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Memorandum to Clients

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NEWS AND ANALYSIS OF RECENT DEVELOPMENTS IN COMMUNICATIONS LAW

No. 16-08

Spectrum Auction Update

An FCC Victory in Court, But Disappointing Forward Bidding Sends Spectrum Auction to Stage 2

By Anne Goodwin Crump
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On the Spectrum Auction front, August, 2016 ended in Dickensian style for the FCC: it was the best of times, it was the worst of times. A victory at the U.S. Court of Appeals for the D.C. Circuit seemed to eliminate a potential pitfall for the ongoing auction process. But the disappointing results of the first round of the forward auction could raise serious concerns about the prospects for the auction's eventual success.

August 30 started well for the FCC, with the [D.C. Circuit rejecting an effort by a couple of LPTV licensees] who claimed that the Commission's refusal to protect LPTV stations in the post-auction spectrum repacking process was inconsistent with the Spectrum Act. The Act, of course, prohibits the FCC from "alter[ing] the spectrum usage rights of low-power television stations". The question before the Court: did the Commission's treatment of LPTV stations in fact "alter the[ir] spectrum usage rights".

Since the creation of the LPTV service more than three decades ago, the FCC has designated that service as "secondary". That is, LPTV stations have to protect "primary" services from interference; if an LPTV station fails to do so, it's got to modify its facilities or cease operation entirely. Since the goal of the Spectrum Auction/Repack process is to reduce the amount of spectrum available for all over-the-air television services, it's a foregone conclusion that some, probably many, LPTV stations will be unable to find space in the repacked spectrum and will have to go off the air.

The LPTV petitioners did not dispute that LPTV licenses have long been subject to displacement or termination if they interfere with full-power TV operations, so any such displacement/termination arising from the repack would not alter their spectrum usage rights. BUT, the petitioners argued, the repack would displace and/or force off the air many LPTV stations because of interference to wireless services (*i.e.*, the folks who, through the "forward" component of the Spectrum Auction, will acquire spectrum currently used for television broadcasting generally). As the petitioners saw it, the secondary status of LPTV stations did ***not*** historically require them to protect such wireless services. Thus, so the argument went, the fact that the auction process would effectively treat LPTV stations as secondary to wireless services constituted an alteration of LPTV spectrum usage rights, which Congress had forbidden.

The Court didn't agree. In its view, more than a decade ago the Commission had clearly held that LPTV stations are secondary to licensed non-broadcast wireless services. That being the case, the Court concluded that the repack did not alter any "spectrum usage rights" that LPTV stations may have had, so the Commission has not violated the Spectrum Act in that regard.

Not surprisingly, the petitioners argued that the decade-old precedent cited by the Court was distinguishable from the current situation. No dice, said the Court: in its view, the repack process "subordinate[s] LPTV stations to wireless licensees in the same way the Commission had done before the Spectrum Act".

While the possibility of further review exists, the likelihood of reversing the D.C. Circuit's ruling is extremely low. With this challenge to the Spectrum Act now tossed, there remain only a couple more pending challenges to the Spectrum Auction process. The petitioners in one of those – *Free Access & Broadcast Telemedia, LLC v. FCC*, No. 16-1100 – will be particularly disappointed in the Circuit's decision. In their brief on the merits, which was filed less than a week before the Court's decision, the petitioners – who represent LPTV interests – spent a considerable amount of space arguing

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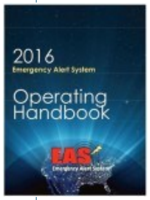

Fill-in-the-blank time!

Tabula (Quasi) Rasa: The 2016 EAS Operating Handbook!

By Harry F. Cole
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Two days after we posted a reminder on CommLawBlog.com about the upcoming deadline for EAS participants to (a) register on the Commission's new EAS Test Reporting System and (b) submit their Form Ones (or should that be "Forms One"?) through that system, the FCC's Public Safety and Homeland Security Bureau did likewise. And, as a bonus, the Bureau also released the latest and greatest edition of its EAS Operating Handbook … although it reads more like a Mad Libs book than an instruction manual.

In a public notice the Bureau reminded one and all of not only the now-past August 26 deadline (for registration and Form One), but also the follow-up deadlines for Form Two (September 28, 2016) and Form Three (November 14, 2016). (It also mentions in passing a "secondary test date" currently set for October 5, 2016 at 2:20 p.m.)

Note in particular the Form Two deadline. Since, as we all know, the next nationwide EAS test is currently scheduled for 2:20 p.m. on September 28, EAS participants will have less than 10 hours – *i.e.*, from the end of the test sometime after 2:20 p.m. to 11:59 p.m. on September 28 – to get Form Two filed. Plan accordingly, but rest assured that Form Two shouldn't take long to complete: according to a Bureau-provided preview, Form Two merely asks two yes/no questions, *i.e.*, whether (a) you received the test message and (b) you retransmitted it.

As noted above, the Bureau has also announced the release of the Commission's new and (theoretically) improved EAS Operating Handbook. A copy of the Handbook is included as an attachment to the public notice, or you can find it here. Particular attention should be paid to this. A copy of the revised Handbook must, according to the notice, "be located at normal duty positions or EAS equipment locations when an operator is required to be on duty and be immediately available to staff responsible for administering EAS tests". And don't think you can get away with using any previous version of Handbook: this new one supersedes all earlier versions and must be in place in time for the September 28 test. Let the downloading and printing begin!

As we reported in June, when the draft revision of the Handbook was first released for comment, the need for an updated version was prompted at least in part by the observation of the Communications Security, Reliability, and Interoperability Council (CSRIC) that the then-most-recent version of the Handbook was "obsolete and contain[ed] inaccurate instructions". The new version seems to avoid those problems by opting not to provide instructions in the first place. As explained in the very first paragraph of the Handbook, helpfully marked "**IMPORTANT**":

> In order to optimize use of the handbook, blank spaces are provided for EAS Participants that may wish to tailor the handbook to accommodate their own individual procedures prior to posting. Blank spaces are provided for EAS Participants to individualize the handbook.

And sure enough, blank spaces abound throughout the Handbook, making it more of a do-it-yourself effort than an FCC-provided regulatory roadmap. And if you find yourself needing help, the Commission doesn't go out of its way to invite inquiries. Instead, the Handbook suggests that

> [a]ppropriate State or Local Emergency Communications Committee personnel and the manufacturer of your facility's EAS device have additional information that will assist you in utilizing this Handbook.

So if you happen to be the person in charge of EAS compliance at an EAS partici-

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Unintended consequence, intended correction

Copyright Royalty Judges Propose To Clarify Streaming Reporting Rules for Noncommercial Broadcasters

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It looks like noncommercial broadcasters who stream may be in for a little more clarity in their reporting responsibilities. The Copyright Royalty Judges (we'll call them "Judges" here) have proposed to modify the rules governing how those broadcasters are supposed to report to SoundExchange the sound recordings that those broadcasters stream. The goal: to correct an anomaly introduced into the reporting rules earlier this year that appeared to give ***commercial*** broadcasters paying no more than the minimum $500 annual fee in royalties more favorable treatment than ***noncommercial*** broadcasters paying no more than that amount.

In a notice published in the Federal Register, the Judges have asked for comments on their proposal to reinstate certain reporting relief for noncommercial broadcasters that, until very recently, had long been available to those broadcasters.

It's hard to argue that noncommercial broadcasters should be treated more harshly than commercial broadcasters.

