Fletcher, Heald & Hildreth®

# Memorandum to Clients

July 2016

NEWS AND ANALYSIS OF RECENT DEVELOPMENTS IN COMMUNICATIONS LAW

No. 16-07

*Drones – the next phase*

## FAA Adopts Operating Rules for Commercial UAS Use

*Jon Markman*
*markman@fhhlaw.com*
*703-812-0493*

*Laura Stefani*
*stefani@fhhlaw.com*
*703-812-0450*

The wait is over: nine months after a Congressionally-mandated deadline, the FAA has finally issued rules for the commercial operation of small unmanned aircraft systems (UAS, known familiarly as "drones") in the U.S. National Airspace System (NAS). The Order – which officially takes effect as of August 29, 2016 – adds a new Part 107 to the FAA's regulations to "allow for routine civil operation of small UAS in the NAS and to provide safety rules for those operations". The following is a brief summary of Part 107's requirements. (Important caveat: The new rules do ***not*** apply to either (a) the increasingly ubiquitous, noncommercial, hobbyist UAS users or (b) large UAS (*i.e.*, UAS weighing 55 pounds or more). They also do ***not*** apply to UAS owned and operated by federal, state or local governments, as long as their use is not "commercial".)

Many readers may recall that last year the FAA adopted a process – known as the Section 333 Exemption process – to serve as an interim means for regulating commercial UAS use while the new rules were being developed. The new Part 107 constitutes those new rules. As a result, for the most part, the Section 333 Exemption process is no longer necessary. BUT, as discussed below, 333 authorizations remain in effect for their duration, and Part 107 permits waivers similar to the Section 333 Exemption process. And, of course, under Section 333, the FAA can continue to grant permission to even more expansive operations if it so chooses.

Under Part 107, those who wish to use UAS commercially will need to: (a) meet a long list of operating requirements that mirror the requirements imposed in the Section 333 Exemptions; (b) use a pilot holding a new authorization dubbed a "Remote Pilot in Command" certificate; and (c) register and mark their aircraft.

***Operating Restrictions***. As many observers had anticipated, the FAA has preserved in Part 107 many of the limits imposed through Section 333 Exemptions. For example, small commercial UAS will still be required to operate below 400 feet. Their pilots will still have to maintain visual line-of-sight (VLOS). And they cannot operate over people who are not directly involved in the flight operation and not under a covered structure. (You can find more details about operating limits imposed by Section 333 Exemptions in our previous posts.) But Part 107 operations will differ from Section 333 Exemptions in notable ways, permitting:

- Transporting property, subject to a number of limitations. The transport must occur wholly within the bounds of a state. The UAS performing the transport cannot be piloted from a moving vehicle (except in "sparsely populated" areas) and cannot carry any hazardous materials. And the FAA has made clear that it will ***not*** be offering waivers of the "visual line-of-sight" rules (more on waivers below) when the transportation of property is involved. Additionally, it's worth noting again that the new rules apply only to small UAS, *i.e.*, aircraft that weigh less than 55 pounds *including any property or package* being transported.
- "Civil twilight" operations, *i.e.*, flights beginning a half-hour before official sunrise and lasting up to a half-hour after official sunset.
- Operation from a moving vehicle, but only in "sparsely populated" areas. While that should greatly expand the possible range of operations for flights in such areas, bear in mind that the term "sparsely populated" is not defined in the FAA's rules. Instead, it is "fact-dependent" on the population density, proximity of buildings, congestion and the like within the UAS's flight path.

*(Continued on page 10)*

## Inside this issue . . .


*By order of Congress!*

# Coming Soon: New Marking Rules for Shorter Towers

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

[*Editor's Note: This article was originally published on the website of Radio World. Our friends at RW have graciously given us permission to include it here.*]

If you own a tower that's between 50 and 200 feet tall, the chances are that you don't have to mark it to satisfy any FAA standards, which makes your life easy. But that may be about to change.

Congress recently passed, and the President signed, H.R. 636 – a/k/a the "FAA Extension, Safety, and Security Act of 2016". The primary purpose of this sweeping, 51-page piece of legislation is to ensure the continuity of the FAA's operations for another year (through September 30, 2017). But buried deep in its legislative bowels is Section 2110, a little-publicized provision that could have serious repercussions for small tower owners, particularly those in rural areas.

Section 2110 requires the FAA to issue regulations within the next year requiring "covered towers" to be "clearly marked". And what's a "covered tower"? That would be a structure that:

- is self-standing or supported by guy wires and ground anchors;
- is 10 feet or less in diameter at the above-ground base, excluding concrete footing;
- is at least 50 feet above ground level and not more than 200 feet at its highest point;
- has accessory facilities on which an antenna, sensor, camera, meteorological instrument, or other equipment is mounted; or
- is located (a) outside the boundaries of an incorporated city or town; or (b) on land that is (i) undeveloped; or (ii) used for agricultural purposes.

Congress helpfully defines "undeveloped" land as area over which the FAA "Administrator determines low-flying aircraft are operated on a routine basis, such as forested areas with predominant tree cover under 200 feet and pasture and range land". The law also expressly excludes any structure that:

- is adjacent to a house, barn, electrical utility station or other building or within "the curtilage of a farmstead";
- supports electric utility transmission or distribution lines;
- is a wind-powered electrical generator with a rotor blade radius that exceeds six feet; or
- is a street light erected or maintained by a Federal, State, local, or tribal entity.

