radio Fees Heading Down

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If it's May, it must be time for proposed regulatory fees – and sure enough, here they are! In a Notice of Proposed Rulemaking (*NPRM*), the FCC has got the ball rolling down the road that, for many regulatees, will lead us to a payment deadline sometime in September (or maybe August, but don't count on it) by which they'll have to cough up their annual tribute to the FCC.

While the final figures (usually announced in July or early August) may vary here and there from the proposed fees, generally any changes can be expected to be minor. Still, the *NPRM* gives one and all an opportunity to comment on the proposals before they get etched in stone (although many may question the utility of trying to sway the Commission on the fee front).

FY 2016 TELEVISION STATION REGULATORY FEES (proposed)		
Digital TV (47 CFR part 73) VHF and UHF Commercial	FY 2015 Fee Rates	FY 2016 Proposed Fee Rates
Markets 1-10	$46,825	$60,775
Markets 11-25	$43,200	$45,750
Markets 26-50	$27,625	$30,575
Markets 51-100	$16,275	$15,225
Remaining Markets	$4,850	$5,000
Construction Permits	$4,850	$5,000

Figure 1

For TV folks, the proposed fees reflect a certain amount of jiggering designed to conform to "the traditional determination that Top 10 stations should pay about twice what stations in markets 26-50 pay." As a result, fees for VHF and UHF TV licensees in the Top 10 markets are proposed to shoot up by nearly 30% (from $46,825 to $60,775). Market 11-25 licensees are looking at a more modest 6% rate (from $43,000 to $45,750), while those in Markets 26-50 are set to come in at just less than 11% more than last year (from $27,625 to $30,575). Stations in markets below No. 100 will also be looking at a modest 3% increase (from $4,850 to $5,000).

FY 2016 RADIO STATION REGULATORY FEES (proposed)						
Population Served	AM Class A	AM Class B	AM Class C	AM Class D	FM Classes A, B1 & C3	FM Classes B, C, C0, C1 & C2
<=25,000	$1,100	$795	$690	$760	$1,200	$1,375
25,001 – 75,000	$1,650	$1,200	$1,025	$1,150	$1,800	$2,050
75,001 – 150,000	$2,200	$1,600	$1,375	$1,525	$2,400	$2,750
150,001 – 500,000	$3,300	$2,375	$2,075	$2,275	$3,600	$4,125
500,001 – 1,200,000	$5,500	$3,975	$3,450	$3,800	$6,000	$6,875
1,200,001 – 3,000,00	$8,250	$5,950	$5,175	$5,700	$9,000	$10,300
3,000,001 – 6,000,00	$11,000	$7,950	$6,900	$7,600	$12,000	$13,750
>6,000,000	$13,750	$9,950	$8,625	$9,500	$15,000	$17,175

Figure 2

The winners on the TV side will be stations in Markets 51-100, who are set to see a more than 6% reduction, from $16.275 to $15,225.

The full table of proposed TV fees is shown in Figure 1.

Changes are also on the table for radio folks. The most obvious change is the creation of another population row in the fee grid. Historically, the Commission has calculated radio reg fees based on two factors: (a) the class/service of the station; and (b) the size of the population served. The serving populations greater than 3,000,000. No longer. The FCC figures that that broad classification should more appropriately be whacked into two separate categories. So the plan is to include a classification in the grid for stations serving 3,000,001-6,000,000 folks, and a new classification for those serving more than 6,000,000.

Over and above that obvious change, the Commission also proposes to "standardize the incremental increase in fees as the population served increases" and also to "more consistently assess fees based on the type and class of service". The news here is, for the most part, good. Nearly all categories of radio licensees will see a modest decrease in their 2016 reg fees; and the small handful that that don't go down are proposed to go up only slightly. The full table of proposed TV fees is shown in Figure 2.

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Deadline … or punchline?

LPTV/TV Translator Deadline "Announced"

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LPTV and TV Translator licensees have known for some time – at least since last December – that they're going to need to be "operating" as of a certain date in order to be eligible for the first displacement window that will open post-auction. But what that "certain date" might be has been, um, less than certain.

No longer, according to the Commission. In a public notice the Media Bureau says that it has "announce[d] the deadline for identifying operating" stations. And what might that date be? Get your calendars out.

According to the Bureau's announcement, the crucial date is "the date that the *Channel Reassignment Public Notice* is released following the completion of the reverse auction."

Got that? We'll give you a minute or two to find that in your calendar and mark it up.

To be honest, the Bureau's assertion that it's announcing the "date" is less than accurate, seeing as how it provides no actual "date". But, to be fair, that's not entirely the Bureau's fault. The eventual deadline will necessarily depend on when the Spectrum Auction wraps up, and at this point that's anybody's guess. But the Bureau recognizes that LPTV/Translator folks deserve some idea of when their eligibility will be determined, since they will be required to have taken steps in order to insure their eligibility as of whatever date the deadline happens to be.

So here's what we know. The LPTV/Translator displacement window will be available to stations that are "operating" as of the deadline. By "operating", the Bureau has clarified that a station will be deemed "operating" if it "has licensed its authorized construction permit facilities or has an application for a license to cover on file with the Commission on that date". And the deadline? The Bureau candidly – oh sure, it's stuck in a footnote, but it's still candid – acknowledges that it "cannot predict with certainty" what the deadline will actually be. But it figures that, "given the current status of the ongoing Incentive Auction", putting everybody on notice ***now*** will give all affected folks enough notice to make their plans accordingly.

