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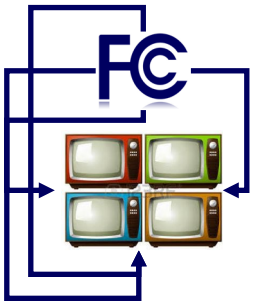
Memorandum to Clients

April 2017 No. 17-04



As with the types of Channel Sharing Agreements previously approved by the FCC, each station would still be separately licensed, maintain its call sign and remain subject to FCC rules

FCC Expands Channel Sharing Options for Post-Auction Repack

By FHH Law

To spur participation in its incentive auction, the FCC early on adopted rules allowing full-power and Class A television licensees to share a single TV channel. That gave them an option to sell their spectrum to the Commission while also staying on the air.

In 2015, the Commission expanded channel-sharing to low-power Television licensees and TV translators. The goal then was to give them alternatives if they were displaced by the auction and subsequent channel repack.

Now, the FCC has voted to further expand the channel-sharing rules among those not taking part in the auction by allowing full power and Class A stations to enter new Channel Sharing Agreements (CSAs) once their auction-related CSA ends. The changes would also allow Class A stations not subject to an auction-related CSA to channel-share with another station; and full power and Class A stations to channel-share with LPTV and TV translator stations. In a factsheet that accompanies the Report and Order that was voted on at the Open Meeting on March 23, the FCC calls these additions "logical extensions" of the agency's 2014 decision to adopt more flexible auction-related channel sharing rules.

When effective, the Order would preserve carriage rights (as they existed on November 30, 2010) for full power stations that share a channel with another station not taking part in the auction. Secondary stations like LPTV stations and TV translators, as well as the "host" sharing stations would retain their carriage rights unchanged as well, provided the "sharee" station is operating on a non-shared channel when the FCC releases its anticipated Public Notice concerning closings and channel reassignments soon after the auction closes.

Inside this issue . . .

As with the types of CSAs previously approved by the FCC, each station would still be separately licensed, maintain its call sign and remain subject to FCC rules. A Class A, LPTV or TV translator sharing a channel with a full power "host" station outside of the auction would be allowed to operate with the technical facilities of the full power station. An LPTV or TV translator in this situation would obtain a sort of "quasi" primary interference protection while the agreement lasts because the full power or Class A is a primary licensee, according to the R&O. However, a full power station sharing a Class A or secondary station's channel would need to operate at the Class A or secondary station's lower power level. Such a station would still need to satisfy

(Continued on page 7)

FAA Waivers May Be Required

Drones for Tower Inspections? Lookout for FAA Regulations

By Laura Stefani
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Last summer, the Federal Aviation Administration (FAA) issued its first regulations allowing commercial flights of small unmanned aircraft (sUAS, colloquially known as drones). As we reported, those rules place a number of restrictions on flying drones for commercial use, although the agency provided the opportunity to obtain waivers of some rules.

For tower owners and inspectors, there is a growing appeal for using drones to perform inspections – and perhaps someday, when the technology is ripe, to actually make repairs. Given the risks involved in climbing towers, the ability to substitute a machine for a human makes sense.

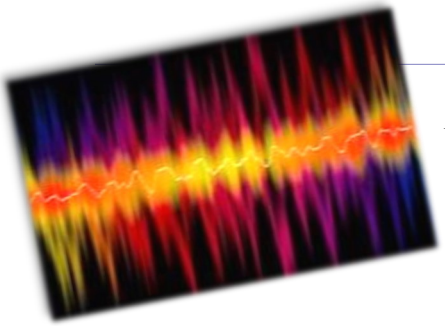
But be aware that the current FAA rules will restrict tower inspections by drones in certain situations. For one, there currently is a 400 feet altitude restriction on commercial drone flights, *unless* the operator is able to fly the UAS within a 400 foot radius around a structure and does not fly higher than 400 feet above the top of that structure. The current rules also restrict drones to certain airspace without prior authorization from the local air traffic control (ATC), namely "Class G" airspace. Class G airspace, uncontrolled by ATC, is essentially low-altitude airspace away from airports (the required distance depends on the size and type of airport, with the greatest areas of protection around the largest airports).

For tower owners and inspectors, there is a growing appeal for using drones to perform inspections – and perhaps someday, when the technology is ripe, to actually make repairs.

