

Memorandum to Clients

March 2017

No. 17-03



Commissioner Mignon Clyburn said February 3 was apparently “take out the trash day.”

Pai Starts Rolling Back Wheeler Media, Telecom Items

By FHH Law

Under new Chairman Ajit Pai, the FCC has begun rescinding decisions made in the waning days of Tom Wheeler’s Chairmanship (and one older decision). The flurry of action involving bureau decisions being reversed or rescinded includes guidelines for the processing of broadcasters’ joint sales and shared services agreements, political ad disclosure complaints, zero ratings probes and Lifeline Broadband Provider designations.

In revoking what he called “Midnight Regulations,” Pai said: “These last-minute actions, which did not enjoy the support of the majority of Commissioners at the

FCC Chairman Ajit Pai said: “These last-minute actions, which did not enjoy the support of the majority of Commissioners at the time they were taken, should not bind us going forward.”

time they were taken, should not bind us going forward. Accordingly, they are being revoked.”

In connection with media regulation (and in the one action that revoked an older decision), in a terse [Notice](#) the agency said it rescinds “in its entirety and effective immediately,” guidance provided in a

March 12, 2014 notice titled “[Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests](#).” That 2014 guidance has applied greatly heightened scrutiny

to any proposed transactions involving sharing arrangements.

NAB was pleased, noting that Chairman Pai is “eliminating unlawful and arbitrary processing guidelines governing broadcast joint sales and shared service agreements.” The regulations “punished smaller broadcasters trying to conserve resources to reinvest in localism and high quality programming,” according to the broadcast trade association. Some brokers believe this is a first step towards jumpstarting broadcast M&A.

The Media Bureau [set aside](#) its January decisions concerning 12 stations involving [political ad disclosures](#), saying the matters are more appropriately addressed at the full Commission level. The complaints now return to pending status.

NAB called the earlier order “unlawful” and said “the appropriate place for consideration of new rules and regulations is at the Commission level and not through orders applying to individual parties.”

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FCC Drops 40-Mile FM Translator Siting Cap for AMs

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As anticipated, the FCC adopted at its February 23 meeting a rule change to ease FM translator siting restrictions for AM owners. (The FCC signaled previously that such a change was forthcoming by releasing a draft decision three weeks before the meeting at which the item was voted upon. That release was part of an experiment to increase transparency in the agency's rulemaking process led by new Chairman Ajit Pai.) The rule change, enacted through the "[Second Report and Order](#)" (2nd R&O) in the AM revitalization docket, concerns only where an FM translator used as an AM fill-in may be located. The Commission states in the document the

agency has now opened and closed two filing windows in which more than 1,000 applications were granted

so AM owners could acquire and move FM translators to increase their signal coverage. Because of the strong need for siting flexibility, the FCC acted on this proposal now. Action on other AM revitalization proposals will come later.

Under the previous rule, an FM translator rebroadcasting an AM station must be sited so that the 60 dB μ contour of the FM translator is contained within both (a) the 2 millivolts per meter (mV/m) daytime contour of the AM and (b) a 25-mile radius centered at the AM transmitter site.

Many stations and engineering consultants told the FCC that the old rule was too restrictive. Some said the previous standard disadvantaged AM stations employing directional signals with deep signal nulls, resulting in a 2 mV/m contour extending only a short distance from the transmitter site. Others argued that the current limitations made it difficult for AM stations whose transmitters are located far from their communities of license, because of high real estate costs,

to site translators so they can serve their communities of license.

Taking all of these views into account, the FCC has changed the standard to the greater of either the 2 mV/m daytime contour or a 25-mile radius centered at the AM transmitter site.

Significantly, the FCC dropped an accompanying proposal that would have prohibited the translator's 1 mV/m coverage contour from extending beyond a 40-mile (64 km) radius centered at the AM transmitter site, even if the AM station's 2.0 mV/m contour stretched past the 40-mile barrier.

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In declining to adopt the 4-mile limit, the Commission took note of commenters who cited instances

in which "substantial covered populations lie within an AM station's 2 mV/m daytime contour but more than 40 miles from the station's transmitter." The Commission rejected the argument that dropping the limit would allow some AMs to unfairly extend their core service area. The FCC disagreed, saying it already held that the 2 mV/m contour in all cases constitutes an AM station's primary service area.

The upshot? Section 74.1201(g) of the rules has been changed so that, when the new rule goes into effect, an FM translator rebroadcasting an AM station must be located so that the 60 dB μ contour of the FM translator is contained within the greater of either (a) the 2 mV/m daytime contour of the AM station – no matter how far that contour falls from the transmitter site – or (b) a 25-mile radius centered at the AM station's transmitter site – even if the translator's 60 dB μ contour is not within the AM station's 2.0 mV/m contour.