What exactly does it mean? It's hard to say.

What exactly does that mean? It's hard to say, of course. But it's at least a plausible guess that the FCC's auction simulations are telling them that the auction could wrap up close to the absolute shortest possible timeline (possibly as little as three months, but it really is anybody's guess), so they better put out some notice, even if it's not really a "notice" in the sense that it provides any, like, actual notice.

What this does confirm is the common sense wisdom that any LPTV or TV Translator permittee hoping to get into the displacement window should get cranking on their construction ASAP, if they haven't already done so.

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The concept of "*de minimis*" adopted last year is still in effect. So, yet again, the traditional $10 fee for auxiliary licenses is gone. Additionally, folks whose reg fees for 2016 total out at $500 or less are exempt from any reg fee liability. (This exemption applies only to filers of annual regulatory fees – not regulatory fees paid through multi-year filings – and it is ***not*** a permanent exemption. That means that, just because you may have been exempt last year does not mean that you will automatically be exempt this year.)

When it comes to paying, remember that, since 2014, the Commission has insisted an all-electronic payment requirement: no cash or checks accepted. That's still true this year, but heads up. Thanks to our pals at the U.S. Treasury, the maximum payment that can be charged to a credit card will again be $24,999.99. (This edict came out in 2014, effective last June.) The old limit was $49,999.99. The new limit applies to single and bundled payments. If you owe more than $24,999.99, you will ***not*** be permitted to split it up into multiple payment transactions, nor will you be permitted to pay it over several days by using one or more cards. The FCC recommends that anyone looking at a fee obligation of $25,000 or more consider debit cards, Automated Clearing House (ACH) debits from a bank account, or wire transfers.

If you think you might want to chip in your two cents' worth on the proposed fees or related matters covered in the *NPRM*, heads up – you don't have much time to work with. Comments on all of the proposals set out in the *NPRM* are due by ***June 20, 2016***; reply comments are due by ***July 5***. You can submit your comments at this FCC website; enter Proceeding Number 16-166.

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sion's failure to act on revising its eligible entity definition. The FCC has long struggled with that definition, which it has attempted to use to satisfy its statutory obligation to promote minority and female broadcast ownership. Because governmental programs awarding preferences based on race and ethnicity have difficulty passing constitutional muster, the Commission since 2003 has instead attempted to award preferences to "eligible entities" as something of a proxy for race and gender. In 2003, the Commission defined "eligible entities" based solely on their revenue, assuming that businesses with lower revenue were more likely to be female- and/or minority-owned. This definition has drawn significant criticism as being unsupported, which is not surprising in view of the fact that the Commission has never demonstrated that this preference actually helps minority- or female-owned businesses.

In its 2011 *Prometheus* decision, the Court agreed that the revenue-based definition was inadequate, and it told the FCC to come up with a better one. But the Commission has yet to do so, repeatedly claiming instead that it doesn't have enough evidence to defend a race/ethnicity/gender-based definition against a constitutional attack. Now, five years down the line, the Court has decided that enough is enough. It is requiring the FCC and the Citizen Petitioners to enter into mediation to set a timetable for the FCC to come up with a final agency action on the definition of "eligible entity". If no such timetable is adopted within 60 days, however, the Court stated that it would impose one on the FCC.

While the failure to adopt an eligible entity definition seemed to irk the Court the most, the Court also took the Commission to task for its failure to complete the overall media ownership rule review called for by the Communications Act. According to the Court, the Commission has provided no "cogent" justification for its delay. Going forward, the Court ruled, the FCC must act expeditiously to resolve the pending quadrennial reviews.

To illustrate the problems that arise when the FCC repeatedly folds one unfinished quadrennial review into the next without ever resolving them, the Court cited the newspaper/broadcast cross-ownership rule. As long ago as 2003, the FCC and the Court had both agreed that this rule (vintage 1975) no longer served the public interest. But because the FCC had not justified the replacement rule it adopted in 2004, however, the 1975 version, now more than 40 years old, remains on the books.

While the Court was clearly exasperated with the Commission, the Court stopped short of granting the broadcaster parties the pie-in-the-sky relief they asked for. The broadcast parties had argued that, since the Commission has not concluded that its media ownership rules are in the public interest, all those rules should be thrown out. But the Court determined that dropping a nuclear bomb on the rules in that fashion would unleash "chaos" in the broadcast industry. Moreover, while the Commission had failed to justify its current ownership rules, the Court is not convinced that the Commission would be unable to justify at least some restrictions on media ownership.

Because total elimination of the rules was the only relief (as to the quadrennial reviews) that the broadcaster parties had requested, the Court found itself unable to grant lesser relief (such as an order requiring the Commission to complete its reviews by a certain time). The Court did, however, make clear that it expects the FCC to act quickly, and will hold the Commission to its estimate at oral argument that a final order should be issued by the end of 2016. If the Commission misses that deadline, the Court strongly suggested that it would take more concrete action in resolving any further proceedings before it.