In sum, urban areas are generally blanketed with controlled airspace. Many towers located in urban areas and near airports cannot be inspected by drones without prior ATC authorization. And even if prior ATC authorization is requested, some airspace, such as the protected airspace over Washington, D.C., as well as near military bases and other sensitive government locations, will essentially always be restricted. (One more point to consider – Notices to Airmen (NOTAM) also list locations where there are temporary flight restrictions.)

Other rules that may impact tower inspections include restrictions on flights over people, flights outside of daylight hours, and flights beyond line-of-sight. The FAA has set out a means of obtaining certificates of waiver of these rules and certain others, which will require the right set of facts demonstrating that a particular flight can be conducted safely.

And as always, fly safe, and lawful, out there. And please contact us if you think you may need a waiver of these FAA rules or have questions on this process.



The cellular industry and others looking to make big plays in the Internet of Things will be pushing this legislation along

Mobile Now Legislation, Moving Along

By Laura Stefani
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Last year, we reported on the proposed Mobile Now Act, the darling of U.S. Senators John Thune (R-S.D.) and Bill Nelson (D-FL), the Chairman and Ranking Member of the Senate Commerce Committee, respectively. The bill aims to encourage broadband deployment. At that time, we noted that the Act had a chance of being one of the few non-routine pieces of legislation to be approved in the last Congress. While it ultimately died, the Act has been teed up again by the Senate Commerce Committee, and we think that it has a good chance of being passed this year.

The current version is substantially the same as last year's, with provisions to open more federal spectrum to both licensed and unlicensed commercial users in various frequency bands. As we highlighted last year, the legislation notably addresses:

- Making up to 500 MHz of spectrum available for wireless broadband;
- Considering permitting mobile or fixed wireless operations on mmWave federal spectrum;
- Opening 3100-3550 and 3700-4200 MHz for shared (federal and non-federal) use; and
- Providing for unlicensed use of newly formed guard bands.

Additional provisions to facilitate broadband deployment include improving access to easements, rights of way and leases on federal property, and providing "relocation incentives" to pay federal users to move to different frequency bands.

The cellular industry and others looking to make big plays in the Internet of Things will be pushing this legislation along.

As with most legislation this year, there is uncertainty as to the impact of the new administration on the Hill's agenda. While Congressional Republicans are certain that they will be able to adopt much more legislation with a Republican in the White House, it is unclear what type of support this type of legislation will receive. For one, the legislation would require a good deal of work by a host of federal offices and agencies, including the Departments of Commerce and Transportation, the Federal Communications Commission, the Office of Management and Budget, and even the Government Accountability Office. And, it would require new regulations. Since this work is at odds with the President's agenda of freezing new regulations, reducing government spending and cutting the federal workforce, the ultimate fate of the legislation, even if adopted, is not clear.

Ninth Circuit is the latest to say that Internet-based services are not cable systems

FilmOn X Loses in Latest Bid to be a Cable System

By Harry F. Cole
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Remember Aereo? Sure you do, if you were a regular CommLawBlog reader pretty much anytime between 2012 and 2015. Aereo was the upstart looking to revolutionize the way cord-cutters watched TV: its dime-sized antennas were designed to receive and capture local broadcast signals for viewing (either virtually "live" or delayed, à la a DVR) through the Internet. It flew high for a while, thanks to an accommodating Second Circuit, but was eventually shot down when the Supreme Court refused to embrace Aereo's view of the copyright law. (For a trip down Memory Lane, click here for a collection of our Aereo-related posts.)

One of the interesting sub-plots of the Aereo saga was the appearance of other Aereo-like services that sprang up nearly simultaneously with Aereo. They included, most notably, a service initially dubbed "Aereokiller". It was the brainchild of one Alkiviades "Alki" David. Like Aereo, Aereokiller – which has since changed its name to FilmOn X – was promptly sued for copyright infringement by the major broadcast networks. The Supreme Court's *Aereo* decision gutted FilmOn X's copyright argument just as it did Aereo's, forcing FilmOn X to come up with a Plan B.

Under that Plan B, FilmOn X claimed that it was a "cable system" under Section 111 of the Copyright Act.

For those unfamiliar with the Section 111, a brief refresher. Under Section 111, a "cable system" is allowed to retransmit a performance or display of a copyrighted work without having to go directly to the copyright owner for permission. The cable system needs only pay a statutory fee to the Copyright Office and comply with a few relatively minor requirements. It's a pretty sweet deal for the cable systems, and FilmOn X wanted to hop on that gravy train – especially since, following the Supreme Court's beat-down of Aereo, that was pretty much the only way forward for it (and Aereo and any similar services).