You may recall that, under the statutory licenses provided by sections 112 and 114 of the Copyright Act, webcasters are required to report to SoundExchange certain information about the sound recordings they play. That information includes a recording's title and featured artist as well as ***either*** the album title and record label ***or*** a special identifier for that recording known as the International Standard Recording Code (a/k/a "ISRC"). Webcasters also must report information regarding the number of listeners to those recordings – more on that below.

These requirements have long given preferential treatment to "minimum fee broadcasters". That universe included licensees that (a) own or operate one or more FCC-licensed terrestrial AM or FM radio stations (check out the definition of "broadcaster") and (b) pay no more than the $500 annual minimum fee in streaming royalties. Because both noncommercial and commercial entities may own or operate a licensed radio station, both noncommercial and commercial broadcasters historically have been eligible for the reporting benefits available to "minimum fee broadcasters". Those benefits have included the ability to:

- report eight weeks of sound recording usage per year (two weeks per calendar quarter) instead of the 24/7 reports generally required of others; and
- report a playlist of sound recordings streamed along with aggregate tuning hours in a particular reporting period without having to link audience levels with specific sound recordings, as others must do.

But a wrinkle cropped up earlier this year. In a pair of publications (the first here, with a technical amendment here), the Judges expanded the availability of these reporting benefits described above to an additional class of licensees – "noncommercial educational webcasters". The new class includes noncommercial webcasters that are affiliated with an accredited educational institution (think schools, colleges, and universities) and whose operations are staffed substantially by enrolled students. The Judges have said that their goal behind this change was "to expand relaxed reporting requirements th[e]n available to Minimum Fee Broadcasters to certain nonprofit educational webcasters that had previously been denied those expanded relaxed reporting requirements".

The complication: in implementing this change, the Judges substituted a new term – "Eligible Minimum Fee Webcaster" – for "minimum fee broadcaster". And in defining that new term, they did so (as they acknowledged in their proposed rule) "too narrowly". "Too narrowly" in that it "arguably exclude[s] noncommercial minimum fee broadcasters, a category that the Judges had intended to include". This arguable exclusion occurred because the Judges swapped out the prior definition of "broadcaster" used to define the types of "minimum fee broadcasters" eligible for reporting relief – *i.e.*, a licensee that owns or operates one or more FCC-licensed terrestrial AM or FM radio stations – with a new definition that expressly excluded noncommercial entities. As a result, under the new rule, ***commercial*** minimum fee broadcasters would continue to be eligible for reporting relief, but ***noncommercial*** minimum fee broadcasters no longer would be.

The Judges have now proposed to correct this apparently inadvertent oversight. Comments on the proposed change must be filed by ***September 9, 2016***.

It's hard to argue that noncommercial broadcasters should be treated more harshly under the reporting rules than commercial broadcasters. In fact, ***both***

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Full-work – not fractional – licensing

DOJ Makes it Official: No Change to ASCAP/BMI Consent Decrees

By Karyn K. Ablin
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The U.S. Department of Justice (DOJ) has formally closed its two-year-long review of the decades-old ASCAP and BMI Consent Decrees. Those Decrees mandate federal court oversight of the rates ASCAP and BMI can charge and the conditions they can impose when licensing public performances of their members' musical compositions. As my colleague, Kevin Goldberg, reported when the review was first announced, DOJ's inquiry – which was opened at ASCAP's and BMI's request – introduced the possibility that the competitive protections afforded by those Decrees could be weakened, to the detriment of music users – broadcasters, telecommunications companies, webcasters, and others – who rely on such licenses.

It looks like that bullet has been dodged: DOJ has announced that it will not seek any modifications to the Decrees despite pressure from ASCAP and BMI to do so.

The Consent Decrees are designed to prevent (or at least discourage) anticompetitive conduct.

If you're not into music licensing or you've been living in a hole for the past, um, century or so, ASCAP and BMI are the two largest U.S.-based performing rights organizations (PROs). They represent composers, authors, and publishers (the "C," "A," and "P" in ASCAP's name) in licensing public performances of songs. (They don't represent record labels or performers in licensing public performances of recordings of those songs.) "Public performance" in this context includes broadcasting, webcasting, and a wide range of other performances.

PROs provide a convenient way for publishers and other copyright owners, on one hand, and broadcasters and other music users, on the other, to make necessary licensing arrangements. But because ASCAP and BMI collectively represent the overwhelming majority of songs available for licensing in the U.S., these two PROs wield enormous market power, which increases the risk of anticompetitive, inflated license pricing. Recognizing this, DOJ sued both PROs in 1941 (and sued BMI again in 1964), alleging antitrust violations.

The Consent Decrees were the upshot of those suits. They are designed to prevent (or at least discourage) anticompetitive conduct by reducing the collective market power of ASCAP and BMI. For example, under the Decrees in their current form, ASCAP and BMI can't pressure music users to accept inflated license rates by refusing to allow those users the right to perform the music while licenses are being negotiated. And if a PRO and a music user can't agree on a rate, a designated federal judge may be called upon to set a competitive market rate.

The two Decrees have been revisited and revised periodically, ASCAP's most recently in 2001 and BMI's in 1994. In 2014, DOJ – having heard that ASCAP, BMI, and others thought that further revision was necessary "to account for changes in how music was delivered to and experienced by listeners" – invited comments on whether (and, if so, how) the Decrees should be modified. Over 50 organizations and nearly 200 individuals chimed in.

Following that initial round of comments, DOJ homed in on one particularly controversial licensing issue: the treatment of musical works whose copyright is owned by multiple persons, some – ***but not all*** – of whom happen to be members of ASCAP or BMI.

When a music user (say, a radio station) acquires a license from one PRO to use such a work, the user generally understands that it's getting a full license, and not a "fractional" license reflecting only the interests of some, but not all, copyright holders. The Consent Decrees support this understanding – each requires ASCAP and BMI to offer licenses to the "works" (that's from the ASCAP Decree) or "compositions" (from the BMI Decree) in their repertories, not to "interests" in those works or compositions. But because a PRO collects royalties only on the basis of the interests held by its own members (and pays only those members), some rightsholders questioned whether, in such circumstances, the PRO was really conveying the full right to play the song. DOJ solicited a second round of comments on this question in 2015. In rolled another 150 or so comments, including about 40 from organizations.

Not surprisingly, music users – including NAB, Sirius XM, and Pandora, among others – argued that the

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Consent Decrees have always required, and should continue to require, that ASCAP and BMI grant full-work licenses. In their view, a shift to fractional licensing would upend the competitive licensing marketplace in multiple ways. With fractional licensing, unaffiliated PROs and publishers holding partial interests in musical works would enjoy greatly increased market power because they would be able to hold performances of those works hostage until their desired license prices were paid. Fractional licenses also would decrease the value of ASCAP and BMI licenses without decreasing those PROs' market power.

For users, this change would make the licensing process – and the licenses themselves – much more expensive and burdensome, not to mention uncertain. Even with an ASCAP or BMI license, the user would still have to take steps to identify, track down, and negotiate with other copyright holders not represented by the PRO providing the license. Such an approach would be inconsistent with the threshold goal of PROs – *i.e.*, providing one-stop shopping for the right to play a large number of copyrighted musical works owned by various entities.

> *Reaction to the decision was sharply divided, with music users cheering it and the PROs lambasting it.*

Needless to say, ASCAP and BMI saw things differently. They claimed that licensing parties long have paid and distributed royalties on a fractional share basis and that the Decrees should be modified to acknowledge fractional licensing expressly. In their view, requiring full-work licensing would disrupt current practices, thwart copyright owners' ability to monetize their partial interests, and trigger a long list of other undesirable results.