Those exclusions narrow the universe of towers subject to the new requirements – but lots of currently unmarked towers would still be left in that universe, depending on how some of the statutory terms end up being defined. And the law authorizes the FAA to define any otherwise undefined terms "as necessary to carry out the section". That could lead to problems for the owners of small broadcast, amateur and other communications towers, depending on how the FAA eventually defines such statutory terms as "adjacent", "building", "curtilage", etc. (For instance, most broadcast towers feature a transmitter shack (sometimes referred to as a "doghouse") nearby. )If a tower were in the middle of a field with only the shack next to it, would the shack constitute a "building" for purposes of any new marking requirements? Similarly, how close would a building need to be to be

*(Continued on page 8)*

**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, Dan Kirkpatrick, Steve Lovelady, Ashley Ludlow, Jon Markman and Laura Stefani

*"Totality of the circumstances" still the name of the game*

# Wheeler Takes Retrans Re-Tooling Off the Table

*By Dan Kirkpatrick*
*kirkpatrick@fhhlaw.com*
*703-812-0432*

In the long-running retransmission consent war pitting broadcasters against MVPDs, a major threat to the status quo has been averted: according to a blog posted on the FCC's website by Chairman Tom Wheeler, the Commission has opted ***not*** to make any changes to the agency's existing approach to resolving retrans disputes "at this time". That leaves the less-than-specific "totality of the circumstances" standard in place. While greater specificity could conceivably have been a good thing for both sides, it could also have favored one over the other. Given the level of broadcaster opposition to change, the Chairman's announcement can be viewed as a big win for broadcasters.

As we all know, when broadcasters and MVPDs negotiate retrans deals, they are required to act in "good faith". When one side believes the other is not doing so, it can complain to the FCC, which then assesses the parties' respective conduct under a "totality of the circumstances" standard. Cable and satellite operators have for some time now been pressuring the Commission, as well as Congress, to make changes to the retransmission consent regime.

As we reported when it happened, in 2014 Congress directed the FCC to "review" the "totality of the circumstances" standard. In 2015 the Commission duly opened a rulemaking proceeding to that end, asking a wide range of questions about the types of conduct that might be deemed to demonstrate "bad faith". As we reported, interested parties (mostly MVPDs) identified a large number of behaviors that they thought should constitute *per se* bad faith. Those included "bundling" of additional channels with a local broadcast station, and preventing online access to programming during retransmission consent disputes – *i.e.*, behaviors used by broadcasters. Determination that such conduct should be deemed *per se* indicative of "bad faith" would have seriously diminished broadcasters' negotiating position.

But according to Wheeler, the record developed in the proceeding didn't justify adoption of any new rules directed at any specific negotiating practices. Instead, the Chairman concluded that the existing "totality of the circumstances" test for good faith was "pretty broad" and would allow the Commission to address instances of bad faith (at least as far as Congress has given the Commission authority to do so).

As a result, the Commission will "not proceed at this time to adopt additional rules governing good faith negotiations for retransmission consent". Thus, no specific negotiating practices will be newly designated as *per se* violations of the "good faith" negotiation rules. But that doesn't mean that various practices might not be considered unacceptable under the "totality of the circumstances" test. As Wheeler pointed out, that test is "intentionally broad," and nothing in the record indicated that it was "inadequate to address the negotiating practices of broadcast stations or MVPDs in the marketplace today".

*As Wheeler pointed out, the "totality of the circumstances" test is "intentionally broad".*

In announcing that the FCC would not be taking further action for the time being, the Chairman reiterated that the Commission would remain involved when blackout-spawning impasses do occur. He mentioned in particular the involvement of FCC staff in the ongoing dispute between Tribune Media and DISH: the staff has called the parties to a meeting in Washington and issued "comprehensive information requests" to the parties to determine whether either party had violated the good faith standards.

While the Chairman's announcement is clearly a win for broadcasters, it is only a single battle: the retransmission consent war is by no means over. While Wheeler's announcement clearly suggests that no new rules are on the horizon while Wheeler remains Chairman, nothing will prevent a later Chairman from initiating a new proceeding in the future. Alternatively, unless the Commission formally closes the currently open proceeding, another Chairman could conceivably opt simply to take action in the context of that proceeding. (On this point, let's bear in mind that Wheeler's blog post announcement that no further action will be taken reflects only the views of one of five Commissioners. A blog post from one of the five – even if it's from the Chairman – does not constitute formal agency action. Before the currently open proceeding can be deemed "closed", a majority of the Commissioners will have to adopt an order expressly closing it. In other words, while Wheeler's announcement may declare the vampire to be dead, nobody has yet pounded a stake through its heart.)

Still, at least for the immediately foreseeable future, the rules will remain as they are, which broadcasters can certainly consider a victory.

*What about those 10 hours of lawyer time?*

# Does the FCC Know How Long It Takes to Complete an Ownership Report?

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

*Steve Lovelady*
*lovelady@fhhlaw.com*
*703-812-0517*

Back in January the Commission announced its most recent overhaul of the biennial Ownership Reports that commercial and noncommercial broadcasters are required to file using, respectively, Forms 323 and 323-E. As we reported back then, thanks to our old friend, the hilariously named Paperwork Reduction Act, the revised forms can't be implemented until the Office of Management and Budget has vetted them. That vetting process has started, so anyone concerned about the burdens the revised forms would impose has the chance to voice those concerns.

In view of the FCC's estimates of those burdens, it might be a good idea for folks who have actually filled out Ownership Reports to provide the Commission (and OMB) a reality check.

First, some procedural background. The PRA provides two opportunities for public comment about proposed "information collections". First, interested folks have a 60-day period during which they can vent at the FCC about the proposals. Then the FCC bundles up whatever comments may have rolled in the door, slaps an explanatory cover memo on the package, and ships it over to OMB. OMB then opens a new 30-day comment period during which further (or repeated) venting can occur. Comments can address, among other things:

> Whether the proposed [information collection] is necessary for the proposed performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ... ways to minimize the burden of the [information collection]; and ways to further reduce the ... burden on small business concerns with fewer than 25 employees.

With two recent notices in the Federal Register (one each for Form 323 and Form 323-E), the process has begun: the first round of PRA comments on the revised Ownership Report forms may be filed with the Commission by ***September 19, 2016.*** You may want to think about chipping in your two cents' worth.

Draft versions of the revised forms were included as appendices to the Commission's decision last January. That's a good place to start if you're thinking about submitting comments.

Among the most significant revisions on the table is the introduction of "Restricted Use FRNs" (RUFRNs). Recall that, back in 2009, the Commission initially announced that every company and/or individual identified as holding an "attributable" ownership interest or position in a commercial broadcast licensee would have to obtain his/her/its own FRN and include that FRN in Form 323. For a variety of reasons – not the least being that getting individual FRNs would require disclosure to the FCC of Social Security Numbers (SSNs), about which a number of folks were unhappy – that led to litigation. As a result of that litigation, the Commission backed off the blanket FRN requirement. It created a "Special Use FRN" (SUFRNs) which could be obtained without providing SSNs. The SUFRN system has been in place since 2010, *i.e.*, through three biennial filing cycles.

