

Memorandum to Clients

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Annual NAB Show touted the evolution and intersection of media, entertainment and technology, termed “the M.E.T. Effect”

NAB 2017: Media + Entertainment + Technology

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The 2017 National Association of Broadcasters Show, held as always in sunny Las Vegas, Nevada, showcased its M.E.T. Effect theme in a multitude of sessions and exhibits on the NAB Show floor. As NAB President Gordon Smith put it, the M.E.T Effect is a result of “a sea change in technology that’s impacting how media companies do business and how people consume content.” Sessions included next-generation technologies, cyber-security, advances in advertising and emphasis on digital strategies. Other sessions focused on copyright and performance rights concerns, FCC rules and other topics which broadcasters must face day in and day out. FHH attorneys were in attendance throughout, but the star of the Show was new FCC Chairman Ajit Pai, and the impressive highlight was his keynote address.

More so than in many years, NAB Show participants were able to celebrate an FCC Chairman who deeply cares about broadcasting.

In his keynote address to a standing room crowd, Chairman Pai outlined his broadcast friendly agenda for the coming years of his term. Gracefully, recognizing the value and expertise of the FCC staff and complimenting fellow Commissioners, Chairman Pai struck a new positive tone and an aggressive strategy to alleviate regulatory burdens on broadcast licensees.



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As he wrapped up his speech, he left the stage to a standing ovation with a throng of individuals rushing after him behind the curtain and on out of the room to shake his hand—like a true rock star.

So what did the Chairman say to merit such accolades? You can read his speech [here](#), but in a nutshell:

“The last thing broadcasting—or any industry for that matter—needs is outdated regulations standing in its way. And that’s particularly true in communications, where things change so quickly. That’s why I’ll work aggressively to modernize the FCC’s rules, cut unnecessary red tape, and give broadcasters more flexibility to serve their audiences. Broadcasting re-

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2017



Media+Entertainment+Technology — (Continued from page 1)

mains an indispensable part of America's communications landscape. And under my Chairmanship, broadcasting won't be seen as a speed bump." And further, Pai wants a new spirit of cooperation between broadcasters and the Commission.

How does this Pai vision translate into details? Changes are still being announced even as we go to press, but key regulatory initiatives include:

- ATSC 3.0, also Known as Next Gen TV: Pai referred to the potential of ATSC 3.0 to let broadcasters offer much better picture quality with 4K transmissions; immersive audio; better accessibility options; and the ability to provide advanced emergency alerts, more tailored to a viewer's particular location. Pai noted that the Commission has already voted to seek comment on a proposal to allow broadcasters to use the ATSC 3.0 transmission standard on a voluntary, market-driven basis. (Comments will be due in June 8.) Chairman Pai's goal is to issue a final authorization of the Next Gen TV standard by the end of the year.
- Getting Rid of Outdated and Unnecessary FCC Rules: Pai announced a review of media rules and regulations, noting that "Rules that get on the books seem to stay there forever, even when they're no longer needed or are counterproductive." He will start this process at the FCC's May 18th public meeting with a vote on a proposal to start a comprehensive review of almost all media regulations. Pai's goal is to have rules that reflect the world of 2017, not 2007, 1997, 1987, or 1977.
- Main Studio Rule Proposed to be Eliminated: One outdated rule mentioned was the main studio rule, which requires each AM, FM, and television broadcast station to maintain a main studio that is located in or near its community of license.

Pai stated he felt that "technological innovations have rendered local studios unnecessary. Nowadays, if individuals want to contact their local station, they are much more likely to do so by social media, email, or phone call." He will bring this proposal to the May Commission meeting *via* a vote on a Notice of Proposed Rulemaking that tees up eliminating the Commission's main studio rule for both radio and television broadcasters. He gave credit to Commissioner Michael O'Rielly for this initiative, and noted that O'Rielly also deserves credit for the recent FCC action modernizing its interpretation of its equal employment opportunity rules to allow recruitment exclusively on the Internet to account for the way that people actually look for jobs these days.

- Media Ownership: Pai stated he feels the current rules are totally out of date. He plans a much more fact-based discussion about where our media ownership regulations rules are and where they should be.
- AM radio Revitalization: Pai noted that most recently, the FCC "focused on helping AM broadcasters get FM translators while we work on the AM band's long-term problems." He referenced nearly 1,100 applications, with almost 95% granted and 20% of AM stations in the United States obtaining FM translators to grow their audience. And, the Commission plans to open two new FM translator application windows, the first this summer, for Class C & D stations, in which AM stations can apply for a new translator. Auctions will be held for mutually exclusive applications which cannot be resolved.

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*While Questions Remain, ATSC 3.0 Next Gen TV Standard
Draws Increased Interest at NAB*

NAB Show 2017: ATSC 3.0 Takes Center Stage

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At this year's NAB show, one of the popular topics of conversation was the next-generation ATSC 3.0 television standard. While ATSC 3.0 has been discussed at previous NAB Shows, it seemed that this year many broadcasters were dealing with the idea in more concrete terms, and really focusing on what the new standard may mean and how to prepare for it.

ATSC 3.0 is a new technical standard for broadcasting that may in the near(ish) future replace (or at least supplement) the existing ATSC 1.0 standard, which has been in place since the advent of Digital TV broadcasting. ATSC 3.0 is an Internet Protocol (IP) based standard and is designed to allow broadcasters to offer many new and enhanced services, including ultra-HD video, immersive audio, datacasting, targeted emergency alerts and advertising, and integration of broadcast programming with other IP services. The standard, however, is not backwards compatible with existing ATSC 1.0 equipment, so for at least the foreseeable future, broadcasters opting to transmit with ATSC 3.0 will need to maintain a second facility transmitting an ATSC 1.0 signal if they want to continue to reach all over-the-air receivers. Indeed, the FCC may require maintenance of ATSC 1.0 service during a transitional period of some length. While existing receivers will remain compatible with cable and satellite set-top boxes, the interface between TV stations broadcasting in ATSC 3.0 and cable/satellite headends remains to be negotiated as well.