But DOJ wasn't buying what ASCAP and BMI were selling. It concluded that the Consent Decrees require (and have always required) ASCAP and BMI to issue full-work licenses and that the Decrees should not be modified to permit fractional licensing, which it said was not in the public interest.

DOJ acknowledged that license pricing and royalty distribution have historically been based on fractional ownership interests. But it also recognized that an important pro-competitive benefit offered by ASCAP and BMI is granting music users immediate access to works in those PROs' respective repertories without fear of infringement liability. It found that fractional licensing would undermine that access and protection from liability, *i.e.*, the "key procompetitive benefits of the PROs preserved by the consent decrees". It also observed that fractional licensing would "impair the functioning of the market for public performance licensing and potentially reduce the playing of music". It concluded that "only full-work licensing can yield the substantial pro-competitive benefits associated with blanket licenses that distinguish ASCAP's and BMI's activities from other agreements among competitors that present serious issues under the antitrust laws".

DOJ disputed ASCAP's and BMI's claims that its decision necessarily would disrupt their licensing practices. In DOJ's view, co-owners of a song who are members of different PROs could still choose to be paid for their interests through their respective PROs (who each could be said to grant a full-work license for that song). Nonetheless, to enable ASCAP and BMI to conform their practices to a common understanding that their licenses grant full-work licenses, DOJ announced that it would refrain from initiating enforcement actions against purported fractional licensing for a one-year period.

Predictably, reaction to DOJ's decision – which was preliminarily disclosed a few weeks ago to interested parties – was sharply divided, with music users cheering the decision and the PROs lambasting it. NAB saw the decision as maintaining "fundamental antitrust safeguards" while preserving the "longstanding and successful relationship that broadcasters have had with ASCAP, BMI," and their respective members. The Television Music License Committee viewed it as confirmation that "the current music performing rights license system is not 'broken'" but "has functioned well overall".

By contrast, BMI bemoaned the "shift to a 100% licensing model and the creative and financial impact it would have on [the nearly 13,000 BMI songwriters'] ability to create music". ASCAP was more colorful: "It is as if the DOJ saw songwriters struggling to stay afloat in a sea of outdated regulations and decided to hand us an anchor, in the form of 100% licensing, instead of a life preserver".

While these reactions were easily predicted, it is much harder to predict where all of the chips ultimately will fall. ASCAP and BMI, for their part, wasted no time in broadcasting their next moves: they announced that they would "[j]oin [f]orces to [f]ight" DOJ's interpretation. In a one-two punch strategy, BMI will be taking the lead in challenging the decision in federal court, while ASCAP will head up the effort to seek legislative change. This division of labor was no accident – conventional wisdom has it that the rate court overseeing BMI's operations is more favorable to PRO interests than is the court charged with monitoring ASCAP. (Within hours of DOJ's formal announcement, BMI had already fired off a letter to its rate court judge seek-

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ing to get the ball rolling on the judicial side.)

Meanwhile, some members of Congress have already gotten involved in the issue – on July 20, five members wrote to the Attorney General to express concern about the decision and to request an independent review of the matter. It remains to be seen whether these efforts will result in changes to, or a reversal of, DOJ's determination.

If DOJ's decision withstands the PROs' two-front assault, ASCAP and BMI will need to take steps to ensure compliance with DOJ's full-work licensing pronouncement. Either or both might decide to seek to become the collection and distribution agent for non-member copyright owners of joint works some (but not all) of whose copyright owners belong to that PRO. If they go that route, the PROs would undoubtedly seek to increase their license prices accordingly.

On the other hand, ASCAP and/or BMI might choose an opposite approach: They could disclaim the right to license any works authored by multiple copyright owners who do not all belong to the same PRO until they reconfirm that they can offer full-work licenses for those works, warning users that they perform any such work at their own risk. This "be careful what you wish for" tactic could dampen music users' enthusiasm for DOJ's full-work licensing decision in at least a couple of ways. It could easily scare users with the increased threat of infringement suits if the necessary additional licenses are not obtained. And it would give rise to higher licensing costs and transactional inefficiencies in securing those licenses. PROs and their members eager to reverse DOJ's decision would undoubtedly be delighted if music users reversed course even a little bit in their support of DOJ's decision.

And let's not forget the copyright holders themselves. If they prefer the option of fractional licensing, they may opt to abandon ASCAP and BMI in favor of another PRO – such as SESAC, Inc. or Global Music Rights – not currently required to operate under an antitrust consent decree. A substantial exodus could seriously devalue ASCAP and BMI licenses and increase the license price and negotiating power of the alternative PROs as their membership increases. But if that happens, it undoubtedly would not be long before the government would be scrutinizing the other PROs for anticompetitive behavior with an eye toward imposing consent decrees on them, too.

What ***is*** clear is that DOJ's strong endorsement of the pro-competitive benefits of full-work licenses has not ended the fight over that issue. We'll keep a close eye on developments. Stay tuned.

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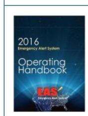
types of radio broadcasters face unique reporting challenges that merit special consideration because broadcasters' main business is over-the-air radio, not streaming, and their systems were designed with over-the-air radio, not streaming, in mind. (Interested in more detail? NAB and the Radio Music License Committee submitted extensive comments in a different reporting rulemaking that described some of these challenges.)

In any event, we're not expecting any fierce or widespread opposition to the Judges' proposed amendment, which would restore the prior status quo for noncommercial broadcasters. One never knows for sure, though, so we'll continue to follow developments on the reporting side and will keep you posted.

**Side note: Another rulemaking proceeding proposing to overhaul the reporting rules much more comprehensively is still open. We'll keep an eye out for developments on that front, too.

[*Editor's Note: Our author, Karyn Ablin, proposed the change to the Judges on behalf of NAB and the National Religious Broadcasters Noncommercial Music License Committee*.]



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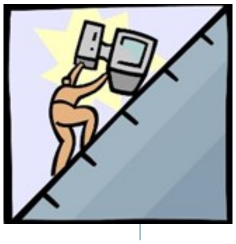
pating facility, you've got your work cut out for you. Print out the Handbook and start filling in the blanks. Unfortunately, neither the Bureau nor the Handbook itself provides any detailed guidance about precisely what information should be inserted into the blanks. While, obviously, each participant's equipment configuration and staffing set-up may entail some idiosyncratic aspects requiring personalized knowledge, it might have been nice if the Bureau had offered at least some hints at how it expects participants generally to summarize their internal procedures. Instead, EAS participants have been given something of a *tabula rasa*.

Further complicating things is the fact that the Handbook version the FCC has released doesn't appear to be set up for on-screen completion. Presumably, anyone practiced in the PDF arts should be able to create a computer-fillable copy of the Handbook. Failing that, you can always kick it old school with a typewriter, or older school with pen and paper.

However you choose to roll, though, you've got until September 28 at 2:20 p.m. to distribute the 2016 edition of the Handbook to all EAS duty positions.

Sisyphus re-re-re-dux



FCC "Concludes" a Decade of Quadrennial Reviews … For Now

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As we have observed more than once (here and here, for example), the FCC's quadrennial media ownership review process is Sisyphean in nature: even before the Commission can complete one review, the next begins, and previously completed reviews return thanks to court remands. Now, with the release of a Second Report and Order (*2d R&O*), the boulder has reached the top of the mountain again.

How long it will stay there this time is anybody's guess.