*The FCC now wants to move away from SUFRNs, replacing them with RUFRNs.*

The Commission now wants to move away from reliance on SUFRNs, replacing them with RUFRNs, which will require the provision of, among other information, only the final four digits of a respondent's SSN. The theory is that that reduced level of disclosure will be more palatable to respondents.

A corollary revision this time around requires individual attributable interest/position holders in ***non***commercial licensees to provide their own FRNs or RUFRNs in Form 323-E. That provision has been controversial, to say the least, with noncommercial licensees concerned about their ability to obtain FRNs – or even RUFRNs – from all members of their governing boards. (A number of noncommercial licensees have sought reconsideration on that point; their petitions are currently pending at the FCC as the FCC pushes ahead with the forms.)

The reason for the Commission's dive into the granular: it wants to develop reliable statistical data relative to minority and female ownership in broadcasting – likely to try to justify policies aimed at increasing minority/female representation in the ownership ranks.

*(Continued on page 5)*

*(Continued from page 4)*

While the FCC has convinced itself that it really, really needs to be able to keep track of each "attributable" individual, reasonable minds might differ on that point. After all, attributable ownership interests may amount to as little as 5% of a licensee, a level not likely to make a decisional difference in a licensee's activities. Attributable positions include ***any*** officer, *e.g*, Secretaries, Assistant Secretaries, Assistant Treasurers, Executive Vice Presidents, again not roles that routinely call the corporate shots. How exactly will being able to keep track of such minor players advance the Commission's regulatory functions?

While OMB is not known for its willingness to second-guess the FCC on such policy matters, the PRA is intended to afford affected regulatees the opportunity to argue that the burden the FCC's proposal would impose on them would be excessive, contrary to the FCC's own estimates.

And about those estimates.

To get an RUFRN, an individual will have to access the FCC's CORES system and provide personally identifiable information, including (as noted) the last four digits of his/her SSN. As the FCC sees it, this will be a one-time -only process that should take only a couple of minutes at most.

*The FCC's "burden estimates" may be the product of a random number generator, as far as we can tell.*

But that assumes that each individual attributable principal will be gung-ho to take care of the sign-up. It's entirely possible, if not likely, that for many low-level broadcast participants, getting an RUFRN won't be an especially high priority. And it's also entirely possible, if not likely, that even some higher-level folks will take a fair amount of persuading before they are willing to dump their name, address and even partial SSN into the FCC's database.

And once RUFRNs have been obtained, the responding licensee will have to be sure to collect an RUFRN (or full-fledged FRN) from each and every attributable individual or entity listed in its Ownership Report. If any individual chooses not to get an RUFRN or FRN, the licensee will have to warn that individual that refusal to do so could result in "enforcement action against the filer and/or the recalcitrant individual". Since (thanks to the SUFRN option which the Commission is trying to phase out) licensees have not had to deal with this extensive reporting obligation, there's no telling how hard it will be. But as a practical matter, there is reason to believe that it may not be easy. In any event, it's doubtful that it will entail only a negligible amount of time and effort.

Which brings us to the FCC's specific "burden estimates".

In its invitation for public comment the Commission is required to calculate, and publicize, an estimate of the burden the revised information collection is anticipated to impose on the public. In the Form 323 notice, the FCC pegs that burden as follows:

- Number of Respondents: 4,340 respondents; 4,340 responses
- Estimate Time per Response: 1.5 to 2.5 hours
- Total Annual Burden: 9,620 hours
- Total Annual Cost: $ 10,093,220

For the noncommercial Form 323-E, the FCC's figures are:

- Number of Respondents: 2,636 respondents; 2,636 responses
- Estimate Time per Response: 1 to 1.5 hours
- Total Annual Burden: 3,867 hours
- Total Annual Cost: $ 2,319,900

How the FCC arrived at these numbers is not indicated. It's possible that they are the product of a random number generator, as far as we can tell. Consider this.

The "number of respondents" appears to refer to everybody who has to file an Ownership Report, *i.e.*, at a minimum, the licensee of every commercial and noncommercial AM, FM or TV station and every Class A TV and LPTV station. As of the end of June, 2016, there were just under 20,000 such stations. According to the FCC's "estimates", though, only 8,207 respondents would be filing (*i.e.*, 4,340 commercial respondents and 2,636 on the noncommercial side). While, obviously, there are likely fewer licensees than the total number of stations (thanks to multiple owners), the FCC's estimate seems low.

To be sure, as part of its latest changes the FCC has streamlined the reporting requirements for licensee subsidiaries of a common parent company. Historically, a parent had to file a separate report for each of its subsidiaries, even though that provided the FCC only largely duplicative information. Now a parent may include multiple subsidiaries in a single report. That should reduce the total number of reports to be filed to some degree – but the FCC's estimate still seem low, especially in view of the fact that Ownership Reports

*(Continued on page 6)*

*(Continued from page 5)*

must be filed not only by the licensee, but also by any entity that happens to hold an attributable interest in the licensee. Trust, us, there are a lot of those, which seriously undermines the FCC's estimate.

At least two other considerations undermine it even further.

First, wild card searches on CDBS indicate that, during 2014-2015, more than 100,000 Forms 323 were filed and more than 9,000 Forms 323-E were filed. Dividing those figures by two – to get an average annual number for the two-year reporting cycle – you come up with some 50,000 reports on the commercial side, and more than 4,500 on the noncommercial side, both considerably higher than the FCC's estimates.

And second, a quick look at previous estimates the FCC has provided to OMB reveals that the Commission has routinely advised OMB that it expects 9,250 responses to the Form 323 requirement. (Historically, the estimate for noncommercial Form 323-E responses has been generally stable at 2,636.) Those estimates are considerably lower than the numbers of forms actually filed as reflected in CDBS.