While the decision is clearly a victory for the broadcaster parties, the relief may be short-lived.

While the Court's decision is clearly a victory for the broadcaster parties, the relief may be short-lived. The Commission is now essentially obligated to complete its quadrennial review(s) by the end of this year. In doing so, the Commission may very well re-adopt some limit on television JSAs and, indeed, the Court explicitly stated that its decision would not prevent such a re-adoption, provided the Commission could justify the underlying ownership rules, whether the existing rules or a replacement. At a press conference after the FCC's monthly public meeting (which coincidentally occurred hours after the Court's decision was released), Chairman Wheeler suggested that he may very well include such re-regulation in the draft ownership order he promised to circulate by June.

All of this leaves us with the question of what comes next. The first deadline is for mediation regarding the "eligible entity" definition, which should result in at least a timeline for resolution (if not actual resolution) of that issue within 60 days. While not a concrete deadline, the Commission has essentially promised to circulate (internally) a draft order wrapping up the 2010 and 2014 quadrennial reviews by the end of June. That order will almost certainly be controversial, and is likely to require significant effort to gain a majority vote. With such a tight timeline, we can perhaps expect the Commission to simply issue a report and order wrapping up the quadrennial review kicked off with its 2014 quadrennial review further notice of proposed rulemaking, rather than attempting to initiate an entirely new comment cycle. While probably necessary to satisfy the timing requirements, that approach may add some complication in that it will be relying on a record that is in many respects almost two years old.

Of course, with the tortured history of the quadrennial reviews, a two-year delay might seem relatively insignificant.

In the works: more hours, more networks

Beefing Up Video Description Requirements?

By Ashley Ludlow
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Way back at the dawn of the century (the 21st Century, that is), the FCC adopted rules requiring video providers to include "video descriptions" in their transmission. "Video description" involves the insertion, into natural pauses in the program's dialogue, of audio-narrated descriptions of a TV program's key visual elements. The goal is to make video programming accessible to individuals who are blind or visually impaired.

The Commission's initial efforts were stymied by the courts, but, as we reported several years back, Congress came to the rescue in 2010 with the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), which took care of the problems the courts had found. As a result, in 2011 the Commission started the process of expanding access to video description by reinstating the 2000 rules (as directed by Section 202).

> *The minimum amount of video-described programming would increase from 50 hours per calendar quarter to 87.5 hours.*

But that was just the start. In the CVAA Congress also gave the Commission authority, subject to certain limitations, to issue additional regulations if the benefits of doing so outweigh the costs. With that in mind, the Commission is now looking to beef up its video description rules: it has issued a Notice of Proposed Rulemaking (NPRM) seeking comment on proposals to expand the amount of and access to video described programming. Some ideas the Commission is considering:

Amount of programming subject to video description requirements. First, the Commission proposes an increase in the amount of described programming that a covered broadcaster or multichannel video programing distributor (MVPD) is required to provide for each included network. (In this context, an "included network" is a programming stream or channel on which a broadcaster or MVPD is required to provide video description.) Under the FCC's proposal, the minimum amount of video-described programming would increase from 50 hours per calendar quarter to 87.5 hours. The Commission asks for comments on this increase, and also on whether such an increase may warrant other changes to the rules to provide more flexibility (*e.g.,* allowing some amount of non-prime time, non-children's described programming to count toward the increased requirement).

Expansion of "included networks". Second, the FCC is looking at an increase in the number of included networks subject to the rules. Currently, the universe of "included networks" comprises: (a) broadcast TV stations in the Top 60 markets carrying any one of the "Top Four" commercial networks (*i.e.*, according to Congress, ABC, CBS, FOX and NBC); and with respect to MVPDs with at least 50,000 subscribers (b) any of the five most popular nonbroadcast networks as determined triennially by the FCC based on a number of considerations. Under the proposal, this universe would be expanded to (a) stations (again in the Top 60 markets) carrying any of the "Top Five" broadcast networks, and (again for 50,000+ subscriber MVPDS), any of the ten (rather than five) popular nonbroadcast networks.

The "Top Five" broadcast networks would continue to include ABC, CBS, FOX and NBC, but would be expanded to any other broadcast network identified as in the Top Five by the FCC through a triennial review of Nielsen figures. (The Commission notes that it's at least possible, although unlikely, that one or more of the current Top Four might drop out of that status at some future time. Should that happen, the "Top Five" could actually include more than five networks. That is, ABC, CBS, FOX and NBC will *still* be viewed as subject to video description requirements; any other network determined to be in the "Top Five" would also be subject to them.) The top ten popular nonbroadcast networks would continue to be identified triennially, using the existing formula. However, the Commission does ask whether it should add more or fewer net-

(Continued on page 10)

A tip of the hat to our friend Mitch

And the NSMA Fellow Award Goes To …

The National Spectrum Management Association (NSMA) is an organization of "like minded individuals who take spectrum and regulatory issues very seriously." Many of its members have been in the spectrum business for decades. Proper stewardship of the spectrum, says their website, is not just "their job but it's also their avocation and their baby." When it comes to spectrum management, these folks are the real deal.