In the *2d R&O* the Commission has largely left in place media ownership rules that have been on the books since before 2002 (in at least one case, since 1975). It has also reinstated its 2014 decision to treat TV joint sales agreements (JSAs) as attributable ownership interests. (That requirement had been tossed by the U.S. Court of Appeals for the Third Circuit earlier this year.) And, prodded by the Third Circuit into finally resolving the question, the Commission has also re-adopted a revenue-based eligibility standard for certain relaxed ownership policies designed to promote "diversity". In doing so, however, the FCC refrained from adopting any specifically race or gender-conscious standards.

The quadrennial review process, first 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". What Congress was thinking when it specified a quadrennial process is unclear – after all, pretty much nothing of that scope gets accomplished in Washington in a mere four years.

And sure enough, 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. While the FCC was still working on that remand, the 2006 review rolled around. That one also went up to the Third Circuit which, in 2011, sent it back to the FCC. But before then, the 2010 review had begun, so the remanded issues from the 2006 review got folded into the 2010 review, which was still underway when the 2014 one kicked off – so the 2010 review (with the folded-in elements of the 2006 review) got folded into the 2014 review. (Additionally, when the 2014 review got started, the Commission decided to expand the definition of "attributable interests" for TV licensees to include certain JSAs.)

Given the length of time the FCC routinely takes to decide items like this, and the length of time the courts take to review the FCC's action, and the FCC's chronic inability to satisfy the courts (leading to remands requiring further FCC action), you can presumably understand the seeming futility of the quadrennial process.

In any event, on review of the then most recent Commission decision, the Third Circuit again shipped things back to the Commission, criticizing it sharply for failing to resolve the pending quadrennial reviews in a timely manner. The Court essentially ordered the Commission to resolve all of the open reviews promptly. The *2d R&O* is the FCC's effort to do so. Whether the *2d R&O* will satisfy the Court remains to be seen.

The *2d R&O* sprawls across more than 160 pages. The following are some of the highlights.

Local Television Ownership Rule (Duopoly Rule)

The Commission has retained the existing local television ownership rule, with a couple of modifications. Still in place: The prohibitions against (a) combinations of two top-four television stations, and (b) duopolies in markets where eight independent voices would not remain. And far from loosening any restrictions, the Commission has ***increased*** restrictions in at least two respects.

First, JSAs are back to being attributable. They had not been prior to 2014, and the FCC's 2014 decision to make them attributable had been rejected by the Third Circuit earlier this year. As required by Congress, JSAs entered into prior to March 31, 2014 will remain grandfathered (and transferrable) until September 30, 2025.

Second, the Commission will now expand its local ownership rule to prohibit "affiliation swaps". "Affiliation swaps" are deals through which a single entity that owns two stations in a market – one top-four, the other non-top-four – acquires from another station in the market a network affiliation, as a result of which both commonly-owned stations become top-four. This prohibition will apply only to situations where two full-power stations enter into an agreement to trade a top-four for a non-top-four affiliation. The prohibition will not apply to situations where an existing duopoly owner obtains a second top-four affiliation from the appli-

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cable network without the agreement of the second television station. Nor will it apply to "affiliation swaps" prior to the release of the *2d R&O*. Further, the Commission has, at least at this point, refrained from regulating a station's ability to hold a second top-four affiliation on a multicast channel.

And in a housekeeping amendment, to reflect a technical change arising from the conversion to digital broadcasting, the Commission has also replaced references to a station's "Grade B" contour with its "noise-limited service contour" (NLSC).

Local Radio Ownership

As with the local television ownership rules, the Commission is retaining, essentially unchanged, its existing local radio ownership rules with two relatively small (although important to those directly affected) changes to the rules.

First, the Commission has formally declared that, for purposes of the local radio ownership rules, Puerto Rico will not be deemed to be a single metro market, even though Nielsen characterizes it as such. As a result, transactions involving Puerto Rico radio stations will need to demonstrate only compliance with the contour overlap methodology. This is a concession to the "unique characteristics" of Puerto Rico, including its mountainous topography. As a practical matter, this won't change much, since the Commission has since 2003 regularly waived the Nielsen market-based aspects of the ownership limits vis-à-vis Puerto Rico stations, instead allowing applicants to rely on the contour overlap approach. Going forward, no such waivers will be necessary.

A limited "exception" will allow common ownership of a local broadcast station and newspaper if either is "failed" or "failing".

Second, the Commission has modified its policy relating to grandfathered radio clusters (*i.e.*, those that existed before the adoption of Metro markets). Owners of those clusters will now be allowed to make "in-market" community of license changes, and will be given a three-month window after moving a station's community of license out of a Metro Market to get Nielsen to stop listing the station as "home" to that market.

Newspaper/Broadcast Cross-Ownership

The newspaper/broadcast cross-ownership (NBCO) rule, which has been on the books essentially unchanged since 1975, will remain in place, with some very minor modifications. The Commission believes that this rule is necessary to protect viewpoint diversity. What about all those online sources of information, which would seem to provide plenty of diversity? According to the Commission, social media sites, while popular, tend to aggregate content from traditional sources rather than producing their own. The Commission does acknowledge some evidence that the rule may harm localism and competition, but it finds that these harms are outweighed by the gains in diversity the rule may protect. Although primarily focused on the importance of local television news, the Commission also finds that local broadcast radio continues to contribute to viewpoint diversity, and in particular is relied on for local news and information by some otherwise underserved communities.

In another housekeeping change, the Commission has updated the NBCO rule to reference a station's its digital principal community contour (PCC), rather than its analog Grade A contour. Under the amended rule, common ownership will be prohibited for a television station and a daily newspaper that are both in the same DMA and where the station's PCC encompasses the community where the newspaper is published. For radio, common ownership will be prohibited where the station's contour encompasses the community of publication and both the station and newspaper are in the same Nielsen Metro market. In possible combinations outside of Metro markets, only contour encompassment will be used.

The Commission has also created a limited "exception" that will allow common ownership of a local broadcast station and newspaper if either is "failed" or "failing". (The definitions of "failed" and "failing" are similar to those used in application of the local television and the local radio/TV cross-ownership rules.) Note, though, that in the NBCO context, the Commission will view this to be an "exception", ***not*** a "waiver", situation. As a result, an applicant seeking to invoke this failed/failing facility option will need to show only that it meets the criteria for a failed or failing station or paper ***and*** that the resulting combination will produce some public interest benefit. Applicants will ***not*** need to show that the benefits outweigh any potential harms to diversity from the combination.

Waivers based on considerations other than failed/failing facilities will be considered on a "pure" case-by-case basis. To obtain a waiver, an applicant will need to show that the proposed combination will not "unduly" harm viewpoint diversity. How any waiver requests will be evaluated in practice remains to be seen.

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Finally, the Commission in the order attempts to close the existing "loophole" that allowed a broadcast licensee to buy a daily newspaper and avoid Commission review until the broadcast station's next license renewal. Going forward, any broadcast owner who wants to purchase (or make an attributable investment in) a daily newspaper that would implicate the NBCO rule will need to obtain Commission approval prior to closing on that purchase (or investment).

Radio/Television Cross-Ownership

As with its other rules, the radio/television cross-ownership rules remain without significant modification. For housekeeping purposes it updates references to (a) a television station's Grade A contour (which triggers the rule) to refer to the station's PCC, and (b) the station's Grade B contour (used for counting independent voices) with its NLSC.

Dual Network Rule

Also still with us is the dual network rule, which prohibits common ownership of any two or more of the "Big Four"networks (Fox, CBS, NBC, and ABC). The Commission figures that, despite increased competition from other sources, the Big Four remain categorically different from their competitors in terms of both viewership and advertising rates.