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Incentive Auction Update: Quiet Period Partially Lifted, Channel Reassignments Coming, M&A Gold Rush Begins

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After teasing that such relief was coming, the FCC has confirmed a partial waiver of the limitations on communications for reverse auction participants. In other words, broadcasters who participated in the auction, regardless of whether they were successful bidders or will remain on the air, are now free to communicate with all parties about their status.

This relief comes at a critical time when the post-auction repack transition is about to get underway. Stations are now free to discuss future plans for repacking, as well as enter negotiations for sales, acquisitions and channel shares, without threat of violating the FCC’s anti-collusion rules. The one caveat to keep in mind: forward auction participants are still forbidden from divulging their bids or bidding strategies, so should not call up carrier and ask (directly or indirectly) if they are market.

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The FCC also announced the mailing to broadcasters of confidential letters to

that are subject to repacking, or elected to move to a VHF or lower-VHF channel, of their new channel assignments, technical parameters and the transition phase to which they will be assigned. If you have not received your letter, please contact us ASAP.

announced the casters of confidential letters to

This is being done in confidence as the official determination of channel reassignments will not be final until the Incentive Auction is complete, which will be signaled only by the release of the *Auction Close and Channel Reassignment Public Notice*. That notice is not expected for at least until sometime in late March or early April.

The [Public Notice](#) also provided some additional guidance for stations wondering how station sales and acquisitions will be processed while the auction is still technically pending. The Commission advises that stations may enter into agreements and file applications seeking consent to assignment, but cautioned that transactions would not be permitted to close until after the official end of the auction.

To learn other post-auction changes the Commission recently announced, see page 4.

Finally, the Public Notice also reminded broadcast licensees of changes to the Commission Registration System (CORES) which is used to assign FCC Registration Numbers (FRNs). FRNs are required to do business with the FCC. These changes will require all licensees to create a new CORES log-in and password, which they can then associate with their existing FRNs.





Media Bureau Adopts Post-Auction Policies and Procedures for Stations Transitioning to New Channels Following the Broadcast Incentive Auction

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On January 27, 2017, the FCC’s Media Bureau released two Public Notices announcing: (1) a methodology for establishing construction deadlines for post-incentive auction facilities; and (2) instructions and proposed deadlines for filing applications related to the post-incentive auction broadcast transition. Although these public notices provided transitioning stations with some much-needed clarity regarding the post-auction process, the Bureau’s attempt to provide broadcasters with a highly sought-after explanation regarding the boundaries of the transition’s prohibited communications rule appears to have been less successful.

Post-Auction Construction Methodologies

In this [Public Notice](#), the Media Bureau adopted a methodology to establish construction deadlines for full power and Class A television stations to transition to new channels following the incentive auction. The methodology adopted by the Bureau was largely based on the transition plan proposed in the [Transition Scheduling Proposal Public Notice](#) – including the usage of the Phase Assignment Tool, and the Phase Scheduling Tool.

Phase Assignment Tool: The Bureau stated that once the forward auction satisfies the final stage rule and the final channel assignments are determined, the Bureau would use the Phase Assignment Tool to assign a transition phase to each transitioning channel. The tool will rely upon eight “Constraints” and four “Objectives” to minimize problems, and ensure that the 600 MHz band is cleared as quickly as possible.

The Media Bureau adopted a methodology to establish construction deadlines for full power and Class A television stations to transition to new channels following the incentive auction.

Furthermore, the Bureau made two alterations to the Constraints proposed in the *Transition Scheduling Proposal Public Notice*. First, the Bureau neglected to adopt as a Constraint a prohibition on temporary channel assignments. Instead, the Bureau stated that it would allow stations to voluntarily seek the use of a temporary channel at any time during its assigned phase transition period. Second, the Bureau adopted the NAB’s suggestion that, as an alternative to capping aggregate temporary interference levels at 5%, the Bureau will instead attempt to find alternative phase assignments for stations predicted to receive greater than 5% temporary aggregate interference.

Phase Scheduling Tool: Additionally, the Bureau adopted several time and resource estimates for the Phase Scheduling Tool, enabling the Bureau to estimate the average amount of weeks it will take all stations in a phase to complete their transition. These variables would be dispersed

across two stages as follows:

- **Pre-Construction Stage:** These categories cover the time and resource estimates for the work stations need to complete prior to constructing post-auction facilities on their towers, including: (1) the time required for antenna equipment to be ordered, manufactured, and delivered; and (2) the time required for all other planning and administration activities necessary to prepare for construction.
- **Construction Stage:** (1) the time to complete all general facets of construction (i.e., “Construction Related Work”); and (2) the time required by tower crews to install equipment on towers. The Bureau, however, noted

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Pai’s FCC Sends Paper Correspondence File Rules Packing

By FHH Law

Commercial broadcasters soon will not need to keep paper copies of viewer and listener correspondence about station operations in their public inspection files. The FCC voted 3-0 on January 31 to eliminate the requirements at its first public meeting under new Chairman Ajit Pai. The [Order](#) also resolves a security issue for stations because they will no longer be required to keep their main studio open for anyone who walks in off the street who asks to see the public file, which will now be entirely available online.