So we are extremely pleased and proud to advise our readers that NSMA has recognized FHH's own Mitchell Lazarus with the 2015 NSMA Fellow Award for his "selfless contributions to the promotion of the efficient use and management of the wireless telecommunications frequency spectrum."

The award was presented only recently because, as readers may recall, at the time of last year's NSMA annual meeting in May, 2015, Mitch was dealing with cancer treatment. Happily for all concerned, that treatment was successful and he is with us, both to accept the award and to continue those same selfless contributions for which NSMA honored him.

And, to state the obvious, all the rest of us who have long shared space with Mitch down here in the *Memo to Clients* bunker heartily join with NSMA in its salute to him.

(Continued from page 9)

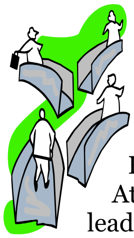
works (either broadcast or nonbroadcast) at this time, and also whether some other approach to determining which networks should be included.

No back-sliding. Also on the table, a "no backsliding" rule, which would ensure that once a network is designated an "included network" subject to video description obligations, it would remain an "included network" even if it falls out of the top five or top ten ranking. Among the reasons, the Commission figures that once a broadcaster or MVPD begins to carry video described programming on a given network, consumers have an expectation that they will be able to rely on that channel for described programming in the future. The FCC does, however, seek comment on whether there should also be an express exemption from the proposed "no backsliding" rule for networks that drop significantly in relative rankings or overall viewership.

Elimination of "50 percent threshold". Under the current rules, nonbroadcast networks that aren't available in 50 percent or more of MVPD homes aren't deemed "included networks". Thus, for example, even if a network were one of the most popular in prime time, MVPDs would not be required to provide video description of any of that network's programming if the network reaches only 40 percent of MVPD households. The Commission proposes to eliminate this exemption. According to the FCC, because of the increasing number of networks and fragmentation of the viewing public, it's unclear whether carriage into a given number of homes is a suitable criterion (as opposed, say, to prime time ratings) for the purpose of establishing a threshold for determining which nonbroadcast networks should be covered.

Customer service contacts. In response to consumer frustration over inadequate MVPD customer support, the Commission seeks input on what the industry is doing to getting the word about available video-described programming. It also proposes to require that covered MVPDs provide dedicated customer service contacts who can assist viewers in accessing video described programming, ***BUT*** hedges that proposal by observing that it is not currently convinced that the benefits of such a requirement would outweigh the costs. Along the same lines, the Commission asks whether it should require covered distributors to notify programming guide publishers when a program will be video described.

The NPRM includes other proposals addressing even more granular aspects of the video description rules. If you are now – or think somebody you may be – subject to the rules, you should be sure to review the NPRM in detail and be prepared to toss in your two cents' worth. As announced in the Federal Register, comments are due by ***June 27, 2016***; replies may be filed by ***July 26***. You can submit your comments at this FCC website; enter Proceeding Number 11-43.



FHH - On the Job, On the Go

Ever the travelin' man, in June **Frank Montero** will be out and about ever farther afield than usual. On June 2-4 he'll be in Madrid, attending the meeting of the International IURISGAL network of law firms from around the world that represent clients in the Spanish language. (FHH is a IURISGAL member.) Then it's back across the Pond so that he can attend SNL Kagans annual TV and Radio Finance Summit in NYC on June 15. (FHH is a silver sponsor.) A shorter hop – to Atlantic City – will take him to the New Jersey Broadcasters Association annual convention (of which FHH is a leading sponsor) on June 22-23. (**Frank** will also be making a presentation to the NJBA board meeting while he's there.) And finally (whew!), a little R&R: he'll be attending the Federal Communications Bar Association's annual spring on June 30 (and yup, FHH is a sponsor of that as well).

Meanwhile, **Dan Kirkpatrick** and **Laura Stefani** will be heading west to appear on panels at the AFI Boot Camp June 27-29 in San Francisco. Check out the separate article below for more information on the Boot Camp (including how to register for your *Memo to Clients* discount).

We'll have the South covered, too. On June 24, **Kevin Goldberg** will be speaking at the Associated Press Sports Editors 2016 Summer Conference in Charlotte, N.C. He'll be part of a panel looking at the legality of aggregating news content by websites.

Back Again: FCC Boot Camp!

Attention, all you Friends of the *Memo to Clients*! San Francisco beckons, again.

The American Conference Institute is presenting its second annual "FCC Boot Camp" program there from June 27-29, 2016. And this year the program will feature not one, but two frequent contributors to CommLawBlog: FHH's own Laura Stefani and Dan Kirkpatrick.

The curriculum covers a wide range of topics, from the fundamentals of FCC regulation to a "Master Class" on privacy, security, and encryption rules for telecom and tech companies. Laura will be speaking about the process of "getting to market" – what entrepreneurs and equipment designers need to know about experimental and unlicensed spectrum uses and the FCC's equipment authorization process. Meanwhile, Dan will be delving into the FCC's regulation of program distribution in the full range of available technologies – broadcasting, cable, satellite and Internet. (For a copy of the official Agenda-At-A-Glance, click here.)