Diversity Remand

A considerable portion of the *2d R&O* is devoted to the "diversity remand", *i.e.*, the Third Circuit's remand relative to the FCC's revenue-based definition of an "eligible entity", which would be entitled to relaxation of certain of the ownership restrictions.

By way of background, the FCC has long committed itself to promoting broadcast ownership by minorities and women. However, a 1995 Supreme Court decision imposes a very high burden on governmental programs affording preference on the basis of race, a fact which has limited the FCC's options. As a race/gender-neutral alternative, in 2008 the FCC – like other governmental agencies – established eligibility for preferences based on the applicant's revenue, the theory being that companies with lower revenues would disproportionately tend to be minority- or female-controlled. But the Third Circuit rejected the FCC's effort, finding that the Commission hadn't shown that the revenue-based eligible entity standard would in fact provide assistance to minorities or women. The issue remained unresolved on remand and, in May of this year, the Third Circuit was strongly critical of the Commission for not getting the job done. The *2d R&O* purports to take care of this, although it's not clear that the FCC's approach will make the Court happy.

That's because the Commission has largely re-adopted the same revenue-based eligible entity definition as in 2008. Unlike 2008, though, this time around the definition is based on the goal of furthering small business participation (as opposed to the participation of minorities and women) in broadcasting. The Commission expressly concludes that it could not justify any specifically race or gender-conscious rules, because it doesn't have sufficient evidence to show either that racially diverse ownership leads to viewpoint diversity, or that it has a compelling interest in remedying past discrimination in broadcast ownership.

Nevertheless, the Commission still concludes that it has a valid – and, indeed, statutorily mandated – interest in encouraging small business participation. Accordingly, it readopts the revenue-based eligible entity standard, which will now apply to a number of specific policies that have been stayed since the Court overturned the 2008 diversity order. Under those policies, eligible entities will be: (a) able to obtain extension of expiring construction permits acquired from other parties; (b) subject to relaxed equity-debt-plus thresholds; (c) able to acquire grandfathered radio clusters that would otherwise violate the ownership rules; and (d) able to acquire licenses in "distress sales" from sellers who have had those licenses designated for hearing on basic qualifications grounds. The Commission also will provide "duopoly priority" to entities that establish incubator programs for eligible entities and will extend divestiture deadlines in larger deals where the parties attempt to sell to eligible entities.

It's not clear that the FCC's approach will make the Third Circuit happy.

Shared Services Agreements

As expected, while the Commission has not made shared services agreements (SSAs) attributable, it has adopted a requirement that television stations place copies of all SSAs in their public inspection files. Here, the term SSA is defined broadly to include any agreements with other television stations that relate to the sharing of "station-related services". While broad, the definition of SSAs explicitly excludes agreements related to producing community and charity events, which the Commission does not consider "station-related". As a result, such arrangements are exempt from the filing requirement. Also exempt is sharing of resources

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Put It In Writing, Part III

Closed Captioning Chores Reassigned

By Rob Schill
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For nearly two decades the FCC has been working to insure that television programming is appropriately accessible to the deaf and hard of hearing through closed captioning technology. In 2014 it finally got around to developing quality control standards which it applied not only to video programming distributors (VPDs) – *i.e.*, television broadcasters, cable operators, etc. – but also to video programmers – *i.e.*, the folks who create the programming in the first place. (You can find a report on the elaborate quality control process here.)

But even as it did that, the Commission acknowledged that the system featured something of a loophole: while the FCC clearly had the ability to compel VPDs to comply – since VPDs tend to be regulatees directly subject to the FCC's jurisdiction – the Commission's ability to reach many video programmers was less obvious. Accordingly, months after it had adopted the quality control standards, the FCC opened an inquiry into whether (and if so, how) the Commission can or should increase its direct regulation of video programmers.

A central certification repository is expected to be more efficient for all concerned.

The result: a *Second Report and Order* (*2d R&O*) in which the FCC attempts to allocate responsibility for quality captioning more effectively between VPDs and video programmers. Along the same line, the Commission has revised to some extent the respective obligations of VPDs and programmers relative to the provision of captioning. The bottom line: video programmers will be having to provide annual certifications to the FCC concerning their provision of captioning and their compliance with the Commission's quality control process. Additionally, the Commission has revised the way that complaints about captions are to be processed.

Programmer Certifications

On the caption provisioning side, the FCC has historically held VPDs responsible for making sure that the non-exempt programming they carry is captioned. That's not changing: the Commission still expects VPDs to be "fully engaged" to ensure that nonexempt programming is captioned, so they will still bear primary responsibility on that score. But the Commission has now imposed a separate certification requirement on video programmers as well.

Up to now, a VPD has been permitted to rely on a video programmer's certification to the effect that the programmer's programming complies with the captioning provision rules. That certification was provided by the programmer to the VPD; no separate certification to the FCC has been required. But now, video programmers will be required to make that captioning provision certification ***to the FCC***. The theory is that it is "more effective and efficient" to impose separate obligations directly on the programmers (while still keeping VPDs responsible as well).

On the quality control side, recall that, when the Commission ventured into that area in 2014, it imposed primary responsibility for captioning quality control on VPDs. At the same time, it recognized that some captioning violations are outside VPDs' control; accordingly, the FCC allowed VPDs to avoid penalties for such violations by making certain "best efforts". Those "best efforts" consisted of trying to get video programmers to certify either (a) that they're exempt from captioning obligations or, if they're not exempt, then that (b) they comply with the FCC's standards or (c) they follow certain FCC-defined "best practices". Again, the programmer's certificate was directed to the VPD, ***not*** to the FCC. If a video programmer failed to provide the requisite certification, the VPD was obligated to rat it out to the FCC, which would then compile and publicize a list of non-certifying programmers.

Under the new rules, video programmers will be required to make their provisioning and quality control certifications not to VPDs upon request, but rather ***directly to the FCC***, annually. (And if they claim that their programming is exempt, they will have to specify the basis for that claim.) VPDs will then be able to check the FCC's files to confirm whether the video programmers providing them programming have made the appropriate certification to the FCC. Having such a central repository is expected to be more efficient for all concerned – and requiring video programmers to file directly with the FCC should remind programmers of the significance of their certifications.

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Once the new certification requirements kick in, VPDs will no longer have to report on non-certifying video programmers. And VPDs will be deemed to have complied with their captioning provision obligations if they rely on the programmer's certification. VPDs are not entirely off the hook in that regard, though. In order to enjoy that protection, the VPD must (a) pass through, intact, the captions as received from the programmer and (b) not know, or have any reason to know, that the programmer's certification was false.

Complaint Process

In an effort to avoid inefficiency, duplication of effort and potential confusion, the Commission has adopted a new approach for handling any type of closed captioning complaint. The new approach – described by the FCC as "burden-shifting" – places initial responsibility for investigating complaints on the VPD.

Complainants may file their gripes with either the Commission or the VPD. If the complaint goes to the FCC, the complainant must include: (1) the channel number; (2) the channel name, network, or call sign; (3) the name of the VPD; (4) the date and time that the captioning problem occurred; (5) the name of the program involved; and (6) a detailed description of the problem. If an incoming complaint has all that information, the Commission will forward it to the VPD ***and*** the relevant video programmer, if the Commission can figure out who the programmer might be. (If it can't, the Commission will alert the VPD, which in turn will have to provide the programmer's ID and contact information to the Commission within 10 days; the Commission with then forward a copy of the complaint to the programmer.)