The bad news for FilmOn X, though, was that courts had repeatedly refused to classify Internet-based services as cable systems. In particular, when Aereo tried that gambit, it got nowhere: the U.S. District Court for Southern District of New York held that Aereo did not qualify for a Section 111 compulsory license because Aereo did not resemble a cable system as defined in the statute.

If either the D.C. or the Seventh Circuit were to rule in favor of FilmOn X, the result would be circuit split, meaning that it would very likely be "game on" at the Supreme Court.

That, however, didn't deter FilmOn X, and, sure enough, it met with some initial success in one court. The U.S. District Court for the Central District of California preliminarily found that FilmOn X was "potentially" entitled to a Section 111 compulsory license.

(No such luck elsewhere: the District Court in D.C. held that it was *not* a cable system under Section 111. And it's worth noting that the California decision is the only instance in which a court has held that an Internet-based retransmission service qualifies as a cable system.

(Continued on page 6)

Continued use of expired licenses leads to enforcement action

Company Fined $60k for Not Seeking Prior OK to Transfer Licenses

By Paul J. Feldman
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The FCC released an Order and Consent Decree that, with a $60,000 fine, acts as a bold reminder to companies that they must seek prior Commission approval to transfer FCC dispatch/internal communications licenses when the licensee company is purchased by or merged into another company. Similarly, companies must pay attention to the expiration dates of those licenses, and either renew them on a timely basis, or discontinue using them after expiration.

This sad story apparently began when the FCC sent a letter to Precision Castparts Corp. (PCC), inquiring about a number of expired radio licenses held by subsidiaries of PCC; the agency asked whether the company continued to operate any of those licenses after expiration. Sure enough, a number of licenses used for remote control overhead cranes and for cross-campus communications were still being used. That's a violation of FCC rules and the Communications Act.

As part of its subsequent internal audit, PCC also realized that when it had been previously acquired by Berkshire Hathaway Inc. (BHI), applications to transfer control of its FCC licenses to BHI had not been filed at the FCC. Oops! ... that was also a violation of the Communications Act and the FCC's rules. Now there was a really big mess to clean up.

Occasionally, big and small companies to enter into a sale or merger and forget to seek prior FCC approval of the transfer of the company's FCC licenses, or to just ignore the issue. But sooner or later, the FCC figures this out on its own, or the newly merged company has to address the matter when it needs to renew the licenses. Filing at the FCC before a sale or merger is relatively quick, easy and inexpensive. But as PCC discovered, cleaning up the mess after failing to do so is anything but: in addition to the $60,000 fine, they must fulfill an extensive on-going FCC compliance and reporting plan.

Manufacturers, utilities, and other companies must seek prior Commission approval to transfer FCC dispatch/internal communications licenses when the licensee company is purchased by or merged into another company.

These situations are not limited to manufacturers: in August of 2016, an affiliate of the Canadian Pacific Railroad settled with the FCC and paid a fine of $1.2 million, for failing to obtain prior approval of the purchase of carriers with FCC licenses, as well as for constructing, operating, modifying, and relocating FCC-authorized wireless facilities without prior FCC approval.

At *Fletcher Heald & Hildreth,* we have deep experience filing the sort of assignment/transfer of control and renewal applications that could have kept PCC out of trouble. We also have deep experience in helping companies navigate the FCC's processes if they have failed to make the proper filings. Call us if you have any questions.

FilmOn X Loses Bid — *(Continued from page 4)*

District Courts in D.C., Illinois and New York went the other way, as have the Second and D.C. Circuits. In addition, the United States Copyright Office has repeatedly said that an Internet-based retransmission service is not a cable system for Section 111 compulsory license purposes.)

But now the Ninth Circuit has weighed in with some bad news for FilmOn X. The Ninth Circuit has reversed the one decision that had provided any hope to FilmOn X.

Let's take a closer look at the opinion (authored by Ninth Circuit Judge Diarmuid O'Scannlain). It starts with Section 111's definition of a "cable system":

A "cable system" is a facility … that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.

Pretty simple, right? Of course each side envisioned a "cable system" differently.

Fox argued that under Section 111 a "cable system" encompasses an entire transmission service (including both the receiving "headend" and the means of transmitting to end users) that must be under the service's control. Because (a) FilmOn X uses the Internet to retransmit its programming to subscribers and (b) the Internet is not under FilmOn X's control, Fox concluded that FilmOn X does not qualify as a cable system.