Laura and Dan will not be alone. The program features a range of other eminent representatives of the communications bar ("A Who's Who of the Telecommunications Bar", according to ACI). The format of the three-day affair provides plenty of opportunity not only to sit in on the various presentations but also to interact with the presenters in one-on-one conversations. If you're looking for a good way to immerse yourself in All Things FCC with a top-notch roster of presenters ready to make that immersion as useful (and as painless) as possible, this FCC Boot Camp is just the ticket. Plus, you'll be in San Fran in late June, just blocks away from the Boudin Bakery (home of some of the best sourdough in the world) – and yes, the Giants will be at home in AT&T Park on June 27-28, playing the A's (and on June 29, they'll be visiting the A's in nearby Oakland).

If that's not enough to attract your attention, get this: *Memo to Clients* readers can get a 10% discount off the current registration fee. Just click on this link to get to the official registration site and enter the code ***D10-662-FHH16*** when registering. Any problems? Feel free to contact Bolam Kim, who is honchoing the production. (Just click on that link and you'll be firing up an email to her.) Tell her Laura sent you, or Dan – or just tell her you're a friend of FHH's *Memo to Clients* – and she'll help take care of the discount. You can also register by phone at **888-224-2480**.

Beyond that, we'll be sure that Laura and Dan bring along a supply of our much-coveted CommLawBlog sunglasses. They'll totally hook you up with a pair if you ask.

(Continued from page 2)

Of course, eventually ***all*** radio licensees will have to get on board with this, but they've currently got until March 1, 2018 before they have to have all of their legacy public file materials uploaded (and until they have to start uploading "new" political materials). Note that the second group, unlike the first group, will have to have all of the old stuff uploaded before they absolutely have to start uploading new items.

How do you get to the demo site? The URL the FCC provides for the demo site itself is https://publicfiles-demo.fcc.gov/admin/. That takes you to the "Entity Sign-In" page, which asks for the Facility ID Number and the specific Passcode for the station whose file you want to play with. If you're a TV licensee, you presumably have a Passcode for each station; if so, enter the appropriate information for the station whose file you want to access and that should be that.

But if you're one of the several thousand who have not any BPIF heretofore – a universe that includes any radio licensee – you'll need to take a couple of extra steps. At the main login screen for the test OPIF system, click on the "Sign in to Owner Dashboard" link immediately below the login blanks. That will take you to the "Owners Sign In" page. There you will need the licensee's FRN and FRN password. (Helpful Tip: The system does not recognize FRN's that include hyphens, so if you're the kind of person who kicks it old school FRN hyphen-wise, don't.)

The Commission tosses in a warning about the need to include joint sales agreements in the OPIF.

Once you have entered the FRN and password and clicked on the "Sign in" button, you should find yourself at a screen listing all stations associated with that particular FRN. Each station's listing provides that station's Facility ID Number ***and*** the FCC-assigned alphanumeric Passcode for that station. The Passcode is case sensitive. In order to keep your own internal record of it (or accurately enter it back on the login screen), we recommend that you simply cut-and-paste it. Transcribing it can be tricky: Zeroes can be mistaken for capital O's, lowercase L's might be ones, etc.; cut-and-paste reduces the possibility of frustrating error.

Armed with the Passcode, you can now go back to the main login page for the test site, enter the Facility ID Number and Passcode and, voilà, you are (or should be) looking at that station's test OPIF, where you should be able to upload, delete and move documents around to your heart's content.

What's new with OPIF? We can't say for sure, since the FCC hasn't itemized all the changes. We did take a quick gander at the demo site and can attest that the interface is different for sure. In its public notice, the Commission has described a number of aspects of the new system that differ from the old, but we can't say how noticeable, or helpful, those changes will be. Again, that's what the demo period is for. Take it for a ride around the block and let us know what you think.

FCC reminder about JSAs and self-reporting of violations. The FCC's three-page notice generally describes the timetable, mechanics and various changes relating to the OPIF. But at the very end of the notice, the Commission tosses in the following paragraph about the need to include joint sales agreements in the OPIF and the obligation to report any failure to timely upload any required material in the OPIF:

> We also remind all commercial broadcast television and radio stations of their continuing obligation to place copies of all current joint sales agreements (JSAs) — attributable and non-attributable —into their local public inspection file, pursuant to 47 C.F.R. §73.3256(e)(16). This public inspection file obligation applies to both the brokering station and the brokered station(s). In addition, we remind station licensees that any failure to place required documents in a station's public inspection file at the appropriate times must be disclosed to the Commission in the station's license renewal application and could be subject to enforcement action.

(We omitted a footnote.) You have been warned. And the latter admonition will be important to keep in mind going forward, because the OPIF system will reflect when each item is uploaded. In other words, even if you don't narc on yourself in your renewal application, the FCC will have ways of determining whether you were late in uploading many, if not most, documents that need to be in the OPIF. (This also means that you should keep a copy of every filing confirmation of items required timely to be in the public file. That's because occasionally the automatic transfer system from an online filing will fail, in which event it will be helpful to have proof of timely filing.)

The whole notion of an online public inspection file will be new to the vast majority of radio broadcasters.

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Not serving the public interest … who knew?

On the Way Out: Two Vestigial Remnants of Pre-Online Public File Universe

By Harry F. Cole
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Following through on a promise it made in January, the Commission has proposed to eliminate one element of its local public inspection file rules for broadcasters, and it has now proposed to do the same for cable operators as well. On the chopping block: for commercial broadcasters, the obligation to maintain in their public files copies of correspondence from the public concerning station operation; and for cable operators, the requirement that their public files include a listing disclosing the location and designation of the system's principal headend.