Even though the programmer gets tagged early on, it is under no obligation to do anything right away (although the FCC fantasizes that the programmer may nevertheless start investigating ASAP). Not so for the VPD, which must get investigating right away to try to identify the nature and source of the problem. The requisite "thorough" investigation must include checks of the program stream, the processing equipment and the consumer's premises, as warranted by the circumstances. If the problem turns out to be the VPD's fault, the VPD must notify the FCC, the programmer and the complainant, in writing, of how it plans to fix the problem, and the complaint must be resolved within 30 days after the FCC forwards the complaint to the VPD.

If the VPD concludes that the problem was not within the VPD's control but, rather, was present in the program when the program arrived from the programmer, then the VPD has to certify (to the FCC, the programmer and the complainant) that it made a diligent investigation to identify the problem and determined that the problem was not within the VPD's control. With that certification the burden for tracking down the problem shifts to the programmer (unless the VPD has also determined, and so certified, that its investigation established that the programmer also was not at fault). The programmer then has 30 days to delve into the question and come up with a written response. If the programmer's investigation indicates that the program was properly captioned when it was handed off to the VPD and no potential third-party interference has been identified, then the VPD and the programmer must cooperate to determine and correct the source of the problem.

If the complaint is initially sent to the VPD rather than the FCC, the VPD is required to go through essentially the same investigatory drill because the Commission "expects" the same level of investigatory care. If the complainant isn't happy with the way the VPD responds, he or she may file directly with the FCC, which starts the whole process over again.

An interesting if arcane wrinkle arises when the complaint goes to the VPD in the first instance.

An interesting if arcane wrinkle arises when the complaint goes to the VPD in the first instance. If the VPD's investigation suggests that the problem is really with the programmer (or somebody else), the VPD is expected to forward the complaint to whoever appears to be the source of the problem. But a VPD is statutorily forbidden from disclosing to third parties its customers' personally identifiable information (PII), such as name and contact information. But forwarding a complaint would ordinarily include disclosure of precisely such information. What to do? To address this problem, the Commission requires that any PII be redacted from the complaint before it is forwarded. Alternatively, the VPD may provide enough information about the nature of the complaint to permit investigation and resolution.

Compliance Ladder

The closed captioning complaint process is likely to turn up the occasional VPD rule violation. In the hope of improving the quality of captioning, the Commission has decided to use a "compliance ladder" approach with respect to caption quality issues. (No compliance ladder will be used in connection with captioning provisioning, equipment issues, registration or certification.)

Basically, if the FCC receives one, or maybe just a few, complaints about a VPD's captioning quality control, the

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during ad hoc coverage of breaking news, provided that such sharing is not done pursuant to a written agreement.)

Each party to an SSA will now be required to place a copy of the agreement in its online public inspection file. While confidential and proprietary information may be redacted from the public file version, such information must still be made available to the Commission upon request. Existing SSAs will need to be filed within 180 days of OMB approval of this change, and newly-executed SSAs will need to be filed "promptly".

In adopting this filing requirement, the Commission noted that it currently does not have reliable information on the prevalence of SSAs, or their content. Without this information, which the filing requirement is intended to provide, the Commission did not believe it could justify making SSAs attributable. But the fact that the FCC even mentions this could suggest that the new filing requirement is only a prelude to a determination that SSAs should be deemed, like JSAs, to create attributable interests. That is unlikely to happen until a further quadrennial review, the next one of which is due to commence in two more years.

Dissents

Not surprisingly, both Commissioners Pai and O'Rielly dissent, strongly, from the *2d R&O*. They both accuse the majority of ignoring the realities of the competitive situation faced by local broadcasters and newspapers, and holding on to regulations that cannot be justified in that current situation. Both dissenters also take the Chairman to task for some backroom manipulation of the internal voting process. While the precise details aren't provided, Pai asserts that a "bipartisan majority" of the Commission was on board to repeal the NBCO rule, but Pai was told that the "[NBCO] rule would not be repealed *unless all commissioners agr*eed". (The emphasis is Pai's.) Apparently referring to the same circumstance, O'Rielly mentions that the Chairman "chose to continue his practice of only approving an item if the majority party commissioners are in unison".

Next steps

So what happens next?

It seems almost certain that most, if not all, of the *2d R&O* will be appealed by some parties. Broadcasters will likely appeal the Commission's refusal to loosen its ownership regulations, and indeed to tighten them in some ways; public interest groups will likely appeal the Commission's approach to diversity in ownership. While those appeals may be filed in multiple different circuits, it is likely that they will end up back in the Third Circuit which, if past is prologue, will review the FCC's latest handiwork closely and critically. However and whenever that may shake out, the fact remains that the next quadrennial review is scheduled for 2018.

And so the rock will start getting rolled up the hill yet again.

To the limited extent that the *2d R&O* changes anything, the changes won't take effect right away. Changes that involve "information collections" will have to be run past the Office of Management and Budget before they can kick in, a process that normally takes several months; that's also when any revised forms will take effect. The FCC will be letting us all know how that goes. The rest of the changes will be effective 30 days after the *2d R&O* appears in the Federal Register. Check back with CommLawBlog.com for updates on all this.

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Commission will not necessarily initiate any separate enforcement action looking toward a possible fine or other sanction. But if the Commission notices a "pattern or trend of possible noncompliance" with the captioning quality rules, it will notify the VPD, which will then have 30 days to file a response explaining (among other things) what corrective action the VPD is taking. If, after than 30-day deadline comes and goes, the FCC notifies the VPD of further evidence of a pattern or trend of noncompliance, the VPD will have 30 days in which to prepare and submit an "action plan" for addressing the problem. Six months (actually, 180 days) later, the VPD will have to file a follow-up report on the results of its action plan. And if, after that follow-up report, the FCC finds a continued pattern or trend of noncompliance with the captioning quality rules, it will "consider" enforcement action.

The crucial element of this approach lies in how the FCC will identify a "pattern or trend of noncompliance". The trigger is non-specific: it could involve several complaints over a long period of time or a flurry of complaints in a short timeframe. Again, this "compliance ladder" approach will be used only for noncompliance with captioning quality rules.

The new rules (which will also require VPDs and video programmers to use a form on the FCC's website to input contact information into the VPD registry) are set to take effect on ***September 22, 2016*** – except for 47 CFR 79.1(g)(1) through (9), (i)(1) through (3), (j)(1) and (4), (k)(1)(iv), and (m), all of which will have to be run past OMB thanks to the hilariously-named Paperwork Reduction Act. Check back with CommLawBlog.com for updates on that front.

Wilkommen, Bienvenu, Welcome!

Keenan Adamchak Joins FHH

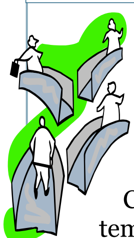
Fletcher, Heald & Hildreth is pleased to announce that Keenan Adamchak has joined us as an associate. Although a relatively recent arrival to the bar – he snagged his J.D. from George Washington University Law School in 2014 – Keenan has been a presence on the communications law scene for a lot longer than that. He served as a paralegal with a communications firm in 2007 (right after he graduated from William and Mary with a B.A. in history and government) and during his law school stint he clerked not only at a couple more firms, but also in the office of then Acting FCC Chairwoman Mignon Clyburn.