Proponents of ATSC 3.0 have made demonstrations at the last few NAB Shows to attempt to convince attendees of the benefits of the new system. This year, those demonstrations received their greatest exposure yet, with the "NextGen TV Hub powered by ATSC 3.0" given prominent placement in the Grand Lobby of the Las Vegas Convention Center. This "hub" allowed attendees to view broadcasts (provided by a local LPTV station) using the ATSC 3.0 standard. The new standard also garnered favorable mentions in both FCC Chairman Ajit Pai's Keynote address and NAB President-CEO Gordon Smith's State of the Industry Address.

While there are still many unanswered questions about how ATSC 3.0 will be implemented, there was undoubtedly more talk about the standard this year than at previous NAB Shows. Two things seem to be driving the increased focus on ATSC 3.0 at this year's Show. First, is that the FCC in February released a Notice of Proposed Rule Making (NPRM) looking towards adoption of ATSC 3.0 as a voluntary standard. Second is the need for many stations to move to new channels and modify facilities as part of the post-incentive auction repack. Many of those stations subject to repacking will need to purchase potentially significant amounts of new equipment. With a potential transition to ATSC 3.0 on the horizon, many buyers (and sellers) in Las Vegas were talking about "ATSC 3.0 -ready" transmitters, which will be readily available, since both standards are digital, and changing from one to the other and back again can be controlled by built-in software. Even for those broadcasters who are not entirely convinced about ATSC 3.0, acquiring equipment that will keep the option open to convert later seemed to be nearly universally desired. This is particularly true where the Commission may be reimbursing at least part of the cost of that equipment.

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Innovative technologies on display, but the future of LPTV is still unclear

Low Power TV at NAB 2017

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Low Power Television (LPTV) operators had plenty to do at this week's National Association of Broadcasters Show in Las Vegas. In addition to exhibits showing new light-weight portable production equipment, ways to bond cellular wireless channels together to allow delivery of broadcast-quality signals from remote locations, and software-defined excitors that can generate multiple formats to facilitate the future evolution of TV broadcasting, LPTV operators had a choice of sessions tailored to their special interests over a span of three days. In the end, there was much to learn about the anticipated future of the entire TV broadcasting industry, but there were no clear answers as to what will happen to LPTV stations as the spectrum repack progresses and the TV spectrum is cut off at Channel 36.

The LPTV Coalition's "Stop the Repack" rally led things off on Sunday evening. Unlike in past years, there were no formal presentations or fiery speeches. The Rally was well attended, by not only LPTV operators but also FCC officials, including Julie Knapp, Chief of the Office of Engineering and Technology; Hilary DeNigro, the newly-appointed Deputy Chair of the Auction Task Force; Video Division Chief Barbara Kreisman and Chief Engineer Jeffrey Neumann of the Media Bureau, and Mark Colombo, one of the FCC's engineering experts who has written many of the computer programs that have been used to assign channels in the repack. The five FCC officials answered questions one-on-one for the many operators who queued up to talk to them.

The Advanced Television Broadcasting Alliance (ATBA) offered presentations all day on Monday and roundtables on Tuesday and Wednesday, ending with a presentation by Edge Spectrum, Inc., which is acquiring LPTV stations and construction permits all over the country

with the objective of creating a 21st Century hybrid television-data network based on the new ATSC 3.0 standard that FCC Chairman Ajit Pai has said he hopes to see approved by the end of this year. I joined One Media's Executive Vice-President Jerry Fritz on Monday morning on a panel discussing the many capabilities of ATSC 3.0, what legal and technical issues LPTV operators need to think about if they want to implement the new technology, and issues that LPTV operators are expected to face in finding and applying for new channels during the upcoming spectrum repack. Other ATBA presentations included information presented by Marge Johnson of Titan TV about PSIPs, a necessary component of digital TV transmission to enable receivers to tune properly to a desired TV channel; Nicole Starett and Dan Fallon of Dielectric discussing antenna tuning and filtering; Joe Casey of LS Telecom providing information about drones; and Sennheiser's Joe Ciaudelli discussing spectrum issues facing wireless microphones, which are critical to the program production process and need access to TV spectrum. Monday evening was taken up by ATBA's reception, with food, wine, presentations, and prizes.

Meanwhile, WatchTV, Inc. opened a hotel suite where Greg Herman explained to guests the capabilities of the experimental ATSC 3.0 multi-frequency network that has been built in Portland, Oregon, using Class A stations and a distributed antenna system.

On Monday afternoon, Ms. Kreisman and FCC Audio Division Chief Peter Doyle fielded questions from an industry-wide audience about regulatory issues, including one from an LPTV operator about the future of analog audio on Channel 6 that is receivable on FM radios.

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NAB Show 2017: The Scoop on Music Licensing Issues

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Calling all broadcasters who attended the NAB Show in Vegas last week: Are you in sensory overload (and not in the ways that you think!) from the plethora of sessions, the array of networking options, and the miles of exhibits and cool new tech on display? In this embarrassment of riches, did you miss out on hearing the latest music licensing developments discussed during two NAB Show panels covering that subject? If so, never fear—we'll fill you in on the latest and greatest.

The first opportunity for NAB showgoers to get up to speed on current music licensing issues took place on April 25, 2017 at an interactive panel entitled, “*Play Local, Pay Global (Music Rights)?: The Shifting Music Licensing Landscape.*” Panelists included two from the licensee community – **Elizabeth Frazee**, the Co-Founder and CEO of TwinLogic Strategies, and **Charles Warfield**, a veteran of the broadcast industry and a Senior Advisor for YMF Media, LLC – and two from the licensor community – **Steve Marks**, the Recording Industry Association of America’s Chief of Digital Business and General Counsel, and **Stuart Rosen**, a Senior VP and General Counsel for BMI. The moderator was **Garrett Levin**, a Senior VP and Deputy General Counsel for NAB.