The two soon-to-be-dispatched rules have been on the books for decades. Their contribution to the "public interest" has, as far as we can tell, been indiscernible. Indeed, the cable headend disclosure requirement may have been *contrary* to the public interest – at least according to some cable operators who expressed concern for the security of their headends as long as the locations of those headends were, by Commission mandate, available to anyone and everyone. So tossing both of these rules is truly a no-brainer.

The non-necessity of these rules is not a matter of recent origin.

When it first indicated its intention to eliminate the public correspondence requirement for broadcasters last January, the Commission derisively observed that "it's hard to imagine anyone ever visiting a station solely for the thrill of reading its mail." And as to the cable headend disclosure rule, the Commission now says that "we do not believe that the general public has any need for or interest in this information." For the record, we agree wholeheartedly with those assessments.

But the non-necessity of these rules is not a matter of recent origin. It's unlikely to the point of total incredibility that, prior to January, 2016, members of the public routinely flocked to broadcast public files "for the thrill of reading" audience correspondence. The same is true of the public's need for or interest in – or lack thereof – headend location information. So why weren't these two rules thrown out years ago? (We could even ask how they got adopted in the first place, but let's not go there just now.) After all, the Commission's attention has been focused on the public file obligations of its regulatees repeatedly over the last, um, 20-25 years or more. If it's so obvious now – as the Commission seems to indicate it is – that these rules don't make much sense, how has that escaped the attention of previous Commissions – or this Commission up until now?

It's all well and good for the Commission to embrace the high tech appeal of online public files. And if, in connection with that embrace, it concludes that some legacy rules (the broadcast public correspondence rule, for example) don't fit comfortably into the High Tech Approach, it makes sense to jettison those inconvenient vestiges of an antiquated system. But let's not forget that those rules are still on the books – and will remain on the books until this latest rulemaking is finally concluded. So while the Commission may smugly jest about the public not flocking to read audience correspondence, broadcasters will, at least for the foreseeable future, still be required to keep that correspondence in their public files, as they have for more than 40 years.

While an apology for imposing a useless obligation on an entire industry for decades is probably too much to ask for, the Commission might at least have announced in its proposal that, pending conclusion of the rulemaking, it would waive compliance with the to-be-tossed rules. By leaving them in place despite their acknowledged uselessness, the Commission does little to encourage respect for its regulatory judgment.

Comment deadlines have not yet been established. Check back here for updates on that front.

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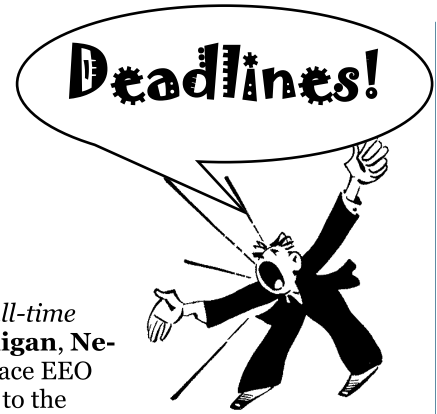
That being the case, we strongly encourage them – and anyone else feeling a bit anxious about the arrival of the OPIF – to take another close look at our previous CommLawBlog posts about online filing, as well as the FCC's January decision imposing the OPIF obligation across-the-board.

And again, we encourage everybody to take advantage of the demo site as much as possible, and to attend the webinar when it happens.



May 31, 2016

Television Incentive Auction – Bidding in the clock phase of the spectrum incentive auction begins 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 **Arizona**, the **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** and **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 **Arizona**, the **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.

June 24, 2016

Online Public Inspection File – *Commercial radio* broadcasters *in the top 50 markets and in an employment unit with five or more full-time employees* must begin placing all new public file documents in the online public file. An employment unit is defined to mean all commonly owned stations in the same market which share at least one employee, and a full-time employee is defined to mean one who, on average, works 30 hours a week or more.

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.

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.

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Crucial to the implementation of any of the guidelines is the definition of "covered data". The term is only vaguely defined (as indicated above), although the Best Practices do further provide that "[i]f data collected by UAS likely will not be linked to an individual's name or other personally identifiable information, or if the data is altered so that a specific person is not recognizable, it is not covered data." While not separately defined in the Best Practices, the term "personally identifiable information" has acquired some generally accepted meaning among privacy experts.

Now that we have these Best Practices, what do they really mean for commercial UAS operators? At this point, it's hard to say. The Best Practices are purely voluntary: that is, no one is under any obligation to adopt and implement them in whole or in part. In fact, the Best Practices expressly state that they're not meant to "create a legal standard of care by which the activities of any particular UAS operator should be judged" or to "serve as a template for future statutory or regulatory obligations". Rather, they supposedly reflect only the consensus of some (but not all) of the multistakeholders who participated in the NTIA process as to how commercial UAS operators should act. Whether that will hold true indefinitely remains to be seen. Throughout the process the possibility of the guidelines eventually finding their way into formal, mandatory regulations was viewed by some as inevitable as states and localities search for ways to respond to people's concerns about intrusive UAS use.