The eliminated rules, which stem from 1973, also required cable operators to maintain and allow the public to inspect the location of each cable system’s principal headend; that’s going away as well, though operators must still provide principal headend location information to the FCC, broadcasters and franchisors upon request.

Commissioner Mignon Clyburn said at the meeting she met with four broadcast owners at the NAB/RAB Radio Show in the fall and asked about the issue; they told her hardly anyone ever asks to see the public file.

Chairman Pai said when he visited KKOW(FM), Pittsburg, Kansas, a station he listened to growing up, personnel “laughed” often people ask to see were maintained in nets with paperwork al years. “But they about the burden of file with the station’s said.

The abolished public file requirements will not officially go away until the changes are approved by the Office of Management and Budget.

when asked how the files that “huge” file cabi-going back sever-didn’t laugh maintaining” the small staff, he

Pai characterized the Order as “taking a few steps towards modernizing our rules” and said that it will allow stations like KKOW “to send those clunky file cabinets packing.”

The rules were the last remaining hold-over from when broadcasters were required to maintain paper public inspection files. Television owners began migrating their station public files online in 2012 and completed the move in July 2014; The Commission expanded the move from paper to online public files for radio, cable and satellite operators in January 2016 (although the roll-out of the new requirements will not be complete until 2018). Due to privacy concerns, however, correspondence from the public could not be posted online, and as a result, broadcasters had to continue to maintain a “hard-copy” file at the main studios.

The abolished public file requirements will not officially go away until the changes are approved by the Office of Management and Budget. Once the revised rules are in effect, viewers and listeners will still be able to contact their stations, by phone and online; those contacts just won’t be included in the stations’ public files. Viewers and listeners can also file petitions or objections to a station’s performance at license renewal time.





The transition will be completely voluntary.

ATSC 3.0 NPRM Adopted

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The FCC has adopted its anticipated Notice of Proposed Rule Making looking toward allowing television broadcasters to transition from the present ATSC 1.0 technical standard to the new, recently developed ATSC 3.0 standard. ATSC 3.0 is Internet Protocol (IP) based and offers many potential benefits, including both multiple broadcast streams and non-broadcast IP services; but it is not compatible with existing receivers, so viewers will have to buy add-on devices or new TV sets to receive the new services.

The transition will be completely voluntary. No station will have to convert to ATSC 3.0, and no multi-channel video program distributor (MVPD, cable or satellite) will have to carry an ATSC 3.0 signal under must-carry rules. The FCC has also tentatively concluded that it will not mandate that ATSC 3.0 reception capability be built into television receivers.

However, the FCC has proposed some roadblocks that impose burdens that may keep some broadcasters from making decisions in a completely free marketplace.

First, and most importantly, every TV station that converts to ATSC 3.0 will be required to continue to provide ATSC 1.0 service. Because a given facility can broadcast in only one standard, that means that ATSC 3.0 cannot be implemented unless the converting station enters into an agreement for carriage of its programming in ATSC 1.0 by some other station that is not converting; in other words, some stations have to stay willing to host their competitors. (Duopoly owners, however, could potentially operate one station in each standard, avoiding the need to negotiate with, or involve, third parties). No station will be required to agree to serve as an ATSC 1.0 host, nor will the FCC regulate how much the host station may charge for its services or whether it may charge different amounts to different stations.

The FCC has also tentatively concluded that it will not mandate that ATSC 3.0 reception capability be built into television receivers.

Second, MVPD must-carry rights will apply to only the ATSC 1.0 service. The FCC asks whether it should permit TV stations that have elected retransmission consent to demand ATSC 3.0 carriage as part of their negotiations with MVPDs. Since most TV stations deliver their signals to MVPDs over fiber or microwave in an IP format that is neither ATSC 1.0 nor ATSC 3.0, we are not sure why the FCC is so concerned about this issue, other than the fact that they have been pressured by MVPD interests to block broadcaster pressure to carry ATSC 3.0 streams.

Finally, stations will be obligated to undertake, and absorb their own costs for, a consumer education program with announcements warning viewers about the migration of their ATSC 1.0 service to another station.

The FCC is concerned that viewers not lose any services they now enjoy, so requirements for children's programming requirements by full power and Class A stations and local programming by Class A stations will apply to ATSC 3.0 broadcast streams. This new concern about loss of service to the public

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Second Circuit Gives Belated Valentine's Day Gift to Music Licensees by Ruling for Sirius XM Regarding Its Use of Pre-72 Sound Recordings

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We previously told you about the [Christmas gift](#) that New York's highest state court had given to licensees that play "oldies" recordings by finding that the owners of those recordings had no right to demand payment when the recordings were publicly performed in New York. That ruling came in one of many lawsuits that Flo & Eddie – a company owned by two members of The Turtles (of "Happy Together" fame) – had filed against Sirius XM Radio challenging Sirius XM's use of sound recordings created before February 15, 1972.