Mr. Levin kicked off the session by inviting panelists to share their music licensing “wish lists.” Charles Warfield said that licensees should “know what we’re getting” when agreeing to a music license – a theme that Elizabeth Frazee echoed when stating that users need to know who owns what. Both panelists wanted to see more transparency from the performing rights organizations (“PROs”) regarding exactly which musical compositions were in their repertoires as well as their ownership shares, which would enable licensees to know whether what they’re paying for is worth it and which works they need to avoid playing if they choose not to pay for the right to play them.

Speaking from the licensors’ perspective, Stuart Rosen wished for a level playing field among the PROs, stating that it was unfair for ASCAP and BMI to have to operate under consent decrees (which restrict their licensing behavior to prevent anticompetitive conduct) while SESAC and Global Music Rights (“GMR”) operated under no such restrictions. Representing the recording industry, Steve Marks wished that various so-called copyright “loopholes” would be closed. For example, he claimed that the record industry had lost \$1 billion from SiriusXM satellite radio because the standard to set rates to perform sound recordings for that service and certain other grandfathered services was based on policy considerations (which historically have resulted in lower rates) rather than the “willing buyer willing seller” standard that applies to newer digital webcasting services.

Following the exchange of wish lists, the panelists touched on several other music licensing “hot topics,” including:

- (1) the Department of Justice’s (“DOJ’s”) appeal of the BMI rate court’s 2016 decision that BMI’s consent decree permits fractional licensing of musical work public performances;
- (2) the lack of a sound recording performance royalty covering terrestrial radio; and
- (3) differential federal copyright treatment of sound recordings created before and after February 15, 1972.

On fractional licensing – *i.e.*, the view that a license from one of multiple owners of a copyrighted work grants only a partial license to use that work and that separate licenses must be obtained from each owner before the work may be used – BMI’s lawyer claimed that licensing under the BMI Consent Decree has always worked this way – a view that the licensee com

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The More Things Change, the More They Stay the Same – UHF Discount Restored

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The Commission has acted to restore the UHF discount used to calculate audience reach in connection with determining compliance with television ownership limits. The national ownership cap currently limits the number of stations one owner may control to those which reach no more than 39 percent of national television households (with reach defined as the number of households in a station's DMA). For a station which operates on a UHF channel, half of the households in its DMA are not included in the total count of audience reached by a particular owner nationwide.

The Commission had previously eliminated the UHF discount in August 2016, but it did not make any other changes to the national or local TV ownership rules. The UHF discount was

The Commission has promised that it will undertake a new rulemaking proceeding later this year.

initially adopted in 1985 as a means of addressing the technical disadvantages that analog UHF stations then suffered in comparison to VHF stations. These UHF challenges included not only smaller signal coverage areas but also higher construction and operation costs. With the advent of digital television,

however, the disparity between UHF and VHF diminished drastically. Indeed, UHF stations generally now have better coverage areas than VHF stations. This recognition was one of the primary reasons cited for eliminating the UHF discount last year.

The ruling was issued over the strenuous objections of the then-minority, Commissioners who pointed out that eliminating the UHF discount without otherwise adjusting the national cap actually had the effect of tightening the ownership limits. Commissioner O'Reilly expressed his view that the 2004 Consolidated Appropriations Act which enacted the 39 percent cap in statute removed Commission authority to take this action. Various groups, including the National Association of Broadcasters and some large TV station group owners, sought reconsideration of the Commission's ruling.

After the positions of the majority and minority were reversed, the Commission's order also was reversed on April 20, and the UHF discount was reinstated. The Commission does not deny that retention of the discount flies in the face of current technical realities. Nevertheless, the new order indicates that because the issues of the discount and the national ownership cap are inextricably linked, the Commission is restoring the discount simply to restore the *status quo ante*. Obviously, if one doubles the number of households counted as being in a UHF station's market, the instant result could be to change compliance with a fixed ownership limit into non-compliance. Even if all existing ownership is grandfathered, the result would be substantially to decrease an owner's options for adding or changing station ownership.

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FCC Adopts Changes to Allow Some NCE Stations to Conduct Fundraising Marathons for Third Parties

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In a [Report and Order](#) released April 20 in MB Docket 12-106 (we'll call it the R&O), the FCC gave one group of noncommercial educational (NCE) broadcast licensees what they wanted: the right to conduct fundraising marathons for third-party non-profit groups. In the same R&O, the FCC gave another group of NCE licensees what they wanted: exemption from pressure to conduct fundraising marathons for third-party non-profit groups.

More specifically, the R&O changed its rules to allow NCE licensees that do not receive funds from the Corporation for Public Broadcasting (CPB) to interrupt regular programming for up to one percent of their total annual airtime to raise money for Section 501 (c) (3) non-profit groups. CPB-funded NCE stations, however, are exempt from the new third-party fundraising rules. (Of course, all NCE stations can still interrupt regular programming to raise funds for their own operations.)

Here's some background: Up until now, a NCE station has not been allowed – absent a waiver – to interrupt regular programming to raise funds for any entity except the station itself. In other words, the fundraising marathons that have become ubiquitous on NCE stations only could be used to generate income for the stations conducting the marathons unless the FCC granted a waiver. Those waivers were hard to come by, typically only granted to raise funds for relief in the wake of a specific disaster – tornadoes, hurricanes and tsunamis, the 9-11 terrorist attack, etc. In contrast, waiver requests for annual fundraising to address ongoing needs (think the Jerry Lewis Muscular Dystrophy tele-

thon) typically were denied. (NCE stations were and are allowed to raise funds for non-profit third parties if fundraising solicitations are in the form of short announcements, i.e., they don't interrupt regular programming.)

Some NCE licensees – particularly religious NCE stations – chafed at the limitations on third-party fundraising. That led to the FCC releasing a Notice of Proposed Rulemaking five years ago – on April 25, 2012 to be precise – to allow NCE stations to interrupt regular programming to conduct third-party fundraising. The National Religious Broadcasters association (NRB) and all of the religious broadcasters that filed comments favored allowing such third-party fundraising. In contrast, NPR, PBS and all the secular NCE broadcasters, save one, that filed comments opposed allowing the interruption of regular programming for third-party fundraising.