Judge O'Scannlain didn't agree that Section 111 *compels* the conclusion that a service must have control over the entire system – from soup to nuts, so to speak – in order to qualify as a cable service. After all, the word "control" doesn't actually appear in the statutory definition. And, interpreting this definition of a 20th Century technology as applied to a distinctly 21st Century service, Judge O'Scannlain reached well into the past, noting that snail mail is transmitted without the sender controlling the entire process to delivery.

But, by the same token, he didn't agree with FilmOn X, either. FilmOn X argued that Section 111 should be interpreted in a "technologically agnostic manner" to include any facility that retransmits broadcast signals, without regard to the particular technology involved. O'Scannlain countered that, had Congress wanted to create a compulsory license applicable to all technologies, it would have done so rather than limiting this license to cable systems.

FilmOn X also argued that the inclusion of "other communications channels" in the list of possible transmission methods supports the notion that Internet-based transmission services should qualify as "cable systems". Again, though, Judge O'Scannlain disagreed, opining that it is not clear that the Internet is a "communications channel" (and in fact, seeming to say it is not). He also cited the legal canon of *ejusdem generis* "which instructs that 'when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.'"

(Continued on page 8)

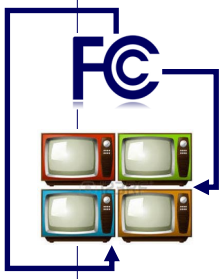
Effective Date Announced for Relaxed FM Translator Siting Rules

By FHH Law

The last "T" has been crossed and the last "I" dotted in the FCC's proceeding to adopt new rules relaxing siting requirements for FM translators seeking to rebroadcast AM stations. In a Federal Register notice, the FCC announced that the Office of Management and Budget has approved the information collection requirements associated with the Commission's *Second Report and Order* in Revitalization of the AM Radio Service.

The changes now become effective on April 10. The Media Bureau recently had said it wouldn't process such FM translator applications until the new rules take effect. In order to be fair to all stations that may want to take advantage of the new rule, the Media Bureau said at that time in a Notice that "any application or notification that does not comply with the current siting rule, including those that seek a waiver of the order's effective date," would be dismissed.

The bureau said this processing policy will ensure that all AM stations "have the same opportunity to propose potentially conflicting facilities in spectrum-congested areas and to prevent filers from gaining cut-off protection for proposed facilities that at the time of filing are patently defective." Any FM translator licensees or permittees now know when they will be able to take advantage of that opportunity – April 10. In the meantime, please contact FHH with any questions.



Channel Sharing *— (Continued from page 1)*

community of license coverage requirements, but would be subject to potential displacement if it were sharing with an LPTV "host" station.

There are many more details in the R&O that could affect your station. Please contact FHH with any questions about either the auction itself, the repack or channel sharing agreements.

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FilmOn X Loses Bid — *(Continued from page 6)*

In Judge O'Scannlain's view, reading Section 111 to include Internet-based services would undercut Congress' intent in passing the statute. He noted that Section 111 was included in the Copyright Act of 1976 as a means of bolstering the fledgling cable industry, which at the time had little financial power or ability to overcome the costs of direct licensing with all copyright owners while also building out its infrastructure to reach distant viewers. This also benefitted broadcasters, who could reach audiences they hadn't been able to reach before. Extending Section 111 to Internet-based services would jeopardize that balance, primarily because the Internet is not geographically limited in the same manner as a traditional cable system. In addition, broadcasters have the ability to transmit on their own via the Internet; thus, no assistance is needed to reach viewers through this medium.

Judge O'Scannlain's bottom line was that the plain text of Section 111 was not unambiguous and, thus, did not resolve the question one way or the other. Accordingly, he turned to the Copyright Office. He noted that on two occasions – in 1992 and 1997 – the Copyright Office applied Section 111 to services distinct from the traditional wired format: satellite and microwave retransmission services. In each instance, the Copyright Office clearly identified as a key characteristic of a cable system the fact that the system consisted of an "inherently localized transmission media". The Internet being less than "inherently localized" as media go, this would seem to rule out an Internet-based service. Moreover, on four occasions since 1997, the Copyright Office has "specifically and unequivocally said that 'Internet-based retransmission services'" are ***not*** cable systems, and Congress had not taken any steps to overrule or otherwise reverse those decision. Overall, Judge O'Scannlain concluded that the Copyright Office deserved deference.