[Recall that February 15, 1972 is a magic date because sound recordings fixed on or **after** that date are protected by federal copyright law. Sound recordings fixed **before** that date are protected – if at all – under the widely varying state copyright laws, with state-law protection expiring on February 15, 2067.]

The Second Circuit has now followed suit by giving licensees a belated Valentine's Day gift – it has found for Sirius XM on each of Flo & Eddie's claims, which ends Flo & Eddie's New York lawsuit.

Flo & Eddie had not merely challenged Sirius XM's performances of pre-72 recordings under New York copyright law. It also had challenged Sirius XM's making of internal copies of those recordings to facilitate the performances under New York copyright law and had alleged that Sirius XM's use of pre-72 recordings amounted to "unfair competition." The Second Circuit gave short shrift to both of these claims, citing its holding earlier in the case that the resolution of those claims "is bound up with whether" Sirius XM's public performances were permissible under New York law. Given the New York high court's ruling that they were, the Second Circuit

ordered the district court to enter judgment for Sirius XM and dismiss the case.

The court's decision to let Flo & Eddie's claims rise and fall together was a good one. It makes little sense to hold Sirius XM liable for making internal copies of recordings whose very purpose was to enable the performances that have now been ruled lawful in New York. The market value of a sound recording comes from hearing it, and the public cannot hear Sirius XM's internal copies of recordings unless they are played – a lawful activity in New York. It also makes little sense to hold Sirius XM liable for unfairly appropriating recordings under New York unfair competition law if Flo & Eddie have no underlying property right to bar Sirius XM from performing them.

While the Second Circuit's decision ends the lawsuit in New York, it does not end Flo & Eddie's litigation against Sirius XM – there are still open cases in California and Florida. In California, the parties have reached a settlement, which the district court preliminarily approved on January 27, 2017. That settlement defines Sirius XM's monetary liability but includes adjustable amounts depending on the outcomes of the New York and Florida cases. (The Second Circuit's ruling will reduce how much Sirius XM has to pay under that settlement and will be music to Sirius XM's ears, both literally and figuratively.)

In Florida, the case is tracking the pattern followed in the Second Circuit – the Eleventh Circuit has asked the Florida high court to weigh in on the key public performance question. Oral argument in that case has been scheduled for April 6, 2017. We'll continue to follow this issue, so stay tuned.





This .RADIO Pre-Launch allocation process could raise serious problems for U.S. broadcasters.

.RADIO Domain Names Available Soon, But Many Unanswered Questions about Availability

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After many years of preparation, the roll-out of .RADIO domain names will finally be underway shortly. The news has potential for broadcasters worldwide (for example, you could have *Nashvillehits.radio* as your URL.) Yet there are many unanswered questions about how .RADIO domain names will be allocated and what happens when multiple parties want the same name. This article provides an overview of the history of the .RADIO ownership disputes, new dates recently announced by the European Broadcasting Union (EBU), and questions that the EBU still needs to answer about the .RADIO domain name roll-out ahead.

Quick Background

In 2012, the EBU applied to the Internet Corporation for Assigned Names and Numbers (ICANN) for the rights to operate .RADIO (ICANN manages the Domain Name System and assigns Generic Top Level Domains, such as .RADIO, by contract). Three other applicants for .RADIO sought .RADIO: large top level domain name registries Afilias and Donuts, as well as George Bundy's BRS Media (well known for its management of .FM and .AM). It took [four years of fighting](#) but, on May, 18, 2016, EBU won when its competitors withdrew their objections against the EBU's .RADIO application.

The main reason that the EBU won (or "prevailed in the contention set," per ICANN lingo) is because it was the only registry to apply for .RADIO as a "Community-based" Top Level Domain. This is a special category of applications created by ICANN to allow representatives of well-known, well-contained communities to offer domain names designed to closely serve those communities. In its application to ICANN, the EBU promised to make .RADIO into "a platform through which radio broadcasters and other radio industry stakeholders worldwide will collaborate to promote audio content distribution and community-wide services, promoting quality and competition in the public interest, for the benefit of listeners and Internet users."

The EBU promised to serve not only its own European members, but the worldwide broadcasting community. In fact, the EBU submitted its application with the support of worldwide broadcasting organizations, including NABA (North American Broadcasters Association).

New Information

The EBU recently issued a [new webpage](#) laying out its plans for .RADIO domain name launch. There are three key issues of note to interested broadcasters (and others who might be eligible for .RADIO):

Registrants — Who will be allowed to register a domain name in .RADIO?

The EBU writes that it will accept certain categories of radio use for .RADIO domain name registration, specifically:

- "Radio broadcasting stations"
- "Unions of Broadcasters," such as the EBU itself
- "Internet radios"

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The saga of the Commission's attempts to revise its ownership reporting requirements for non-commercial broadcasters is still unresolved.