In the R&O, the FCC gave each side of the debate what they wanted – or at least most of what they wanted. CPB stations are exempt from the new rules, meaning that absent a waiver they cannot interrupt regular programming to raise funds for any outfit other than the stations themselves and non-CPB NCE stations can interrupt programming to do third-party fundraising. The FCC, however, has placed some restrictions on third-party fundraising by non-CPB NCE stations:

- The maximum amount of time a non-CPB NCE station may interrupt programming cannot exceed one percent of the station's total airtime for the previous calendar year. For example, if a station

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The Commission determined that use of non-Internet sources is no longer necessary

FCC's EEO Policies Subject of Re-examination and Update

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The FCC's policies with regard to diversity generally have taken center stage over the past few days. First up, on Friday, April 21, the Commission released a [Declaratory Ruling](#) which updated its policy as to whether the use by broadcasters and multichannel video programming distributors (MVPD's) of only Internet-based recruitment sources provides sufficiently wide dissemination of news about full-time job openings. In a ruling some might describe as an overdue recognition of reality, the Commission determined that use of non-Internet sources is no longer necessary. Then, on Monday, April 24, FCC Chairman Ajit Pai [announced](#) that he intends to establish a new Advisory Committee on Diversity and Digital Empowerment. The stated mission of the Advisory Committee is to provide recommendations to the FCC with regard to providing opportunities for all Americans to participate in the communications marketplace, without regard to race, creed, gender, ethnicity, or sexual orientation. Both moves were generally praised in the industry.

The Declaratory Ruling represents a significant change in the policy established when the Commission adopted its current EEO rules in 2002. At that time, the Commission considered the possibility of recruiting applicants for full-time openings through use of the Internet. It stated that the purpose of the EEO rules is to ensure that all applicants are afforded equal opportunity and non-discrimination, and not just to bring about the proportional representation of certain groups. In order to achieve that goal, it would be necessary to make sure that all segments of the population heard about job openings, and none were inadvertently excluded just because they did not know to apply. Accordingly, the FCC's EEO rules and policies emphasize wide dissemination of recruitment information.

The Commission emphasized, however, that it is still concerned about how widely the word of openings is spread.

When the rules were adopted, the Commission did not believe that use of the Internet was sufficiently widespread to ensure by itself that news of job openings would be likely to reach the entire community. Of particular concern was the gap in access to the Internet between non-minority and minority job-seekers. Therefore, while the Commission recognized that the Internet could be one good method of recruiting job applicants, it explicitly stated that reliance upon only Internet-based sources would be insufficient. Other, more traditional, means also would need to be used. The Commission applied this policy when it reviewed the EEO programs of broadcast licensees or MVPD's in EEO audits or at license renewal time. Indeed, over the years, the FCC fined a number of licensees, and one as recently as last year, for the failure to use any non-Internet sources for job recruitment.

Now, fast forward about a decade and a half from the adoption of the current EEO rules. Two broadcasters (Sun Valley Radio, Inc. and Canyon Media Corporation) filed a petition seeking a

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FCC Releases Instructions on Receiving Incentive and Reimbursement Payments after the Incentive Auction Closes

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On March 29, 2017, the FCC released a [Public Notice](#) providing instructions to full power and Class A television broadcasters and Multi-Channel Video Programming Distributors (MVPDs) on receiving incentive and/or reimbursement payments following the closure of the Incentive Auction. The Public Notice stated that, in order to receive payments, winning bidders in the reverse auction (*i.e.*, broadcasters that successfully bid to relinquish some or all of their spectrum rights) must submit an FCC Form 1875 (Reverse Auction Payments), and broadcasters and MVPDs eligible to receive reimbursement payments from the Television Broadcaster Relocation Fund for costs incurred during the reverse auction and repacking process must submit an FCC Form 1876 (Reimbursement Payments). While the application processes are similar for Reverse Auction and Reimbursement Payments, payment recipients may receive their disbursements at different times depending on the type of payment for which they are eligible. In addition, while the Public Notice did not announce a deadline for reimbursement payees to file Form 1876, entities receiving Reverse Auction Payments must file their Form 1875 by no later than 20 days after the FCC releases its public notice closing the auction (currently expected in early to mid-April).

CORES Update. Prior to submitting payment applications and receiving payment, all Reverse Auction and Reimbursement Payment applicants must update their Commission Registration System (CORES) accounts by: (1) creating an FCC Username Account; and (2) designating at least one FRN Administrator. Detailed instructions on how applicants may complete these steps can be found on the FCC's

CORES [site](#). We have also kicked the tires on the new CORES, so please feel free to contact us if you need assistance.

Payment Applications. The application processes for Reverse Auction and Reimbursement Payments both follow a two-step process to reduce “the risk of error or fraud.”

First, all payment applicants must submit to the FCC a signed and notarized FCC Form 1875 or 1876, as applicable, along with either a bank account verification letter or redacted bank statement confirming ownership of the bank account to which payments are made. Applicants may only designate one bank account to which payments are to be made, but may designate third party payment recipients on their applications. Reverse Auction Payment applicants must submit a separate application for each station with a winning bid in the reverse auction. Reimbursement Payment applicants must submit a separate application for each reassigned station or for each MVPD eligible for reimbursement as a result of expenses during the reverse auction and repacking process.