Wait, there's more. He was on the editorial staff of the Federal Communications Law Journal while at G.W. ***and*** he copped the award for Best Brief in the 2014 National Telecommunications Moot Court Competition! He's also the author of an article featured in the most recent issue of the FCLJ. (Title: "Confusion Uncertainty and Fear: How the FCC's Unchecked Destruction of the Contamination Theory through Adjudications is Harming Carriers, Competition, Consumers and Investment"; he'll be happy to autograph a copy if you send it to him.)

Suffice it to say that Keenan is not unfamiliar with communications law.

And he fits into the practice in at least one other way: he golfs. ("Avidly", he says – but he's still looking to break 90.) Back in the day he competed on the National Geography Bee circuit; nowadays, though, he just travels, with some skiing on the side.

Keenan lives in Washington, D.C., with his wife, Catherine. He can be reached at adamchak@fhhlaw.com or by phone at 703-812-0415.



FHH - On the Job, On the Go

Talk about a summertime gig! On August 20, **Frank Jazzo** was on duty at the Arlington County Fair, staffing the Arlington Information Technology Advisory Commission's table. But once Labor Day pops up in the rearview, the crew will be heading in all directions.

Westward-bound: **Laura Stefani**, **Jamie Troup** and **Tony Lee** will be winging their way to Las Vegas for CTIA Super Mobility 2016 ("EVERYTHING WIRELESS in one comprehensive, course-charting event") from September 7-9.

In the opposite direction, **Frank Montero** will be jetting east to San Juan, where he'll be attending, and speaking at, the Puerto Rico Broadcasters Conference on September 7.

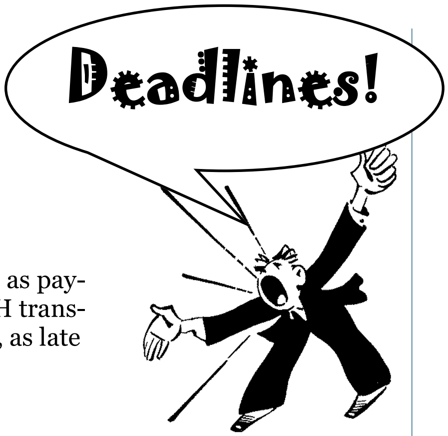
The following week, look for **Kevin Goldberg** just a bit up the road to the north in Philadelphia, where he'll be speaking at the 2016 ASNE-APME News Leadership Conference on September 13. (**Kevin** will be sitting in on a legal hotline Q&A session. Title: "Coffee with your Counsel".)

And the week after that, **Matt McCormick** will be toddling down to Myrtle Beach for the Calvary Chapel Radio Conference on September 19-20.

But then all roads will lead to Nashville, where the NAB Radio Show will be the main draw from September 21-23, following hot on the heels of the Radio and Internet News RAIN Summit Nashville conference and the National Alliance of State Broadcasters Association reception and meeting (both on September 20). Currently scheduled to hit some or all of the shindigs: **Karyn Ablin**, **Frank Jazzo**, **Scott Johnson**, **Dan Kirkpatrick**, **Jon Markman**, **Matt McCormick** and **Frank Montero**. And don't be surprised if you run into other FHH notables once you're there.

Post-Nashville, **Matt** will be off to the Pacific Northwest – Portland, to be exact – to attend the board meeting of the Oregon Association of Broadcasters on September 30.

And finally, an extra tip of the *Memo to Clients* hat to our pal **Kevin Goldberg**. Not only is he a copyright guru and, of course, CommLawBlog's Supreme Court Swami, but he also happens to be a leading light in the ranks of FOIA lawyers. How do we know that? He's in the National Freedom of Information Act Hall of Fame, for crying out loud (yes, there really is such a thing and yes, he's really in it, and has been since 2006). So it's no surprise that, in his spare time, he also happens to serve as President of the D.C. Open Government Coalition. What *was* a surprise – to some of us, at least – was to start seeing Brother Goldberg's name all over the *Washington Post* and other mainstream print media, and hear his name and cheerful voice all over local radio. It turns out that the Coalition is putting on a push to insure the openness and transparency of the operation of a safety commission proposed to oversee the operations of the Washington area's accident-prone Metro subway system (Metro's motto: Oops!). That's big news in these parts, and Kevin is smack in the middle of it, with soundbites galore … which is why he's our *Media Darling of the Month*!



September ??, 2016

Annual Regulatory Fees – On a date not yet announced but probably near the end of the third week of September and 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.

September 28, 2016

EAS National Test - Participants' ETRS Form Two Due – All EAS participants must be prepared for a national EAS test on September 28. Additionally, all participants must prepare and file, though the online EAS Test Reporting System (ETRS), a Form Two for each station by 11:59 p.m. on September 28. This form is scheduled to become available at 2:20 p.m. EDT, following the national EAS test.

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** or **Missouri** 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.

October 11, 2016

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the third 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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Heads up!

New Drone Rules Now In Effect

By Laura Stefani
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As of August 29, the FAA's new rules permitting commercial operation of small unmanned aircraft systems (UAS, also known as "drones") have taken effect. (And, just in time, the FAA has announced that the Office of Management and Budget has signed off on the "information collections" created by those rules, thereby eliminating any Paperwork Reduction Act concerns.) Previously, small UAS could be operated commercially only pursuant to what were known as "333 exemptions". As we reported a couple of months ago, the FAA has now added a new Part 107 to its rules that obviates the need for such exemptions, so long as specific flying requirements are followed. Before you launch your UAS into the wild blue yonder, though, be sure to familiarize yourself with those requirements, which impose limits on a number of operational aspects: how, where and when your UAS can be flown, what it can transport, how it is to be registered, etc.

And don't forget, you'll be needing an authorized pilot at the controls

And don't forget, you'll be needing an authorized pilot – technically, a "remote pilot in command" (remote PIC) holding a "remote pilot certificate with a small UAS rating" – at the controls. Individuals already holding a Part 61 pilot certificate have a relatively easy path to their remote pilot certification: they just take the online "Part 107 sUAS Course" available at the FAA's website and, having successfully completed the course, apply for the remote certification. Would-be remote PICs who don't already have a Part 61 certificate face a more rigorous and time-consuming process which includes threshold background checks and a mandatory initial aeronautical knowledge test administered at an FAA-approved knowledge testing center. If you're looking to get your UAS airborne as quickly as possible, using a Part 61-certified pilot willing to take the Part 107 course is probably your best bet.

While Part 107 operation has now largely replaced the need for 333 exemptions, the FAA is still facing a backlog of applications for 333 exemptions that were in the pipeline before the new Part 107 rules were adopted. We understand that the FAA is triaging applications in the backlog, with plans to dismiss those proposing operations permissible under the new rules. Pending applications proposing operations beyond the scope of Part 107 will continue to be processed.

And coming up on the horizon: a new set of rules to provide more guidance and flexibility on UAS flights over people. The FAA reportedly aims to complete this next year.

Finally, a word to the wise. We hear that the FAA has been training both field staff and local law enforcement on the new rules. While the precise penalties for violations have not been spelled out, the FAA does have authority to assess civil penalties up to $27,500 – which provides plenty of incentive to fly lawfully out there!

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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. 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 the online file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

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

Late Breaking News!!!

2016 Reg Fees Set

On the Friday before Labor Day weekend, the Commission released the final listing of regulatory fees for 2016. Those fees will have to be paid sometime before September 30, but as of press time for the *Memo to Clients*, the FCC had neither announced the deadline nor opened up its Fee Filer system for acceptance of reg fees.

We will be posting word about the deadline on CommLawBlog.com as soon as it's available. Be sure to check there. In the meantime, we're providing listings of the TV and radio fees that will be payable, once the FCC opens Fee Filer. (FWIW, the fees adopted by the Commission all track reasonably closely with the fees as proposed last May.)