So the FCC's current estimate of the total number of anticipated responses may not be entirely valid.

And then there's the estimated time per response. It's not clear why the Commission figures that it will take commercial respondents longer to prepare their Form 323 than it will for noncommercial respondents to prepare Form 323-E. After all, noncommercial licensees have not previously had to deal with FRNs, RUFRNs or SUFRNs. That additional requirement will almost certainly slow the process down.

Back to the FCC's numbers. The estimated "per response" time ranges – 1.5-2.5 hours for Form 323, 1-1.5 hours for Form 323-E – don't exactly match up with the FCC's other numbers. For Form 323, the Commission estimates a "total annual burden" of 9,620 hours; since that presumably reflects the total number of hours that all respondents would rack up, dividing 9,620 by 4,340 should give us the overall estimate of hours per response, *i.e.*, 2.2 hours. While that's within the FCC's estimated range, it's on the high side of that range. The noncommercial numbers work out similarly: estimated total annual burden (3,867 hours) divided by total respondents (2,636) figures out to about 1.5 hours per response, again at the high end of the FCC's estimated range.

But just last February, the Commission sought OMB approval of the yet-to-be-revised Form 323. Then it estimated that the 9,250 total responses would entail a burden of 38,125 hours, or 4.1 hours per response on average. And that was for "in-house" efforts only – it did ***not*** include an estimated 10 hours of outside attorney time that would have to be devoted to each response. (The 10-hour figure was not mentioned in any published document; it was mentioned, only in passing in an FCC memo – available at the link at this OMB site – that appears to have been available only if you knew to dig deep enough into the OMB website.) There is no reason to believe that that additional attorney time would not be required for the revised version of Form 323 – but no mention of that time (or expense) is included in the FCC's current notice.

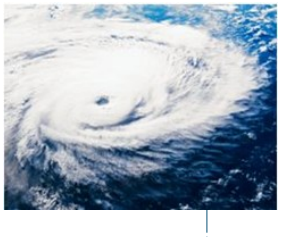
As for noncommercial reports, the Commission's 2013 "burden per response" estimate (available by clicking on the link at this OMB site) was one hour (*i.e.*, 2,636 hours for 2,636 responses). But, again, that was for "in-house" work only, and did not include an additional two hours of outside attorney assistance per report – outside attorney time that, again, was not widely publicized. (No explanation for why the 323 might require five times the amount of attorney time as a 323-E.)

So while the FCC's current invitations for comments obviously low-ball the estimated "burden per response", even the FCC's own representations to OMB in the past strongly suggest that those low-ball figures are unrealistic. Indeed, if it really does take more than four hours of "in-house" work and 10 hours of outside attorney time to prepare one biennial Form 323, that's at least 14 hours, more than five times the FCC's current highest estimate.

Historically, the OMB's PRA review of FCC information collections has seemed at times to be nothing but a charade that results in a largely meaningless rubberstamp: as long as the FCC puts some numbers down on a page, OMB seems willing to accept them regardless. At least theoretically, the PRA process is in place to permit those affected by governmental requirements to question whether the burden imposed by those requirements is justified. But that process can work properly only if the public is provided legitimate figures to begin with, and only if OMB is prepared to analyze the government's proffered figures critically. It is far from clear that the FCC's notices inviting comment on the new Forms 323 and 323-E provide anything close to legitimate numbers. It will be interesting to see how OMB reacts.

Again, interested parties may submit comments to the FCC by ***September 19, 2016***. A second opportunity comment directly to OMB will follow, but anyone considering participation at this would be well-advised to start the process at the FCC.

*Trying to reason with hurricane season*



# EWW, SSA, SSW: New EAS Event Codes Added

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

In what four out of five FCC Commissioners seem to view as a no-brainer, the Emergency Alert System just got three more event codes and two slightly-revised geographic location codes. The odd man out? Commissioner O'Rielly. He doesn't question the potential utility of the new/revised codes, but he does take issue with the cost/benefit analysis endorsed by his colleagues. We'll get to that shortly.

The three new event codes are EWW, SSA and SSW, which stand for "Extreme Wind Warning", "Storm Surge Watch" and "Storm Surge Warning", respectively. We all know by now that event codes are elements included in the message issued when an authorized official initiates an EAS alert. The several dozen specific codes mandated by the FCC – you can find them in Section 11.31(e) of the rules – range from "Avalanche Watch" through "Volcano Warning" and on to "Winter Storm Watch", and include three separate hurricane-related codes.

*Replacement gear, new or used, will have to accommodate the new codes.*

According to the National Weather Service, however, the three hurricane-related event codes already on the books – *i.e.*, HUW (for Hurricane Warning), HUA (for Hurricane Watch) and HLS (for Hurricane Statement) – only "apply generally to the hurricane event itself, and are not specifically tailored to warn of extreme sustained surface winds associated with a Category 3 (or greater) hurricane". Hence, in the NWS's view, additional, more narrowly-defined, event codes are called for to permit officials to provide more accurate warnings.

Historically, NWS had improvised a bit, using the Tornado Warning heading to advise of high winds associated with Hurricane Charlie in 2004 – but that caused confusion among the public and led to "the dissemination of incorrect risk-avoidance advice". Since 2007 NWS has been using the EWW code in connection with its own weather alert radio system warnings. But EAS participants have been reluctant to add that particular code to their systems because the FCC hadn't blessed it by including it in the rules.

Now we can consider it blessed ... and SSA and SSW, too.

In accepting the NWS's view that more finely-tuned EAS alerts would benefit the public, the FCC rejected the one nay-sayer among its commenters. That nay-sayer, EAS equipment manufacturer TFT, had argued that, with a general hurricane alert already in effect (as would almost invariably be the case before storm surge or high wind warnings would kick in), the public would not likely discern the finer distinctions afforded by the new codes. And, frankly, that's not an unreasonable observation, particularly in this day and age when meteorological science provides days', if not weeks', worth of notice of an impending hurricane. The FCC was not persuaded.