Second, after determining the accuracy of the payment applications, the FCC staff will grant each applicant access to the CORES Incentive Auction Financial Module. For Reverse Auction Payment recipients, this access will be granted to only the single individual listed in the Form 1875; Reimbursement Payment recipients may identify two individuals to receive access in their Form 1876. Other users may later be granted access to view certain limited

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FCC Brings Spectrum Auction to a Close, Sets Repack Transition in Motion

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With the release of the *Incentive Auction Closing and Channel Reassignment Public Notice* (affectionately known as the “CCR”) on April 13, the FCC officially drew the spectrum Incentive Auction to a close. The CCR is a must-read for TV broadcasters and wireless carriers alike. It announces broadcast and wireless winning bidders, sets deadlines and timetables for filings, and provides buildout benchmarks relevant to both broadcasters and wireless companies to convert the new 600 MHz band to wireless use. Of particular interest to FHH broadcast clients is the setting in motion of the Post-Incentive Auction Transition (“Repack”), starting with a 90-day scramble to file construction permit applications and relocation expense reimbursements for repacked stations which ends on **July 12, 2017**. LPTV stations also will be impacted by the channel reassignment and will need to prepare for displacements starting this fall. Fletcher, Heald & Hildreth PLC is ready to guide you through this process – give us a call.



Low Power TV at NAB — (Continued from page 4)

While the session was off-the-record, we can tell you that no answer to that question was provided.

Chairman Pai addressed a packed room on Tuesday, showing a more sympathetic and favorable view of broadcasting than the industry has seen from the FCC during the past several years. However, LPTV ears pricked up, many with disappointment, when the Chairman stated that no “protected” station should have to go dark during the repacking process, with no comment about the fate of secondary LPTV and TV translator stations that do not qualify for protection.

There was a lot to learn at the NAB Show, but LPTV and TV translators operators came away still not knowing how many channels will be available for them, how quickly and through what procedures the FCC will grant construction permits for displaced stations to move to new channels, or how the FCC will resolve conflicts when more than one applicant seeks to move to the same channel.

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He also plans to move forward as soon as feasible on other aspects of the AM Radio Revitalization Initiative relating to the AM band that remain pending.

Finally, he recognized Commissioner Clyburn's positive role in launching the AM revitalization proceeding in 2013 when she was the Acting Chair of the Commission.

- **The Television Incentive Auction:** Pai recognized that many people in the audience, and himself as well, didn't agree with every policy choice that the FCC made concerning the Incentive Auction, and appreciated that the process is far from over. He committed to ensuring that no protected television broadcaster is forced to go dark due to circumstances outside of its control. To foster greater cooperation, he emphasized that the Commission has assigned dedicated Commission staffers as "regional coordinators" to various regions of the country to help support broadcast television stations moving to new channel assignments during the transition to resolve issues that arise. Pai hopes there will be a new spirit of cooperation between broadcasters and the FCC.

Pai closed in saying "so long as I have the privilege of serving as FCC Chairman, you can be sure that I'll do my best to get unnecessary rules out of the way so that broadcasters can rev that engine."

*ATSC 3.0 Takes Center Stage — (Continued from page 3)*

One of the potential questions about ATSC 3.0 that was also creating some buzz concerned how to handle the concept of "nightlight" stations in various markets. Because ATSC 3.0 is not compatible with existing receiver equipment unless a new set top box, dongle, or other adapter is attached (complete receiver replacement should not be necessary), broadcasters adopting the standard under the FCC's proposed voluntary plan will still need to broadcast a separate signal in ATSC 1.0 to reach legacy receivers. One way to do this that seems to be gaining some traction is the idea of having one facility (or more) in each market act as a "nightlight" facility, channel-sharing to host the ATSC 1.0 broadcasts of other in-market stations that want to adopt ATSC 3.0. While this concept certainly has some complications, especially since it requires significant cooperation among competitors, with the increasing view of ATSC 3.0 as a real and imminent option, and the lifting of the incentive-auction related "quiet period," many broadcasters were at least discussing these issues.

While the future of ATSC 3.0 remains somewhat uncertain, one thing is for sure – the standard is now at the forefront of broadcasters' minds as they address new competitive realities and the impact of the incentive auction repacking. That attention was on clear display (pun intended) at this year's NAB Show, and will undoubtedly only increase in the time before next year's show.





Payment Instructions — (Continued from page 9)

financial information, but only the individuals listed in the Forms 1875 and 1876 will be able to enter such information in the system. In the Financial Module, applicants must enter bank account information for the designated payment recipient. The FCC will then compare the financial information entered in the Financial Module with that submitted on the applicable FCC Form 1875 or 1876, and will contact the applicant regarding any discrepancies prior to payment.

Payment Disbursements. While application processes for Reverse Auction and Reimbursement Payments are similar, the payment disbursement processes differ between the two.

Due to the fact that Reverse Auction Payments cannot be made until forward auction licenses are granted (and payments made), the Commission demurred from offering a precise timetable for issuing Reverse Auction Payments. In addition, the Commission noted that if it is able to release only some Reverse Auction Payments at any given time (based on its receipt of forward auction payments and grant of forward auction licenses), it would do so on a schedule that was designed to accommodate the repackaging schedule for continuing broadcasters. In other words, if forward auction licenses are granted on a rolling basis, Reverse Auction Payments may also be made on a rolling basis, with those stations who may hold up the transition schedule getting paid first. When the FCC is ready to disburse any given Reverse Auction Payment, it will release a “Ready to Pay Public Notice,” directing the U.S. Treasury to disburse payments to eligible recipients. Reverse Auction Payments are deemed to be made within five days of release of the Public Notice.

The process for disbursing Reimbursement Payments is, necessarily, somewhat more complicated. Within 90 days of the release of the public notice closing the auction, any entity expecting to receive reimbursements must submit an estimate of such reimbursements to the Commission. The Media Bureau will then make an allocation of up to 80% of those costs for commercial broadcasters and MVPDs and

90% for non-commercial broadcasters. Entities will then be entitled to “draw down” against these allocations as they incur expenses. As the three-year reimbursement period proceeds, these allocations will be adjusted by the FCC.

Because Reimbursement Payments will be made on a rolling basis, and subject to the allocation noted above, the Commission does not make any estimate as to how soon after a request a payment will be made. All Reimbursement Payments, however, are to be made within three years of completion of the forward auction pursuant to the Spectrum Act. In contrast to Reverse Auction Payments, the Commission does not have the authority to direct the Treasury to make Reimbursement Payments to eligible recipients and cannot control when Treasury does so after receive the Commission’s instructions. Instead, the CORES Incentive Auction Financial Module will be updated when the Treasury has made payment.