Under New Leadership, FCC Media Bureau Reverses January Decision on Reconsideration of NCE Ownership Reporting Requirements

*By Daniel Kirkpatrick
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Back in early January, the FCC's Media Bureau released an [Order](#) denying a number of Petitions for Reconsideration of an earlier Bureau Order that had adopted new requirements regarding FCC Registration Numbers ("FRNs") and "Restricted Use FRNs" ("RUFNRNs") used in broadcasters' biennial ownership reports. The Petitions had objected to application of certain new FRN and RUFNRN requirements to non-commercial licensees. [As we reported at the time](#), the Bureau's decision drew swift and vocal criticism from Commissioner O'Rielly and Commissioner (now Chairman) Pai, who rebuked the Bureau for adopting an Order that, due to the change in administration, no longer was supported by a majority of Commissioners.

That January Bureau Order has now been reversed. In an extremely terse [Order](#), the Bureau (now headed by a new Acting Chief appointed by new Chairman Pai), determined that the Petitions for Reconsideration dismissed and denied by the Bureau in January should, in fact, be handled at the Commission level. Accordingly, the Petitions have now been "returned to pending status" for full Commission consideration.

As we predicted in January, the saga of the Commission's attempts to revise its ownership reporting requirements for non-commercial broadcasters is still unresolved. All indications, however, are that the current Commission may very well reach a different decision than did the Bureau in January and in its underlying 2016 Order.

Renewed Push for FM Class C4

By FHH Law

What may happen to the petition to create an [FM Class C4 designation](#) under FCC Chairman Pai's leadership? Readers may recall SSR Communications CEO Matthew Wesolowski and the Minority Media and Telecommunications Council petitioned the FCC in 2013 to add a [new FM class](#) in between Class A and Class C3. The proposed class would feature maximum ERP of 12 kW and maximum antenna height of 100 meters.

"The 12 kW Class C4 allocation would fill in the gap of the currently incompatible maximum effective radiated power relationship between FM Class A and FM Class C3," said station owner Wesolowski, who's also an engineer, in his petition. "Every adjacent FM 'C Class' allocation's power level is 3.0 dB from the next (C3 to C2, C2 to C1, et cetera), while Class C3's 25 kW is slightly more than 6 dB higher than Class A's 6 kW. A 12kW authorization would be about 3.0 dB between either A or C3."

Last fall, Commissioner Pai spoke at the NAB Radio Show about the concept, saying he thought the idea is worth considering. "An NPRM would allow us to ask the right questions, explore the advantages and

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Laura Stefani Is Now a Member of FHH

Fletcher, Heald & Hildreth is pleased to announce that Laura Stefani has become a member of FHH. She came to the firm in 2014 as Of Counsel. Her promotion became effective as of January 1, 2017.

Her primary professional focus has been emerging technologies and spectrum use. She has considerable experience with unlicensed wireless technologies, RF equipment issues, and spectrum sharing, as well as with a broad range of licensed wireless services. She has represented clients before the FCC, NTIA and other federal agencies with respect to wide range of regulatory matters such as spectrum allocation and sharing, equipment authorizations and enforcement issues.

Laura is a graduate of the George Washington University School of Law. She got her BA in Economics (*magna cum laude*, in fact) from Lawrence University (home of the Lawrence Vikings). Her senior thesis focused on public policy agenda setting.

Laura lives in Washington, D.C. with her son and an escape-artist beagle named Polly. When she's not in the office, she generally can be found hiking, biking, running, kayaking, or engaging in any other activity that keeps her outside.



FM Class C4 — (Continued from page 9)

disadvantages of the proposal, and receive the views of all stakeholders," Pai said at the time, according to prepared remarks.

Recently, MMTC President Emeritus and Senior Advisor David Honig discussed the proposal in a letter to Chairman Pai and fellow Commissioners Mignon Clyburn and Michael O’Rielly. The Commission previously invited public comments on the [Petition for Rulemaking](#) (RM-11727) and Honig stated that nearly 800 Class A FMs could potentially “double their power from 6,000 watts to 12,000 watts, and allow hundreds of stations of all classes to improve their technical facilities without impacting the protected signal contours of neighboring stations.” Honig asked the Commission to issue a NPRM on the initiative, noting that “Under the current regulatory environment, many independent and minority-owned stations are and will be forever unable to upgrade their facilities,” without the C4 classification.

Given the speed at which Chairman Pai is making decisions, we should know soon what the state of this petition is. FHH can help you decide if the new allocation would affect you.

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Rollback — (Continued from page 1)

Regarding telecom actions, the agency [set aside](#) a “Zero Rating” report that had been issued under the previous administration criticizing AT&T and Verizon for allegedly favoring their own mobile video services over competitors by allowing customers to watch their video services on mobile phones without counting against monthly data caps. The FCC said that it’s closing Wireless Telecommunications Bureau investigations into AT&T Mobility, T-Mobile, and Verizon Wireless which could have eventually resulted in further sanctions or limitations for alleged Net Neutrality and 5G security rules violations. “The Bureau now sets aside and rescinds the Policy Review Report and any and all guidance, determinations, and conclusions contained therein, including the document’s draft framework. The [Policy Review Report](#) will have no legal or other effect or meaning going forward,” the agency said.