As for the revised geographic codes, the changes are relevant to you only if you happen to be in the areas defined as "location code 75" or "location code 77", which cover offshore marine areas in the Atlantic and Gulf of Mexico. The end point for both used to be Bonita Beach, Florida, but the NWS has changed the end point it uses when triggering weather alerts in these areas to Ocean Reef, Florida. Accordingly, it asked the FCC to change the specifications for those location codes in Section 11.31(f), and the FCC was happy to accommodate that request. (TFT objected to this change, too, arguing that those codes are not widely used and any inconsistencies between the FCC's definition and the NWS's "will not be meaningful to the public". The FCC, however, has opted for consistency.)

What does this mean for EAS Participants? Not much, at least for now. Because EAS is a voluntary system, the FCC is not inclined to require Participants to upgrade their existing gear to accommodate the new codes. The Commission's reluctance in that regard is bolstered by the fact that the new codes relate to relatively limited geographical areas – and Participants in those areas are likely to be "highly motivated" to make the changes on their own. So if you're an EAS Participant, you can modify your existing gear or not, as you wish.

The same is not true for EAS equipment manufacturers. The Commission has decided that manufacturers must "integrate these codes into equipment yet to be manufactured or sold, and make necessary software upgrades available to EAS Participants no later than six months from the effective date of the rule amendments." Oddly, though, it does not appear that the FCC's order specifies what that effective date will be. (We anticipate a correction or clarification on that reasonably soon; check back with CommLawBlog for updates.)

And EAS Participants are not entirely off the hook. As of

*(Continued on page 8)*

*(Continued from page 7)*

one year after the new rules' effective date (whenever that may be), anybody replacing their current EAS equipment will have to install gear capable of receiving and transmitting the new codes. Whether the replacement gear is new or used, it will have to accommodate the new codes. (FWIW, the NWS does not plan to start using the new codes in its alerts until the 2017 Atlantic Hurricane Season.)

Now, about that cost/benefit analysis.

The Commission concludes that the benefits of these changes clearly outweigh the costs. It figures that the costs are likely to be minimal, since manufacturers assure it that upgrading existing equipment will impose only minimal burdens on EAS Participants. But, as Commissioner O'Rielly observes, the only dollar figure the FCC comes up with on that score is based, inexplicably, on an estimate of the time that it will take EAS Participants to complete the ETRS forms in connection with the EAS test report procedure recently adopted by the FCC. But the completion of online forms does not necessarily tell us anything about the level of difficulty of upgrading equipment, so the FCC's cost estimates are essentially *non sequiturs*. Additionally, O'Rielly notes that no dollar figures at all have been associated with the costs which manufacturers will face in upgrading their products. So, in O'Rielly's view, there is no valid cost estimate on the table.

Ditto on the benefits side. The Commission figures that, if use of the codes saves only one life, that will be worth $9.1 million – based on a U.S. Department of Transportation determination of the "value of a statistical life". For sure, that would be a heap of benefit … if the new codes would save a life. But, according to O'Rielly, "there is no evidence that the current hurricane and other severe weather codes have been insufficient in protecting life and property or that the updated marine location codes are regularly used". So while it may seem a reasonable guess that more specific high wind or storm surge warnings *might* provide some greater measure of protection, it's at best a guess because there does not appear to be any solid evidentiary basis for it.

This is the second time in as many weeks that Commissioner O'Rielly has taken his colleagues, and the Commission's staff, to task for their lack of critical analysis relative to seemingly minor aspects of Commission decisions. But are they *really* minor aspects? Here, for example: If the FCC is purporting to justify its decision based on a cost/benefit analysis, shouldn't that analysis be demonstrably valid, with actual support in the evidentiary record? If there is no such support, shouldn't that be acknowledged and addressed? And if the FCC fails to do so, what does that say about the legitimacy of the rest of the decision?

Here, the question is probably inconsequential: the the new/revised codes were adopted unanimously (O'Rielly dissented only with respect to the cost/benefit analysis), and it's unlikely that the decision will be appealed. But O'Rielly may be doing us all a favor by calling our attention to the fact that corners are being cut in the decision-making process. Whether it's an obviously unsupported cost/benefit "analysis" or inappropriate citation to statutory sections, such flaws undermine the fundamental reliability of the FCC's decisions. O'Rielly's recent dissents have, if nothing else, encouraged everyone to read FCC decisions more critically than they might otherwise have. Ideally, this in turn will encourage the Commission (and those drafting its decisions) to take greater pains to insure that the agency's decisions are well-founded and defensibly analyzed.

*(Continued from page 2)*

considered "adjacent"? And what does "clearly marked" mean, anyway? The FAA already has a well-developed set of standards for marking taller towers – would those apply to shorter towers, too, or might the FAA opt for less onerous marking requirements? At this point, we can't be sure.

Point being, depending on how the FAA chooses to define things here, many small, rural broadcasters might find themselves required to fork over considerable change to mark their towers to FAA standards.

Section 2110 appears to have been included in the Act as a result of some prodding by agricultural and other low-altitude pilots – think crop dusters, emergency medical helicopters, firefighting aircraft and the like – concerned about the dangers posed by certain types of unmarked towers. One organization representing some such pilots (the National Agricultural Aviation Association) has indicated particular concern about meteorological testing towers erected in connection with wind power installations.

While concern about aeronautical safety can never be discounted, it's not clear that the dangers posed by meteorological testing towers are also posed by, for example, broadcast towers. If not, presumably the FAA could carefully tailor its regulatory definitions to limit the scope of any new marking rules to reach only the problematic towers, while leaving others free of new marking chores. But because government agencies are notorious for their "one-size-fits-all" approach, it's at least possible, if not likely, that the FAA will instead propose sweeping requirements applicable to situations totally removed from and unrelated to the purpose behind the legislation.

That being the case, we think it would be a very good idea for potentially affected folks to participate in the FAA's rulemaking, once it gets cranked up. Check back with FHH's CommLawBlog for updates (and if you're not already a subscriber to the blog, be sure to sign up while you're there).

*Pursestrings 2016*

# New Application Fee Schedule Announced

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

Thanks to Congress, the FCC has got to charge application fees and, also thanks to Congress, those fees have got to be adjusted every two years in light of changes in the Consumer Price Index. The last time the Commission tweaked its application fee schedule was 2014. If you do the math, you won't be surprised to learn that we're due for another adjustment.