Ownership Changes for Stations Receiving Reimbursements. The Commission’s Notice also addressed how the Commission will handle the (potentially numerous) situations where a station receiving Reimbursement Payments is transferred or assigned during the reimbursement period. Upon receipt of a notice of consummation of such a transfer of assignment, the Commission will de-activate the bank account information of the assignor and hold any pending reimbursement requests. The assignee will be required to submit a Form 1876 and otherwise follow the same process to provide account information and gain access to the Financial Module. The Commission in the Public Notice promised that, prior to granting or accepting any consummation notices, it would provide additional guidance to the parties involved regarding reimbursement procedures.

Please contact us if you have any questions regarding the Reverse Auction and Reimbursement Payments processes after the closure of the Incentive Auction.



The Scoop on Music Licensing —
(Continued from page 5)

munity strongly disputes. When confronted by a hypothetical from the moderator about a copyright owner owning 2% of a number of popular songs and exercising “hold-up” power over those works until excessive fee demands were met, Mr. Rosen’s response was that he couldn’t guarantee against such a scenario but that it hadn’t happened yet. While his earlier comments suggested that a licensee should be safe so long as it held licenses with each of the three major PROs – ASCAP, BMI, and SESAC – that statement does not account for copyright owners affiliated with GMR, another PRO, or no PRO at all. Mr. Rosen also warned that a “full-work” licensing regime would present a “be careful what you wish for” dilemma for licensees because numerous works would leave the PRO licensing model altogether and force licensees to seek out the publisher-owners directly to obtain licenses. Mr. Warfield and Ms. Frazee warned in turn that without certainty that necessary licenses had been obtained (for example, in a world of increasing PROs, unaffiliated publishers, and fractional licensing), broadcasters and other licensees would simply stop playing music, which Ms. Frazee observed would harm new musicians trying to get their start in the industry. All panelists agreed that transparency and the creation of a widely available database including comprehensive music rights information would alleviate such problems.

Regarding the lack of a sound recording performance right covering terrestrial radio, Mr. Warfield observed that: (1) radio is still the number one source for listening; (2) radio airplay benefits both artists and labels; and (3) that model has worked well for the past 90 years and continues to work well today. He noted that while there have been many transitions in the music industry, the value of radio airplay still remains and that he has never met an artist who has asked for his or her music not to be played. Instead, he said that the opposite is true and that there is a healthy relationship between radio and performing artists. Mr. Marks reiterated support for a full sound

recording performance royalty, stating that 50% of recording revenues now come from listening and that revenues from downloads and CD sales are decreasing. Ms. Frazee noted that there are two bills in the House Judiciary Committee to enact a performance right but that there are also about 200 co-sponsors of a local radio freedom bill opposing such a right. She said that the debate had not changed, and she doubted whether legislation creating a performance royalty would pass anytime soon.

As for the pre- versus post-1972 sound recording issue – *i.e.*, only post-72 sound recordings are subject to federal copyright law protection whereas pre-72 recordings are subject only to state-law protection, if any – Mr. Warfield said that his company has not tried to distinguish between the two but that it’s up to individual broadcasters how to address this issue. Mr. Marks claimed that the distinction bears no rational connection to the market and that recent litigation has made it more confusing. He said that the major labels support a legislative solution that falls short of a full federal right, and he urged licensees to support such legislation.

The second opportunity for showgoers to get up to speed on music licensing issues occurred on April 26, 2017, where attention shifted to the television broadcast industry in a panel entitled, “TV Music Licensing: What the Future Holds.” The moderator was **Janet McHugh**, Executive Director of the Television Music Licensing Committee (“TVMLC”). Panelists were **Ben Marks**, an attorney in the field, and **Chuck Sennet**, Assistant General Counsel for Tribune Media Company.

After some general background provided by Ms. McHugh regarding music licensing and the role of the TVMLC in negotiating musical work performance licenses for non-ABC, CBS, NBC, and Univision networks as well as syndicated

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The Scoop on Music Licensing –
(Continued from page 13)

and local TV stations, the panel provided an update on the TVMLC's licensing negotiations with ASCAP, BMI, and SESAC. With respect to ASCAP, the most recent license expired at the end of 2016. The total industry fee under that license was \$92 million. Negotiations for a new license are ongoing. BMI's current total industry fee is \$78.65 million, and the licenses expire on December 31, 2017.

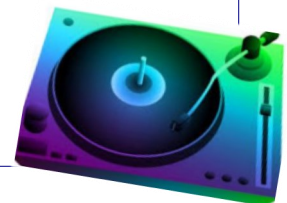
The TVMLC recently concluded a negotiation with SESAC for a license covering 2016-2019. The total industry fee for 2016 is \$25 million – an amount that increases in stages to \$36 million in 2019 to reflect SESAC's increasing market share. When asked during the Q&A session about the TVMLC's position regarding GMR, Ms. McHugh did not acknowledge ongoing talks but responded that the Committee is willing to talk to anyone with a demonstrated share of television music performances.

The panel also discussed DOJ's ongoing appeal of the BMI rate court's decision that the BMI consent decree does not prohibit BMI from offering fractional licenses. One panelist said that fractional licensing had been less of a concern when there were only three major PROs but that the concept was increasingly troubling with the fragmentation of music licensing rights among more PROs (such as GMR) and large publishers potentially deciding to go it alone. When fractional licensing became a key issue in the Department of Justice's examination of the operation of the ASCAP and BMI consent decrees, the TVMLC joined with other licensees in arguing that those PROs should, consistent with past practice, continue to be

required to grant full licenses to perform all works in those PROs' repertoires. While DOJ sided with licensees, BMI convinced its rate court to reject DOJ's interpretation – a decision that DOJ appealed last November. (DOJ's opening brief is due on May 18, 2017.)