Chairman Pai said: “Free-data plans have proven to be popular among consumers, particularly low-income Americans, and have enhanced competition in the wireless marketplace.” In the future, the FCC “will not focus on denying Americans free data. Instead, we will concentrate on expanding broadband deployment and encouraging innovative service offerings.”

For its part, the Wireline Competition Bureau reconsidered earlier orders and [revoked the Lifeline Broadband Provider designation](#) for nine entities — Spot On Networks LLC, Boomerang Wireless LLC, KonaTel Inc., STS Media, Inc., Applied Research Designs, Inc., Kajeet Inc., Liberty Cablevision of Puerto Rico, LLC, Northland Cable Television, Inc., and Wabash Independent Networks, Inc. The Bureau found that reconsideration of the decisions released in December and in January would promote program integrity “by providing

the Bureau with additional time to consider measures that might be necessary to prevent further waste, fraud, and abuse in the Lifeline program.” The move returns their petitions for Lifeline designation to pending status before the bureau and removes them from streamlined treatment.

Commissioner Mignon Clyburn, however, the lone Democrat on the Commission — whose party was in the majority when the items being revoked on February 3 were initially issued — especially disagreed with the Lifeline action, saying it widens the digital divide. “By eliminating the designations of nine entities to provide Lifeline broadband service, the Bureau has substantially undermined businesses who had begun relying on those designations. These providers include a minority-owned business, a provider enabling students to complete their homework online, and others serving Tribal lands.”

The actions suggest that the comradery displayed in the first Open Commission Meeting under Pai on January 31 may be short-lived. Commissioner Clyburn said February 3 was apparently “take out the trash day.”

“In the past, then-Commissioner Pai was critical of the agency majority for not providing sufficient reasoning behind its decisions,” said Clyburn. “It is a basic principle of administrative procedure that actions must be accompanied by reasons for that action, else that action is unlawful. Yet that is exactly what multiple Bureaus have done.”

The Commissioner said that her office asked for more than the allotted two days to review the latest decisions but did not receive extra time – “it is disappointing to see this Chairman engage in the same actions for which he criticized the prior Chairman.”



40-Mile FM Translator Siting — (Continued from page 2)

The new rule will not go into effect immediately. First, it must go to the Office of Management and Budget for review under the Paperwork Reduction Act. Then, after OMB approval, the FCC will announce the effective date in Federal Register notice.

CommLawBlog will keep you apprised of developments. Contact us if you have questions.





***Post-Auction Policies
and Procedures*** – (Continued from page 4)

that these time and resource estimates would not account for delays created by weather.

These variables will enable the Bureau to simulate how long it will take all stations in each phase to obtain access to limited resources, and to complete their transitions. The Bureau will run the Phase Scheduling Tool 100 times to generate the average number of weeks required for phase completion, which in turn will enable it to project the completion dates for each phase.

Finally, in the Public Notice, the Bureau attempted to provide transitioning broadcasters with some much-needed clarification of the scope of the prohibited communications rule – which prohibited broadcasters and forward auction applicants from communicating information regarding an applicant’s bids and bidding strategies to other covered parties. Specifically, the Bureau stated that broadcasters may communicate with third parties not covered by the rule (*e.g.*, consulting engineers, equipment vendors, and counsel) – even if doing so discloses bids or bidding strategies – so long as the third party did not convey such information to another covered party.

Later, the FCC granted broadcasters a waiver from the ban. See other story (POSITION).

Post-Incentive Auction Applications

In the second [Public Notice](#), the Bureau announced instructions and projected deadlines for filing applications related to the post-auction facilities. The Bureau stated that transitioning stations will have 90 days from the *Closing and Reassignment Public Notice* release date to file construction permit applications for operations on post-auction channels – with subsequent opportunities to file construction permit applications for alternate channels or expanded facilities on new channels. The Bureau provided information and application instructions depending on several station categories, including: (1) Reassigned Stations; (2) Band Changing Stations; (3) Non-

Reassigned Stations (with greater than 1% population loss); (4) Displaced Class A Stations; (5) License Relinquishment Stations; (6) Channel Sharing Stations; and (7) Multichannel Video Programming Distributors (“MVPDs”).

The Bureau further noted that all transitioning stations are required to complete construction of post-auction facilities and notify viewers of impending channel moves by the end of their transition period. Once stations become operational on their new channels, they must file a license application to cover their new post-auction facilities. However, the Bureau also stated that applications for extensions of time, requests for Special Temporary Authority (“STAs”), and requests for waivers of deadlines to discontinue pre-auction operations would be granted on a case-by-case basis – and that applications/requests unlikely to delay or disrupt the transition will be viewed more favorably.