Sure enough, the FCC has lifted the curtain on a revised application fee schedule. And there's reasonably good news to report. Thanks to recent economic trends, this year's adjustment is hardly worth mentioning: a 1.8% across-the-board increase. Sure, it's an increase, but it's nowhere near the 8% increase we saw in 2014, the nearly 5% bump announced in 2008, or even the 3% or so increase adopted in 2011. So let's not be looking this gift horse in the mouth.

*Thanks to recent economic trends, this year's adjustment is hardly worth mentioning: a 1.8% across-the-board increase.*

The new fees won't kick in until ***August 26, 2016***. In other words, you've got some time to prepare and file applications and still take advantage of the current fee schedule.

Usually, the announcement of a new application fee schedule is about as non-controversial as an FCC order gets. That's because the FCC has very little say in the matter: Congress has dictated how the fees are to be adjusted every couple of years, and Congress even went so far as to preclude any judicial review of adjustments once they are made. But this year Commissioner O'Rielly has injected some buzz into the biennial ritual by dissenting in part from the Commission's bare-bones order (which consists of just one page of text, slightly less than O'Rielly's separate statement).

What's got the Commissioner's knickers in a twist? Not the decision to increase fees – he acknowledges that the FCC has "little discretion" on that score. What bothers him is the seemingly boilerplate language in Paragraph 3 of the Order stating that the fee adjustment is being made "pursuant to §§ 1, 4(i), 4(j), and 8 of the Communications Act". In his view this is offensive because Sections 1, 4(i) and 4(j) provide zero basis for the increase in fees. Rather, Section 8 (which appears in the Act as Section 158) is the only provision that authorizes the application fee adjustment process, and it does so comprehensively. So, as O'Rielly sees it, reference to any other sections is superfluous.

This may seem a bit nit-picky, but there's more going on here than may initially meet the eye. The Commissioner is apparently troubled by the suggestion that Sections 1, 4(i) and 4(j) provide some kind of "ancillary authority" for the Commission to up its application fees. In his view, those sections plainly provide no such authority; moreover, no "ancillary authority" is needed in view of the unmistakable clarity of Section 8. According to O'Rielly, citation of those other sections is "offensive to those lawmakers who write our governing statute" because it suggests that "Congress doesn't know the difference between issuing direct requirements to the Commission, appropriately delegating authority as it sees fit, and expressing policy positions without requisite authority". He rejects the reference to the (in his view) superfluous sections with a resounding "Phooey" and colorfully likens the Commission's approach to "belts and suspenders on a baby onesie".

The issue of "ancillary authority" pops up every now and then – Net Neutrality aficionados may recall the role it played in the 2010 rejection of the FCC's early "Open Internet" efforts. It can be a matter of considerable consequence, especially when the Commission attempts to regulate in ways arguably not consistent with the Act. In such cases, those challenging the agency's action will argue that the FCC's actions exceed the authority Congress has granted it, and the FCC will in turn respond that its actions are well within the "ancillary authority" bestowed, usually indirectly or by implication, by one or another section of the Act.

Commissioner O'Rielly seems to see reliance on "ancillary authority" in this case as an inappropriate and unwarranted stretch, especially when express authority has clearly been provided to the Commission. Accordingly, he has taken this opportunity to lay his marker down in opposition to overreaching reliance on claimed "ancillary authority". Will that make any difference here? Not at all – the adjusted application fee schedule has been approved and cannot be appealed. But we now know that we can expect O'Rielly to be more aggressive in pressing against questionable "ancillary authority" claims going forward. That could prove interesting. Stay tuned.

*(Continued from page 1)*

***Pilot Requirements***. Perhaps one of the biggest hurdles facing would-be commercial UAS operators has been the requirement that a licensed pilot control the UAS. Having to hire a pilot licensed for manned aircraft to handle the controls has been a disincentive. No longer. The FAA has created a new crewmember position – "Remote Pilot in Command" – for Part 107 operations. Each small UAS flying pursuant to Part 107 will have to be under the command of a Remote Pilot in Command before and during the flight; he or she will have final authority, and responsibility, for the operation.

Rather than require the Remote Pilot in Command to have the same kind of license required of manned-aircraft pilots, the FAA has created an alternate airman's certificate for UAS operations. The new certification – a "remote pilot certificate with a small UAS rating" – will be easier to obtain than, and won't require the same knowledge as, certificates for manned flights. The basic qualifications for the new certificate are relatively simple: UAS pilots will have to be at least 16 years old and be able to speak, read, write and understand English.

*UAS pilots will have to be at least 16 years old and be able to speak, read, write and understand English*

There will be two separate paths to certification, one for those without any prior pilot certification and one for pilots already certified under the FAA's standard (Part 61) processes. Would-be UAS pilots starting from scratch will need to pass a TSA background check and an aeronautical knowledge test covering a wide range of flight-related areas (including, among several others, applicable UAS regulations, equipment maintenance, the effects of weather on UAS, airport rules and emergency procedures). Pilots who already hold Part 61 certificates (a universe extending from commercial pilots all the way to recreational pilots) will still have to obtain a remote pilot certificate with a small UAS rating, but that will require only either an online course on UAS rules and principles or a demonstration of proficiency via a test.

***Registration/Marking Requirements.*** Requirements for registering and marking your UAS remain the same as under the Section 333 Exemption process: all commercial UAS (and, for that matter, hobbyist UAS) must be registered with the FAA. In December 2015, the FAA opened its online registration system to hobbyist users (hobbyists had not previously been required to register) and then expanded the system in March of this year to include commercial users (who had previously been required to use an old school paper-based registration system). The new rules don't do anything to change that system.

The same is true of the marking requirements: unlike manned aircraft, which are required to keep a series of documents onboard at all times, UAS don't really have the space or need for most of them (such as the full operating manual). But operators are still required to display their registration numbers on their UAS. This can be done, according to the FAA, using "a permanent marker, label, or engraving, as long as the number remains affixed to the aircraft during routine handling and all operating conditions and is readily accessible and legible upon close inspection". You can also write it internally, such as in a battery compartment.