The panel also touched on legislative reform of the copyright laws, with one panelist observing that the last major overhaul took place more than 40 years ago, in 1976, and that the United States has been operating under analog copyright law in a digital world. Active legislative issues include the record industry's repeated attempts to obtain a performance right covering terrestrial radio, the differential treatment of pre- and post-72 sound recordings, potential changes to the various statutory licenses, and the potential abolition of the ASCAP and BMI rate courts (which the TVMLC opposes).

Whew! That was a mouthful! Hopefully, though, the above recap has relieved your FOMO from having too much of a good thing at your fingertips during the NAB Show. If you have questions relevant to your business about any of the music licensing issues discussed at the NAB Show, or if GMR, SoundExchange, or others have been knocking at your door to demand payment, please call Karyn Ablin at (703) 812-0443 or Kevin Goldberg at (703) 812-0462. We are here to help!





Changes Allow NCE Stations to Conduct Fundraising Marathons – (Continued from page 7)

operated 24 hours a day, seven days a week the previous year, it could do third-party fundraising for up to 88 hours during 2017.

- If a NCE licensee has multiple channels, the one-percent limitation applies separately to each channel. For example, a NCE licensee with a main channel and two other separately programmed channels could not aggregate the airtime of all three programming streams and devote three percent of its airtime on any one channel to third-party fundraising.
- The beneficiary of a NCE station's third-party fundraising must be a Section 501(c) (3) entity. The FCC rejected the notion that any *bona fide* non-profit entity qualified under state law or any section of the Internal Revenue Code should be eligible. The FCC reasoned that limiting third-party fundraising beneficiaries to 501(c) (3) organizations, which are strictly prohibited from supporting or opposing candidates and are subject to limits on lobbying, would dovetail with the prohibition found in Section 399B of Communications Act prohibiting paid political advertising on NCE stations.
- NCE stations interrupting regular programming to conduct third party fundraising must announce over the air that the fundraiser is not for the station itself and identify the third-party beneficiary. The announcement must be made at the beginning and at the end of each fundraising program and at least once an hour during the program.
- NCE stations will be allowed to accept reimbursement of their expenses incurred in connection with third-party fundraising. The receipt of "additional consideration" for conducting or airing third-party fundraising programs will not be allowed.
- The station must place a report in its Public Inspection File for each calendar quarter that a NCE station engages in third-party fundraising that interrupts regular programming. That report must include the following: (a) the date, time and duration of the fundraiser, (b) a brief description of the cause or project, if any, supported by the fundraiser, and (c) to the extent that the NCE station participated in tallying or receiving the funds collected, an approximate of the total funds raised. (Recognizing that it may be difficult for a station to provide an exact figure, since donations may come in for days or weeks after the fundraiser was aired, the Commission has indicated an approximation to the nearest \$10,000 will be sufficient.)

In other respects, the Commission has given NCE stations some leeway in conducting third-party fundraising marathons:

- The beneficiary does not need to be an entity unaffiliated with the station. For example, if the non-CPB NCE station is licensed to a college, it could interrupt regular programming to raise money for the college's general coffers.
- Eligible beneficiaries are not limited to local non-profit organizations.

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UHF Discount Restored — (Continued from page 6)

The Commission has promised that it will undertake a new rulemaking proceeding later this year. At that time, it will consider the UHF discount in conjunction with the national TV ownership cap. The new VHF discount previously requested by Sinclair Broadcasting’s petition for reconsideration and rejected in Friday’s order also will likely be considered in the context of that comprehensive review.

Not surprisingly, Commissioner Clyburn was not mollified by this promise of future proceedings. She argued that the UHF discount is a return to an outdated rule, and that reinstatement of the rule will have the effect of increasing the cap considerably above the 39 percent level. While she recognizes the promise of a new rulemaking, she is worried that in the interim, large broadcast groups will add more stations and will thereby harm the public interest by reducing localism, competition, and diversity. In her view, the UHF discount was aimed only at addressing analog-era technical disparity, not competitive disadvantages with other types of video programming providers, such as satellite or cable operators.

We will keep you posted as to further developments with the planned new rulemaking proceeding. Check back here to learn of future opportunities to file comments on the matter.

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Changes Allow NCE Stations to Conduct Fundraising Marathons — (Continued from page 15)

- NCE stations will not be required to produce all third-party fundraising programs they air or conduct all the third-party fundraising activities themselves, such as collecting and distributing the funds.

As in the past, the FCC staff, upon a proper showing, will grant waivers to allow CPB stations to interrupt regular programming to raise funds to provide relief from specific disasters. Similarly, non-CPB stations that already have hit their one-percent limit may ask the FCC staff for waivers to interrupt programming to raise relief funds for specific catastrophic events.

The new third-party fundraising rules must now go to the Office of Management and Budget (OMB) for review. The new rules and the requirements set forth in the R&O will go into effect 60 days after the FCC publishes a notice in the Federal Register announcing OMB approval.



FCC's EEO Policies Re-examined — (Continued from page 8)

modification of the FCC's policies. After receiving comments overwhelmingly in favor of granting the relief requested by the petition, the Commission looked around and saw that Internet use has grown exponentially among all demographic groups, including minorities. Job seekers now routinely use the Internet to search for job openings. In fact, some employers, including the Commission itself, require that job applications be submitted online, absent extraordinary circumstances. At the same time, traditional go-to sources, such as newspapers, have declined in popularity and reach fewer people. In this climate, the Commission decided to reverse course and allow broadcast licensees and MVPD's to rely exclusively on Internet sources for recruitment.

The Commission emphasized, however, that it is still concerned about how widely the word of openings is spread. The question of whether one or more Internet job postings, either with or without other non-Internet contacts, could reasonably be expected to disseminate widely word of a job vacancy will remain the central question in evaluating recruitment efforts. MMTC proposed that the policy be changed so as to include three requirements: (1) that any online job posting be easy to find; (2) that it be posted for a sufficient period of time, with records kept of interviewees referred; and (3) that broadcasters continue to cultivate relationships with groups that might refer diverse candidates. The Commission declined to adopt these ideas as requirements but encouraged broadcasters to keep them in mind in their recruitment efforts. Doubtless, these factors will be considered when the FCC evaluates EEO programs.