Finally, the Bureau outlined in the Public Notice the post-auction reimbursement process for transition costs incurred by reassigned stations and MVPDs. The Bureau clarified that involuntarily reassigned stations and MVPDs that incur costs for carrying reassigned stations are eligible to receive reimbursement for reasonable costs or may request a waiver of the Commission’s service rules permitting the station to provide non-broadcast television services. Such waivers must be filed by eligible stations within 30 days of the release of the *Closing and Reassignment Public Notice*. The Public Notice also reaffirmed that costs for third party stations affected by transitioning stations (*e.g.*, collocated FM stations) are eligible for reimbursement if a contract existed as of June 2014.

While the two public notices provide a comprehensive framework for stations transitioning to post-auction facilities, the Media Bureau advised stations involved in the Incentive Auction to stay tuned for any updates that may affect their transition requirements and obligations as a result of obstacles encountered during the progression of the post-auction transition period.

(Continued on page 11)



ATSC 3.0 NPRM Adopted – (Continued from page 6)

contrasts rather starkly with the position the FCC took during the recently concluded incentive auction that there would be no harm to the public if a community were left with no public television, or no television station at all, as a result of station shut-downs after the auction. (In the end, few enough stations were bought in the auction that it is not likely that any community will be left without any service.)

The Commissioners have expressed considerable excitement about the potential of the new technology, including hyper-local content directed to sub-zones of a station's service area and the numerous benefits of IP format transmission. However, they may not recognize some of the complexities they have put on the table. For example, concern was expressed over loss of high definition (HD) ATSC 1.0 service. If stations convert to ATSC 3.0 and move their ATSC 1.0 service to another station acting as a host, there may not be enough room for continuation of ATSC 1.0 services in HD rather than standard definition (SD) format, because one station can normally accommodate only two HD streams. In addition to technical concerns, compressing signals onto a single ATSC 1.0 host will create business issues that will need to be worked out between stations and their program providers (e.g. networks and syndicators). Moreover, Commissioner Clyburn expressed concern about the loss of diverse programming now carried on ATSC 1.0 subsidiary streams (dot 2, dot 3, etc.). Will the FCC require all ATSC 1.0 streams to be moved to a host station? If so, there will likely not be room for all the streams, and the conversion to ATSC 3.0 will be stymied.

The draft NPRM that we saw included Class A and low power television (LPTV) stations in the proposal, rather than leaving those stations out of the transition until later (LPTV was left out of ATSC 1.0 digital transition until after full power rules were in place). However, the problem of finding a host for ATSC 1.0 service may be more difficult for LPTV stations than for full power stations, as not all communities have enough LPTV stations to serve as hosts to accommodate many streams, and many LPTV stations transmit 4 or more program streams that would be too numerous to accommodate on a host station in anything but a low-grade SD format.

In other words, the FCC is not really ready to let television evolve in a completely free marketplace. But with the recent resurgence of over-the-air viewing, and the ability of ATSC 3.0 to reach ever more pervasive mobile receivers, should the TV industry instead be left completely free to use their best judgment all around? Will the demands and preferences of viewers and advertisers act as sufficient constraints to allow the FCC to take a fully "hands-off" approach? These questions and others will undoubtedly be addressed in comments on the NPRM.

The deadline for comments in GN Docket No. 16-142 will be known when the NPRM is published in the Federal Register.

If you have any questions about the FCC's proposals or the potential benefits and detriments of converting to ATSC 3.0, FHH attorneys stand ready to help.



Deadlines!



April 1, 2017 –

EEO Public File Reports - All radio and television stations with five (5) or more full-time employees located in Delaware, Indiana, Kentucky, Pennsylvania, Tennessee, and Texas must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. 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 paper public file for the time being. For all stations with websites, the report must be posted there as well.

EEO Mid-Term Reports – All radio stations with eleven or more full-time employees in Texas, and all television stations with five or more full-time employees in Indiana, Kentucky, and Tennessee must electronically file a mid-term EEO report on FCC Form 397, with the last two EEO public file reports attached.

April 10, 2017 –

Children's Television Programming Reports - For all commercial television and Class A television stations, the first quarter 2017 children's television programming reports must be filed electronically with the Commission.

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, including those limits related to the on-air display of website addresses, or other evidence to substantiate compliance with those limits, must be uploaded to the online public inspection file.

Issues/Programs Lists - For all commercial and noncommercial 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 paper file for the time being. Television and Class A television stations will continue upload them to the online file.

Class A Television Continuing Eligibility Documentation – The Commission requires that all Class A Television stations 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.





.RADIO Domain Names — (Continued from page 8)

- “Radio Amateurs”
- “Radio professionals (journalists, radio hosts, DJs, ...)” and
- “Radio-related companies selling radio goods and services.”

Thus, all U.S. broadcasters licensed by the FCC (and others involved in the radio industry, including individuals) will be eligible to submit their call signs to EBU for a .RADIO domain name. **BUT NOTE:** this does not mean U.S. broadcasters will receive these domain names (as per the discussion that follows).