With the new rules now in place, what becomes of authorizations issued pursuant to the Section 333 Exemption process? Those authorizations were issued on a case-by-case basis, with each applicant demonstrating (among other things) how it intended to use UAS. In some cases, the resulting authorization permitted operations beyond what are now permitted under the new Part 107 rules. All of the Section 333 Exemption authorizations had their own expiration dates.

Going forward, operators holding Section 333 Exemption authorizations may continue to operate pursuant to them, at least until they expire. That may be desirable in situations where the outstanding authorization permits operations otherwise barred by the new rules; it may also be desirable to operators who would prefer not to take the time just now for their pilots to get a remote pilot certificates with small UAS ratings. Alternatively, Section 333 Exemption holders can choose to operate pursuant to the Part 107 rules.

One particularly interesting aspect of the new rules is a set of provisions (gathered in new Subpart D of Part 107) specifically inviting requests for waivers of various operating requirements. The new Part 107 rules are intended to integrate the lowest-risk UAS operations into the NAS as quickly as possible. But the FAA recognizes that the UAS universe is developing rapidly, and higher-risk operations outside the scope of the new rules may prove both safe and useful. To encourage such operations – and also in the interest of gathering data that can inform future rulemaking – the FAA is inviting, perhaps even encouraging, the submission of requests for "certificates of waiver".

Such waivers will be available with respect to any of nine of the new Part 107 operating requirements. The nine waivable rules are listed in Section 107.205; they include non-line-of-sight operations (except for flights transporting property), operating from a moving vehicle, and operating over people. Waiver applicants will have to provide a detailed description of the proposed operation and a demonstration that the operation can be conducted safely. In other words, having just adopted a laundry list of UAS operating rules, the FAA is opening the door for in-

*(Continued on page 11)*

## FHH - On the Job, On the Go

**Kathy Kleiman**, seemingly on a quest to corner the market in frequent flyer miles, again spanned the globe in recent weeks, travelling to Helsinki and then on to San José, Costa Rica. In Finland, **Kathy** attended a four-day Policy Meeting focused on various policy items in progress at ICANN (that, of course, is the Internet Corporation for Assigned Names and Numbers, the folks who, among other things, serve as technical coordinator of the Internet's Domain Name System). She co-chaired the Cross-Community Session of the Rights Protection Mechanisms Working Group, which is considering protections for trademark owners. (Curious about Rights Protections Mechanisms? Check out **Kathy** on YouTube, providing useful background.) In Costa Rica she participated in the Latin American Internet Governance Forum, with a pit stop at a meeting of the Costa Rica Chapter of the Internet Society (ISOC-CR). Her San José adventure wasn't all fun and games. The meetings there addressed such weighty issues as privacy and surveillance, Internet intermediary liability issues, and the challenges and opportunities of a multistakeholder approach to Internet public policy at national and regional levels.

Having performed the national anthem (along with the Capital Men's Chorus) at Nationals Park, **Frank Montero** stepped off the field and into the limelight. On July 28 he spoke at the Legal Innovator Talk Experience at *Busboys and Poets*, a well-known Washington, D.C. institution. The gig was a cross between an open mic and a TED talk-like experience, featuring minority and female lawyers speaking about various legal issues relevant to communities, businesses, corporations, non-profits and government entities. The goal is to provide a "speed networking experience" that motivates, invigorates and promotes minority and women legal professionals.

**Scott Johnson** will be driving south in August, with stops in Columbia, South Carolina and Birmingham, Alabama. On August 6 he'll be participating in the South Carolina Broadcasters Association Annual STAR (for State Television and Radio) Awards. Two weeks later, it's down to Birmingham for the Alabama Broadcasters Association's Annual Conference. On August 19 **Scott** will be waxing eloquent on the FCC and Legal Update panel, which he'll be sharing with prominent broadcast engineer **John George**.

Meanwhile, **Davina Sashkin** will be Texas-bound, heading to Austin on August 10-11 for the Texas Association of Broadcasters Annual Convention and Trade Show. In September, **Davina** will be off to Puerto Rico for their annual broadcasters convention.

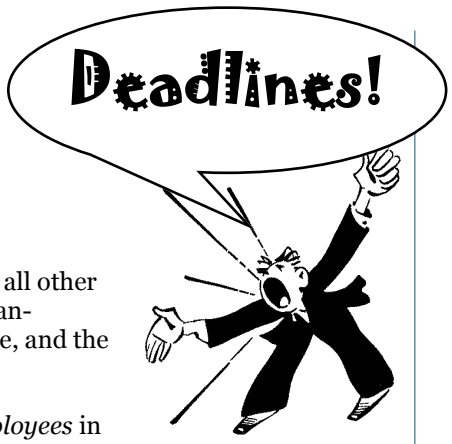
Also in September, look for **Matt McCormick** in Myrtle Beach for the Calvary Chapel Radio Conference on September 19-20, immediately after which he'll be hitting Nashville for the NAB Radio Show. And look for **Laura Stefani** at CTIA's Super Mobility 2016 at the Sands Expo in Las Vegas from September 7-9.

*(Continued from page 10)*

novators to operate outside those rules. It's not quite the system described by Barbossa in *Pirates of the Caribbean* (where certain provisions of the supposed pirates' code were "more what you'd call 'guidelines' than actual rules"), but it may prove to be the next best thing.

The Section 333 Exemption process enabled the FAA to see (and analyze the implications of) each new commercial use for UAS – because each applicant for an exemption had to describe in detail how it planned to use UAS. But now, with Part 107 rules permitting UAS operation without any prior description or registration of the use, the FAA won't have that easy access to how UAS are being used by U.S. businesses. The waiver process adopted by the FAA should help fill that gap, and keep the FAA abreast of what's going on at the cutting edge of the UAS world. And that, in turn, should give the FAA a sense of where its rules should go in the future. In that regard, the waiver process will complement the FAA's Focus Area Pathfinder Initiative, a program in which the FAA, along with industry partners, is exploring incremental expansion of UAS operation in the NAS in a number of "focus areas". Those areas include UAS operations over populated areas (particularly for newsgathering), operation outside direct line-of-sight in rural areas (for, *e.g.*, improved agricultural operations), and beyond visual line-of-sight operations in rural/isolated areas (for, *e.g.*, inspection of rail system infrastructure).