Notwithstanding their current purely voluntary status, in our view it would be a mistake to ignore the Best Practices. Many of the big UAS players did sign on, and many others are likely to adopt privacy policies very much in line with the Best Practices. If (as may be expected) acceptance of the Best Practices spreads widely though the commercial UAS universe, all participants may eventually sense pressure – from peers, the government, the public, etc. – to follow suit.

But be forewarned: If you do opt to adopt the Best Practices (or some variation thereof), you will need to stick to them carefully or risk having to deal with the Federal Trade Commission. That's because the FTC has taken the position that, when a company has adopted – even voluntarily – a privacy policy, a failure to abide by that policy may constitute an "unfair and deceptive trade practice" in violation of Section 5 of the Federal Trade Commission Act (FTCA). And making that point emphatically, recent draft legislation in the Senate specified that such violations related to UAS operations are covered by Section 5. In other words, you do not have to embrace the Best Practices in whole or in part, but if you do, you must be committed to implement whatever you do embrace carefully and consistently.

Important Note to Broadcasters and Journalists: The Best Practices do ***NOT*** apply to you. To the contrary, they include an express exemption arising from First Amendment considerations. A number of process participants argued that the use of UAS is no different from any other data collection means (such as helicopters and telephoto lenses) journalists use that are capable of collecting personal data from afar, and therefore UAS operations should not be singled out for specific treatment. The Best Practices explicitly state that the guidelines do not apply to "newsgatherers and news reporting organizations." Those groups are instead encouraged to follow their own "ethics rules and standards for their organizations and … Federal and state laws."

But heads up. Section 5 of the FTCA includes no exemption from enforcement for broadcasters and journalists. If you adopt a UAS privacy policy, whether based on the Best Practices or not, be sure to follow it to avoid potential penalties.

Interestingly, when NTIA initiated the multistakeholder process, the topics to be considered included, in addition to privacy, "transparency" and "accountability" in UAS operation. Those two extra topics still appear in the formal title of the Best Practices, but they do not appear elsewhere in the document. It's not clear whether any further effort will be made to address them, under the aegis of NTIA or otherwise.

Check back with CommLawBlog for future updates on UAS regulations.

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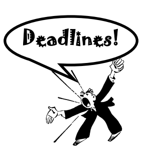


Issues/Programs Lists – For all *radio*, *television* and *Class A television* stations, a listing of each station's most significant treatment of community issues during the past quarter must be placed in the station's public inspection file. As noted above, for the first time, *radio stations in the top 50 markets and in an employment unit with five or more employees* will have to place these reports in the new online public inspection file, while all other radio stations may continue to place hard copies in the file for the time being. Television and Class A television stations will continue upload them to their existing online files. 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 licensees* 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.

(Continued from page 5)
ter or the employer will have to pay overtime retroactively.

DOL Suggestions for Adjusting to the new Rules

Recognizing the widespread impact of these changes, the DoL has issued guidance for businesses to smooth this transition. Whether DoL's suggestions can be easily implemented in any particular business is far from clear. Nevertheless, for whatever they're worth we pass them along to you as we got them from DoL:

Provide pay raises to get as many employees as possible above the new threshold if paying overtime or hiring new employees is not an option;

Spread work around. Employers may hire others to fill in the time not being worked by "capped" employees.

Calculate how best to pay overtime. Employers enjoy a great deal of flexibility when it comes to tracking hours for purposes of the 40 hour cut-off and overtime pay for nonexempt employees. Hours and payments can still be tracked in a wide variety of ways – there is no requirement that employees "punch a time clock"; rather, they are required simply to record their hours each day. Employers and employees can, in certain situations, agree to a flat overtime fee. However, be forewarned that there must be a clear understanding between employer and employee as to this amount, meaning that such an arrangement probably works only where the employee works a consistent amount of overtime (since variations in overtime hours would require adjustment of the overtime payment). Further, from an employer point of view, this relaxed arrangement will work well only until it doesn't, *i.e.*, until the employee files a complaint under the FLSA.

What now?

The clock is ticking. You have until December 1 to determine whether, and how, your situation will be affected by these changes and, more importantly, to make any necessary adjustments. This is not a trivial process: it could affect a significant number of your employees.

How do you do this? Where to start?

A natural starting point would be to review how many employees might be affected. Remember, this could be "NONE". The FLSA doesn't apply to all employees or to all companies. So getting a fix on where you stand vis-à-vis the FLSA should probably be Step One.

(With respect to company exemptions, I identified the general applicability of the FLSA in my prior post. Our usual media-oriented readers should be aware of a couple of narrow exemptions that may be applicable: a "small newspaper" exemption and an exemption for certain employees of non-metropolitan broadcast stations. Each of these is subject to very specific limits; if you think you might not be subject to the FLSA, be sure to check with an employment attorney for details.)

If you conclude that you're subject to the FLSA without exemption, your next order of business is probably to identify how many employees fall between the old ($455 per week or $23,660 per year) and new ($913 or $47,476 per year) thresholds. Those are the folks who will be converted from exempt to nonexempt if their salaries don't change. This will let you know exactly what you're dealing with in terms of your financial situation and needs, as well as their personalities.