As has always been the case, failure to pay reg fees on time can have dire consequences. Those have historically included: a late payment penalty of 25% of the unpaid amount, starting immediately after the deadline; additional processing charges for collection of late fees; and administrative penalties, such as withholding of action on any applications from delinquent parties, eventual dismissal of such applications, and even possible revocation proceedings. And this year the Commission has thrown one more consideration into the mix, a consideration aimed directly at broadcast television participants in the Spectrum Auction: "Licensees must pay the required regulatory fees to avoid any delay of payments resulting from the Incentive Auction". So if you're expecting a big pay day from the auction, it will be worth your while to double-check, maybe even triple-check, your reg fee calculations.

FY 2016 RADIO STATION REGULATORY FEES						
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	$990	$715	$620	$685	$1,075	$1,250
25,001 – 75,000	$1,475	$1,075	$925	$1,025	$1,625	$1,850
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

Digital TV (47 CFR part 73) VHF and UHF Commercial	
Markets 1-10	60,675
Markets 11-25	45,675
Markets 26-50	30,525
Markets 51-100	15,200
Remaining Markets	5,000
Construction Permits	5,000

When you're ready to pay, don't bother reaching for your checkbook. Under the electronic regime initiated a couple of years ago, reg fee payments ***must be made electronically****, i.e.*, by online ACH payment, online credit card, or wire transfer. No checks, money orders, green stamps, or anything else on paper. If you aren't familiar with the FCC's online Fee Filer system, we recommend that you not wait until the last minute to try to figure it out. It's not especially user-friendly or intuitively obvious. (Of course, if you don't feel like doing it yourself, you can always ask your communications counsel to help out.)

Once Fee Filer for 2016 reg fees is up and running – you should be able to get to it at this link once it's functioning – you'll log into the system using your FCC Registration Number (FRN) and password, generate a Form 159-E (which you'll need to tender as part of the payment process), and then get on with the payment process. (If you're paying by wire transfer, you'll have to fax in your 159-E.)

When it comes around to figuring out exactly what you owe, heads up: While Fee Filer will ordinarily list fees associated with the FRN used to access the system, the list of fees shown in Fee Filer may not be complete. (The same is true for the broadcast reg fee "lookup" page the Commission usually provides.) As a general rule, it's the payer's responsibility to confirm the fullest extent of the payer's regulatory fee obligation so double- and triple-checking other FCC databases, as well as your own records, is prudent. (Historically, this is the point at which we would remind readers not to forget about auxiliary license fees, since those could be easily overlooked. But last year the FCC eliminated the old $10 fee for auxiliaries, which takes some of the pressure off. Still, it's a good idea to be sure that you're paying all the fees you're supposed to.)

One more tip – if your ***total*** reg fee obligation comes to $500 or less, you're off the hook. You don't have to pay anything at all.

A final curmudgeonly observation, which we repeat largely verbatim from last year: The reg fee process has been in place for decades. The FCC knows that every year the fees must be collected by September 30 (*i.e.*, the end of the federal fiscal year). From 2009 to 2013, it was able to get the final fees set by mid-August each year. Why, then, has the Commission chosen to wait until the last minute this year (and last, and the year before last) to get its annual reg fee ducks in order? The FCC normally expects its regulatees to be mindful of their deadlines and to take appropriate steps to meet those deadlines. Shouldn't regulatees be entitled to expect the same of the Commission?

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essentially the same points that the Court has now rejected. The outlook obviously is not brilliant for those arguments. The *Free Access* petitioners still have a couple of additional claims involving alleged violation of the Regulatory Flexibility Act and several constitutional provisions (including a "takings" claim arising from the Fifth Amendment, a bill of attainder claim, and an "unconstitutional private delegation" claim). Those arguments, and particularly the constitutional ones, involve relatively esoteric areas of the law not often raised in FCC-related appeals. It will be interesting to see how the Court chooses to address them.

While the FCC's litigation team was probably celebrating its victory in the D.C. Circuit, developments over on the auction side of the Commission likely tempered any exuberance. In a notice posted on the Forward Auction page, the Commission announced that Stage One of the auction had concluded unsuccessfully, *i.e.*, "without meeting the final stage rule and without meeting the conditions to trigger an extended round". Disclosed elsewhere on the Auction website, the grim reason: the Reverse Auction component of the process established that the FCC could clear its initial target of 126 MHz of spectrum for a total pay-out to bidding broadcasters just north of $88 billion, but the amount of cash bid by wireless participants in the Forward Auction barely squeaked past $23 billion. In other words, a nearly 75% shortfall.

A nearly 75% shortfall appears to be Bad News both for the Commission and for broadcasters.

That, of course, appears to be Bad News both for the Commission and for broadcasters who might have thought that the FCC's sky-high initial bids could be even minimally realistic. The shortfall means that the auction will now proceed to Stage 2 (based on a 114 MHz clearing target, down from the 126 MHz target in Stage 1), starting with a second round of the Reverse Auction followed by a second Forward Auction round. And, since the Commission now has a sense of the level of proceeds it can eventually expect from the Forward Auction – a number which apparently is dramatically below $88 billion – broadcasters participating in the Stage 2 Reverse Auction can expect to see commensurately reduced bids for their spectrum from the Commission. While it is still possible that the auction will eventually generate significant proceeds for the FCC and broadcasters alike, any hyper-optimism that may have been experienced when the initial Reverse Auction bids were announced months ago has for sure been dampened substantially, if not extinguished entirely.

The Stage 2 Reverse Auction is currently set to kick off on ***September 13, 2016***; the Stage 2 Forward Auction will crank up the next business day after the conclusion of the Stage 2 Reverse Auction. The Commission will make available an online tutorial for the Stage 2 Reverse Auction bidding process sometime on September 1. Check out this public notice for further details about Stage 2.

Only broadcasters whose status was "FROZEN" in Stage 1 of the Reverse Auction – *i.e.*, their spectrum was deemed provisionally sold – will return to bidding in Stage 2. Stations that exited the auction in Stage 1 will not be eligible to return. Returning stations will generally start at a bidding level approximately where they were frozen in Stage 1, with some variations. The Commission also has announced that it has reset the base clock price $900 per unit of volume for Stage 2 of the Reverse Auction, with a station's "volume" based on service area and population served. Also, the price will initially decline by five percent of the reset base clock price as the auction moves to the next round of Stage 2.

Returning bidders need to have held on to their bidding tokens from Stage 1, and only those bidders who have the proper "FROZEN" status will be able to access the Commission's auction system. That access won't start until September 7.

In the meantime, the FCC has reminded all full-power and Class A broadcast television licensees that they remain subject to the Commission's rules prohibiting certain communications in connection with Commission auctions until the completion of the Incentive Auction as announced by the Commission by public notice. A party that is subject to the prohibition remains subject to the prohibition regardless of developments during the auction process. In addition, though communicating whether or not a party filed an application does not violate the rules, communicating that a party "is not bidding" in the auction could constitute an apparent violation that needs to be reported.

It is essential to recognize that this prohibited communication rule still applies even if you ceased bidding or otherwise exited the auction – if you participated by accepting even the opening bid, it applies to you.

With one auction round under its belt, the Commission will likely be inclined to speed things up in Stage 2 (and any additional stages beyond that). Still, it seems unlikely at this point that the auction process will be completed before November, or even by the end of the year. But you never know.

Check back with CommLawBlog.com for further updates.