We've entered the next stage of the FAA's planned incremental approach to integrating UAS into the NAS. The FAA has effectively normalized the authorization of commercial small UAS operations, opening the door to a dramatic increase in the numbers of users. By providing for waiver requests that may allow operations beyond-line-of-sight and other currently-prohibited operations, the FAA has afforded a wide range of industries the opportunity to take advantage of the many capabilities that small UAS offer going forward. Over the next few years, the FAA will be collecting data from pilot reports of errors, reviews of waiver decisions, and tests conducted at test sites scattered around the country, providing it with more and better information on which it may rely in continuing to expand the use of UAS in the U.S. NAS.




**August 1, 2016**

***EEO Public File Reports*** **–** All *radio* and *television* stations *with five (5) or more full-time employees* located in **California**, **Illinois**, **North Carolina**, **South Carolina** or **Wisconsin** 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. *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; all other radio stations may continue to place hard copies in the file for the time being. 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 **Illinois** and **Wisconsin** and all *television* stations *with five or more full-time employees* in the **North Carolina** and **South Carolina** 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 **California, North Carolina** and **South Carolina** 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 **Illinois** and **Wisconsin** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

**August 26, 2016**

***EAS Participants' ETRS Form One*** **–** All *EAS participants* must prepare and file in the EAS Test Reporting System (ETRS) a Form One for each station by August 26, 2016. This form provides information as to the owner of a station, its transmitter location, the geographic area it serves, the EAS sources if monitors, and its EAS equipment, including make, model, and software version. The geographic area and sources monitored are generally included in the relevant state's EAS plan. Persons preparing the forms are encouraged to have the above information handy before starting to complete the form, as the filing system is not particularly friendly to resuming work on partially completed forms.

***FCC Filing Fees*** **–** New and increased application filing fees go into effect, and applications filed on or after this date must be accompanied by the new fees.

**August/September ??, 2016**

***Annual Regulatory Fees*** – On a date not yet determined but certainly before September 30, 2016, annual regulatory fees will be due. These will be due and payable for Fiscal Year 2016, and will be based upon a licensee's/permittee's holdings on October 1, 2015, plus anything that might have been purchased since then and less anything that might have been sold since then. The fees must be paid through the FCC's online Fee Filer, and once again this year, the FCC will not accept checks as payment of the fees but will require some form of electronic payment (credit card, ACH transfer, wire transfer, and the like). Please keep in mind that timely payment is critical, as late payment results in a 25% penalty, plus potential additional interest charges.

**October 3, 2016**

***EEO Public File Reports*** **–** All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, the **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands** and **Washington** must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. *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; all other radio stations may continue to place hard copies in the file for the time being. 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 **Iowa** and **Missouri**

*(Continued on page 13)*

*Keeping up with the cost-of-living …*

## FCC Forfeiture Limits Increased Across the Board

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

If you happened to feel a vague, somewhat disturbing, shudder recently, don't worry: it was just the upper limit of potential FCC fines being raised across the board. By Order effective July 1, 2016 (or maybe August 1 – we'll get to that), the Commission followed up on a Congressional directive to factor in a cost-of-living increase for the various maximum penalties listed in various places in the Communications Act. If you hadn't guessed, the goal is to deter you and others from violating the Act and the FCC's various rules, orders and instruments of authorization.

Note that this does ***not*** change the specific base-line fines for particular rule violations listed in the Commission's rules. Rather, it alters only the maximum possible penalties for such violations. As a result, for example, previously a broadcaster found guilty of violating any of the rules or the terms of its authorization could get whacked no more than $25,000 per violation, with a total cap of $250,000 for any continuing violation. But now, thanks to the FCC's recent order, those numbers have jumped to $47,340 and $473,402, respectively. Perhaps more daunting, the maximum penalty for a broadcast indecency violation – already steep at the original level of $325,000 per violation (capped at $3,000,000 for a continuing violation) – is now $383,038 per, with a new overall cap of $3,535,740.

Common carrier and other non-broadcast maximum fines will increase as well. If these might affect you, check the order linked above.

For violations of the equipment authorization rules, the base fines likewise remain unchanged, but the actual fines assessed may go up anyway. The upward adjustments for a single offense – or a single day of a continuing offense – will be able to reach $18,936 per model of device involved, up from $16,000. Over multiple days, the total can hit $142,021, up from $122,500. Fortunately, except for this case involving a $34.9 million fine, recent per-day assessments for equipment violations have been rare.

The FCC's Order spells out how these numbers were calculated, and how they will be re-calculated going forward – and they ***will*** be re-calculated, repeatedly, because Congress wants such adjustments performed annually from here on out. (Look for the next adjustment by January 15, 2017.) But it probably doesn't make much difference to you ***how*** the numbers are arrived at. Rather, the only important question is what the numbers are.

*None of this should matter to anyone who makes a practice of sticking to the straight and narrow.*

Of course, none of this should matter to anyone who makes a practice of sticking to the straight and narrow by complying with all the rules, etc. We strongly recommend that course. But if you need any more encouragement, just remember that the potential penalties are not likely to be getting any smaller.

Oh, and the effective date? According to Paragraph 11 of the Order itself, the changes became effective as of July 1, 2016. And when the Order found its way into the Federal Register, Paragraph 11 still said July 1 was the date … but up at the top of the order the folks at the Government Printing Office inserted a paragraph saying that the effective date is August 1. Ordinarily the Federal Register version tends to be the Official Version, which would suggest that August 1 is the real effective date. But as a practical matter it probably doesn't make any difference: August 1 will be around soon enough, and it's unlikely that anybody is going to get whacked between now and then with a fine higher than the pre-Order levels would have permitted. Still, we thought you'd like to know.

*(Continued from page 12)*

and all *television* stations *with five or more full-time employees* in **Florida**, **Puerto Rico** and the **Virgin Islands** 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 **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, the **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** 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 **Iowa** and **Missouri** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.