The clock is ticking. You have until December 1 to make any adjustments that may be called for.

You may even want to begin tracking these employees' hours in the lead-up to December 1 to help you determine whether those regularly working beyond 40 hours per week should simply receive a salary increase to boost them over the exempt/nonexempt threshold and thus eliminate the need to provide minimum wages and overtime to them. (Bear in mind, too, that before making any changes, you should be aware of and sensitive to other relevant laws, like discrimination laws and the employee/contractor distinction.)

You may also want to start thinking about how to treat "off duty" tasks like taking work home, making calls and sending emails at home, and working through lunch and before/after shifts. Such things can constitute overtime work. You may need to update your employee handbooks to specifically include limits on after-hours communication. Such clarifications may be important to get the message more to supervisors than to the employees themselves, since supervisors may need to refrain from communicating with workers after hours or even shut down excessive work by employees they supervise.

But the most important step – given that these are just basic suggestions – is that you contact an employment law attorney as soon as possible with any questions. December 1 will be here before you know it.

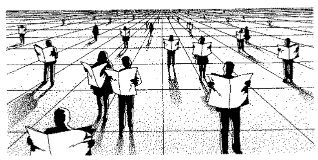
Stuff you may have read about before is back again . . .

Updates On The News

Reconsideration of revised Ownership Report sought – The saga of the FCC's quest to devise the Perfect Ownership Report slogs on. Readers will recall that, back in January, the Commission adopted a new approach to identifying individual attributable owners for tracking purposes across reports (so long, SUFRN; hello, RUFRN!). Also, among other changes, noncommercial educational licensees were advised that they, too, would be having to identify their attributable principals individually.

While the new rules were published in the Federal Register four months later, they haven't really taken effect across the board (as we explained on CommLawBlog last month). And now comes word that four petitions for reconsideration of various aspects of the new rules have been filed. The petitioners:

- A group of more than 60 noncommercial educational licensees;
- The State University of New York (which is also part of the group filing, above, but they also wanted to add a bit more on their own);
- The American Public Media Group (the parent support organization for Minnesota Public Radio and Southern California Public Radio); and
- The "Public Broadcasting Parties", a separate group of 11 noncommercial educational licensees.



All of the petitions express concern about the need for, propriety of, and/or mechanics for satisfying the requirement of individual identification (by FRN or RUFRN) of folks sitting on NCE governing boards.

The FCC has now published a notice of the filing of these petitions in the Federal Register, which sets the deadlines for comments/oppositions and replies relative to any or all of the petitions. Comments or oppositions must be filed by ***June 2, 2016***; replies are due by ***June 13***. Submit your pleading at this FCC website; enter Proceeding Numbers 07-294, 10-103 and 10-234.

Foreign-language EAS rules set to take effect (sort of) – Last month we reported on the FCC's "grant" of a petition by several organizations – Independent Spanish Broadcasters Association, the Office of Communication of the United Church of Christ, Inc., and the Minority Media and Telecommunications Council, to be specific – who wanted the Commission to require the provision of Spanish-language (and, where appropriate, other language) alerts in the Emergency Alert System (EAS). While the Commission stopped well short of adopting the proposal, it did elect to impose some new reporting obligations on EAS participants and on State Emergency Communications Committees (SECCs). The Order reflecting those obligations has now made it into the Federal Register; as a result, some, but not all (see below), of the new and modified rules will take effect as of ***June 6, 2016***.

The notice also establishes the date for any seeking reconsideration (by the Commission) or judicial review (by the courts) of the Order. Recons are due at the FCC by ***June 6, 2016***, and petitions for review may be filed with your favorite federal court of appeals by ***July 5***. (As always, would-be appellants with their hearts set on a particular circuit should jump through the proper hoops, as described in this notice from the General Counsel's office. Spoiler alert: Those hoops require filing the petition for review way earlier than the outside July 5 deadline.)

For the time being, EAS participants and SECCs need not panic about this new effective date – EAS participants aren't likely to be called upon to do anything new until late 2017, at the earliest, and SECCs not for another six months after that.

That's because amendments to Sections 11.21(d)-(f) involve revised "information collections" that have to be run past the Office of Management and Budget first, thanks to the hilariously-named Paperwork Reduction Act. That process normally takes at least three-four months, sometimes more.

If and when OMB signs off on the changes, it will notify the FCC, which will in turn publish a further notice in the Federal Register advising us of OMB's approval. That notice will trigger a one-year period, by the end of which EAS participants will have to have let their respective SECCs know about: (a) any steps they have taken to provide foreign-language EAS announcements; (b) any steps they plan to take to do so (including an explanation for why they plan to take any such steps or why they don't); and (c) any other "relevant information" they feel like passing along. (EAS participants will also be expected to update their submissions within 60 days of any "material change" to information submitted.)

And the end of that initial one-year period will mark the beginning of a follow-on six-month period during which SECCs revise their respective State Plans to reflect the information submitted by EAS participants.

So EAS participants won't be having to do anything for at least, say, 15-18 months (*i.e.*, one year plus however long it takes the FCC to publish a notice of OMB approval), and SECCs will have another six months beyond that. As we said, notwithstanding the technical effective date of the underlying order, there is no reason for anybody to panic. Check back here for updates on that front.