Of course, none of the other aspects of the EEO rules has changed. The Commission will continue to evaluate EEO programs on the basis of employment units. Record-keeping and generalized outreach efforts, not related to a particular job opening, but calculated to make community residents aware of employment opportunities in broadcasting or with MVPD's, remain key.

The new Advisory Committee on Diversity and Digital Empowerment seeks to move beyond both the employment context and mass media to promote diversity in the communications industry generally. For example, some of the ideas it might promote include the establishment of an incubator program to promote ownership of communications businesses or the identification of ways to combat digital redlining. According to the news release announcing the establishment of this Advisory Committee, the Commission will soon be seeking applications for membership on the Advisory Committee. While its establishment was generally lauded, and the Advisory Committee seems to have high goals, a few individuals, including former FCC Chairman Michael J. Copps, complained that the Commission had already had a Diversity Advisory Committee, rechartered during his chairmanship, and felt that setting up a new committee, which would have to seek new members and establish itself, was a step backward. Whether the two committees will have common outlooks, as well as their relative measures of success, are matters that remain to be seen. If you have questions, let us know. In the meantime, keep on following those EEO rules.



Deadlines!



Upcoming FCC Broadcast Filing Deadlines

Do you know what FCC filing deadlines are coming up in early May through early June? We do. Note our list is not comprehensive, and other proceedings may apply to you. Please do not hesitate to contact FHH if you have any questions.

May 9, 2017 – *ATSC 3.0 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 3.0.

May 11, 2017 – *Incentive Auction – Winning Bidders* – Each station that was a winning bidder in the incentive auction must submit to the FCC a signed and notarized FCC Form 1875 along with either: (a) a bank account verification letter; or (b) a redacted bank statement confirming ownership of the bank account to which payments are to be made.

Incentive Auction – TV Station Repack – **Editor’s Note: some broadcasters have been advised to submit this form by May 11. There in fact is no deadline for filing the FCC Form 1876; rather, repacked broadcasters are only encouraged to submit the form well before July 12 to ensure there is no delay in the availability of repacking reimbursement funds.** Each station that has been involuntarily repacked after the incentive auction must submit to the FCC a signed and notarized FCC Form 1876 along with either: (a) a bank account verification letter; or (b) a redacted bank statement confirming ownership of the bank account to which payments from the Relocation Fund for reimbursement of costs to change channel are to be made.

May 15, 2017 – *Incentive Auction – TV Station Repack* – Requests for service rule waivers are due for any station seeking flexible use of its television spectrum instead of being reimbursed for repacking expenses.

June 1, 2017 – *EEO Public File Reports* – All radio and television stations with five (5) or more full-time employees located in the Arizona, the District of Columbia, Idaho, Maryland, Michigan, Nevada, New Mexico, Ohio, Utah, Virginia, West Virginia, and Wyoming must place EEO Public File Reports in their public inspection files. All TV stations, as well as radio stations in the top 50 markets, must upload the reports to the online public file. Smaller market 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. 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 Arizona, Idaho, Nevada, New Mexico, Utah, and Wyoming, and all television stations with five or more full-time employees in Michigan and Ohio must electronically file a mid-term EEO report on FCC Form 397, with the last two EEO public file reports attached.

June 8, 2017 – *ATSC 3.0 Television Broadcast Standard* – Reply 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 3.0.

June 12, 2017 – *Incentive Auction – TV Station Repack – Stations Unable to Construct Post-Auction Facilities Waiver* – Requests for extension of a station’s construction permit application filing deadlines are due if a station is unable to construct the facilities specified in the Channel Reassignment Public Notice released April 13, 2017.

Please contact [Anne Goodwin Crump](#) and [Dan Kirkpatrick](#) if you have questions about any of these deadlines.



FHH - On the Job, On the Go

Mitchell Lazarus will speak at the TCB Council in Baltimore on May 4th on the topic “*Regulatory Law for Engineers.*”

On May 4th, **Francisco Montero** will attend the Spring Meeting of the U.S. Chamber of Commerce Telecommunications & E-Commerce Committee in Washington, DC, and then on May 11th, find him at NAB Key Policy Priorities and Initiatives Luncheon, also in Washington, DC.

On May 17th, **Mitchell Lazarus** will speak at the National Spectrum Management Association in Arlington on the topic, “*Fixed Service versus Full-Band, Full-Arc Satellite Coordination.*”

If you're in Denver May 18-20th, be sure to say hello to **Kathleen Victory** and **Peter Tannenwald**. They're teaming up for the National Translator Association convention.

Kevin Goldberg will be speaking at the Media Financial Managers Conference in Orlando on Tuesday, May 23rd at 4:30 p.m. The topic is “*Best Practices in Drafting Contest Rules.*”

On May 31st, **Davina Sashkin** and **Frank Jazzo** will be on the “*Legal/Regulatory Update*” panel at the Louisiana Association of Broadcasters/Mississippi Association of Broadcasters Joint Convention at the Hotel Monteleone in New Orleans.

Frank Jazzo will be presenting a “*Legal/Regulatory Update*” at the New Mexico Broadcasters Association's Annual Convention on June 2nd at the Marriott Uptown in Albuquerque.

Francisco Montero will attend the SNL Kagan TV & Radio Finance Summit in New York City on the 15th of June, and then on June 21st & 22nd he will attend and present “*Washington/FCC Update*” at the Florida Association of Broadcasters convention in Ft. Lauderdale.

Dan Kirkpatrick will also be attending the SNL Kagan TV & Radio Finance Summit on June 15th, where he will be part of a panel on “*TV Station Retrans Revenue Opportunities and Challenges in an Emerging OTT World.*”