What now? It's never been in FilmOn X's – or Alki David's – nature to quit. So it wouldn't be out of the realm of possibility for FilmOn X to seek rehearing *en banc* before the full Ninth Circuit, or possibly even review by the Supremes. As to the latter, it's unlikely the court would agree to such review unless there's a "circuit split" which, as of this decision, doesn't exist.

But wait! FilmOn X still has cases pending before the Seventh and D.C. Circuits. The D.C. Circuit heard oral argument just a week before the Ninth Circuit issued its ruling. Originally allocated a total of 30 minutes of time (15 minutes per side), the argument lasted nearly two hours. (You can listen to it here, or check out a recap of the argument from *Broadcasting and Cable* here.) Obviously, the D.C. judges had a lot of questions for both parties – which could signal that this is far from a slam dunk for either side. If either the D.C. or the Seventh Circuit were to rule in favor of FilmOn X, the result would be circuit split, meaning that it would very likely be "game on" at the Supreme Court.

Upcoming FCC Broadcast Filing Deadlines

Do you know what upcoming FCC filing deadlines early April through early May apply to you? We do. Note our list is not comprehensive. Other proceedings may apply to you. Please do not hesitate to contact FHH if you have any questions.

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. All TV stations, as well as radio stations in the top 50 markets, must upload the reports to their online public files. All other radio stations may continue to place hard copies in the paper public file for the time being. For all stations with websites (including those with online public files), 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 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.

May 9, 2017 – *ATSC 3 Television Broadcast Standard* – Comments due with regard to the Commission's Notice of Proposed Rulemaking proposing to authorize television broadcasters to use the "Next Generation" broadcast television transmission standard developed by the Advanced Television Systems Committee and known as ATSC 3.

Please contact Anne Goodwin Crump and Dan Kirkpatrick if you have questions about any of these filings.

FHH - On the Job, On the Go

Kathy Kleiman has recently returned from Denmark where she attended the 58th ICANN (Internet Corporation for Assigned Names and Numbers) international public meeting in Copenhagen, from March 11-16. Her work there included co-chairing two sessions of the Rights Protection Mechanisms Policy Development Process Working Group (reviewing procedures for domain names disputes by trademark owners) and being a panelist on the ***Roundtable for Women Leadership in ICANN***. Kathy and Fletcher, Heald & Hildreth were also featured in a special ICANNWiki card deck as the Eight of Diamonds!

CableFax named **Frank Montero** one of its "Cablefax Top Lawyers" at an Awards Dinner at the National Press Club in Washington, D.C. on March 22. In that same city two day later, he taught a class on "*Closing on a Broadcast Station Acquisition*" to the NAB Educational Foundation's Broadcast Leadership Training (BLT) class. He jetted to Ft. Lauderdale, FL to attend and present at the *Radio Ink* Hispanic Radio Conference on March 28-29, where he moderated a panel discussion entitled "*Hispanic Radio: What We Learned From the 2016 Election & Where We Go From Here."* Frank also received the Hispanic Radio Conference's Distinguished Service Award. On Saturday, April 1st he will attend the George Washington University Law School Alumni Association (GWLAA) Board of Directors meeting in Washington, D.C.

On April 12th, catch **Paul Feldman** speaking about Positive Train Control at the SafeRail conference. The event will be at the Georgetown University Hotel & Conference Center in Washington, D.C.

On the west coast, **Frank Montero** will attend the American Bar Association's Seminar "*Representing Your Local Broadcaster*" in Las Vegas on April 23.

Several FHH attorneys plan to attend the annual NAB convention in Las Vegas. Those on the list so far include: **Dan Kirkpatrick**, **Frank Jazzo**, **M. Scott Johnson**, **Frank Montero**, **Davina Sashkin**, and **Kathleen Victory**. Others may come as well. **Peter Tannenwald** will attend the LPTV Coalition's "Save LPTV Rally" from 6p.m. to 8p.m. on Sunday, April 23. Peter will also give a presentation at the Advanced Television Broadcasting Alliance's "NAB LPTV Day" program at 1 p.m. on Monday, April 24 in Ballrooms D, E, F, and G at the Westgate Hotel. ***If you are planning to attend NAB and would like to meet, please let us know.***

Catch **Frank Jazzo** in Albany, NY on April 28 for the Rockefeller College Advisory Board meeting.

If you're in Denver May 18-21, be sure to say hello to **Kathleen Victory** and **Peter Tannenwald**. They're teaming up for the National Translator Association convention.