When will the .RADIO domain names be available?

The .RADIO domain names will actually be made available in two stages: (1) a planned “pre-launch period” exclusively for radio stations and (2) a second stage for other eligible parties.

The EBU plans a special “Pre-Launch” period from May 3 to July 5, 2017, though ICANN approval for this proposal is still pending. During this pre-launch period, registration will be by a special process. Rather than use the tried and true “first-come, first-served” method we see in .COM and so many other generic top level domains, the EBU will try to balance various interests around the world and allocate domain names to “Official Radio Operators”. As the EBU (vaguely) explains: “The .radio team will seek to optimize domain name allocation to solve contentious issues and prioritize existing radio services. The pre-launch is exclusively reserved for radio stations.”

This .RADIO Pre-Launch allocation process could raise serious problems for U.S. broadcasters. If the call sign allocation pattern of other countries is the same (or similar), multiple stations around the world may want the same domain name, e.g., WXYZ.RADIO. To whom will the EBU register the domain name? We asked EBU representatives whether other countries have similar call sign allocation patterns, and what will happen when two broadcasters in two different countries with two different licenses seek the same domain name? No answers have been forthcoming. We will continue to ask, investigate and provide insight and answers. Radio stations interested in participating in the pre-launch should be prepared for anything and should consider consulting an attorney with experience in ICANN matters.

The EBU is planning to have a second part of the pre-launch rollout from August 20 to November 1, 2017. Domain name registrations will be open to: unions of broadcasters, Internet radio, radio amateurs, professionals and companies and trademark owners (the latter being a specially protected group under ICANN rules.)

We will share additional details on both phases as the plans become approved and clarified.

How much will .RADIO domain names cost?

While domain names in the “new generic top level domains” of .MEDIA, .PHOTO, .CAR and .FLOWERS are generally higher than the original generic top level domains (.COM, .ORG and .NET), domain names in .RADIO will be higher still. EBU’s website states that “for companies, we expect typical prices between 200€ and 250€ per domain each year.” That’s \$213 to \$267 a year.

CommLawBlog will continue to monitor the roll-out of .RADIO domain name and seek answers to important questions U.S. broadcasters will need to know. Please don’t hesitate to contact us with any questions.



FHH - On the Job, On the Go

On February 7th **Frank Montero** co-hosted the High Tech Policy and Awards Luncheon during the MMTTC Broadband Conference in Washington, D.C.

Kevin M. Goldberg presided over the National Press Foundation's Annual Awards Dinner on February 16 as Chairman of that organization's Board of Directors. **Frank M.** and several other FHH attorneys also attended.

Kathy Kleiman wins the prize for flying the farthest to represent FHH. She attended the ICANN Intersessional meeting in Reykjavik, Iceland, on February 14-16. There, she co-led a session on the future of policy making in the Generic Names Supporting Organization of ICANN and participated in an array of discussions about domain name registrants and policies to protect users of the domain name system. She also greatly enjoyed the unusual landscapes of Iceland!

On the west coast, **Tom J. Dougherty** traveled to Tucson, AZ for the annual meeting of the National Educational Broadband Service Association on February 20-22.

Kathleen Victory taught a session on negotiating purchase and sale agreements at the NAB Broadcast Leadership Training class in Washington, D.C. on February 26.

Frank M., Frank Jazzo, Davina Sashkin and **Matt McCormick** are attending the NAB and NASBA State Leadership Conference for the state broadcast associations in Washington, D.C. during the week of February 27th.

Davina Sashkin, Scott Johnson and **Bob Winteringham** are attending the APTS Summit in Washington, D.C., February 28.

Kathleen Victory and **Karyn Ablin** are travelling to Orlando, FL for the National Religious Broadcasters Convention. Karyn is there from Feb. 27-Mar. 3 and Kathleen plans to attend March 1-2.

Catch **Frank Jazzo** at "Satellite 2017" in Washington, D.C., March 6-9.

If you're in Denver Saturday, March 11, be sure to say hello to **Michelle A. McClure** and **Frank Montero**. They'll be attending the Colorado Broadcasters Conference. Frank is a presenter at the Awards of Excellence Gala.

Cablefax named **Frank M.** one of one of its Top Lawyers for 2017 and he will be recognized at the Cablefax Top Lawyers Awards Ceremony at the National Press Club in Washington, D.C. on March 22. Then, Frank teaches a class on "Closing on a Broadcast Station Acquisition" to the NAB Educational Foundation's Broadcast Leadership Training class on Friday, March 24, in the same city. He will travel to Ft. Lauderdale, FL as an attendee and presenter for the *Radio Ink* Hispanic Radio Conference on March 28-29, where he's also being honored with the Distinguished Leadership Award. Finally, on April 1st Frank will go to the George Washington University Law Alumni Association's Board Meeting in Washington, D.C.

