

MEMORANDUM TO CLIENTS

June 2019

No. 19-05

FCC Revises Procedures for Submitting Financial Information Regarding Repack Reimbursement

The FCC on June 4 released in a [Public Notice](#) streamlined financial information instructions for full-power/Class A TV stations receiving repack reimbursement that have changed their banking information or have sold or acquired an eligible station and need to transfer the banking information to the new owner.

Eligible entities with a change of non-banking information – including name, mailing address, and contacts listed as authorized agents – will no longer need to file a new Form 1876, but can instead email their changes to a designated FCC email address (provided the email is sent from the account of a contact or authorized agent listed on their current Form 1876). Another difference from the prior procedure is, for those who are changing their banking information, the FCC will now only accept Form 1876 submissions filed in the Commission Registration System (CORES) Incentive Auction Financial Module (CIAFM). Otherwise, repack reimbursement-eligible entities should continue to follow the instructions from the FCC’s [Banking Procedures Public Notice](#) published in 2017.

As always, contact us with any questions on the revised procedures.

ATTENTION OLDIES STATIONS (OR OTHERS WHO PLAY PRE-72 RECORDINGS): Think Twice Before You Pony Up Three Years of Royalties Under New MMA Provision

by *Kevin M. Goldberg & Karyn Ablin*
goldberg@fhhlaw.com & ablin@fhhlaw.com
 (703) 812-0462 & (703) 812-443

Remember our April 4, 2019 [“CALLING ALL OLDIES STATIONS!”](#) post that alerted you to a simple form you could file to receive certain protections from potentially crippling infringement awards for unauthorized uses of sound recordings fixed before February 15, 1972 (aka “pre-72 recordings”)? That post created quite a stir. In fact, we were flooded with questions from webcasters around the country about whether and how to sign up.

Now, there is another upcoming deadline – **July 8, 2019** – for webcasters to take action to receive another potential benefit under the Copyright Act. Specifically, if webcasters who have streamed – but not paid for – pre-72 sound recordings from October 11, 2015 forward treat that activity **as if** it had been covered by federal law by providing notice of use



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of, and paying SoundExchange for, those recordings, they will be immune from potential **state law** infringement suits for that streaming (and related reproductions). But for reasons we'll explain below, this latest potential benefit applies to far fewer webcasters and is far less valuable than the benefit that we flagged for you in our earlier post. As always, do not treat this post as legal advice, and please consult an attorney should you need counsel on this issue.

This deadline and benefit, like those we wrote about in our prior blog, arise from the recently enacted Music Modernization Act (MMA). Before the October 11, 2018 effective date of that legislation, pre-72 recording owners were entitled to **no** copyright protection under federal law for those recordings. Instead, those recordings were subject to varying degrees of copyright protection – **if any** – under the patchwork laws of the various States.

That all changed with the passage of the MMA, which granted, for the first time, certain federal copyright protections to these recordings beginning on October 11, 2018. Pre-72 copyright owners welcomed this legislation, as they had met with mixed results, to say the least, in suing large webcasters for copyright infringement under state law. For example, courts in both [New York](#) and [Florida](#) flatly rejected such claims, finding that no public performance right existed under the laws of those states. Other States similarly rejected such claims.

(Even California, where one might expect the laws to be about as pro-copyright owner as anywhere given the large music and movie presence, the existence or nonexistence of a state public performance right in pre-72 recordings had not been finally decided. Although an early decision had favored the pre-72 recording owners, the question had been certified to the California Supreme Court in early 2017. After sitting on the issue for over two years, the Court [dismissed the question](#) on May 22, 2019, finding that it no longer needed to resolve that question in light of the MMA's passage.)

The grant of federal copyright protection to pre-72 recordings is a copyright owner's dream to overcome the difficulties they faced with pre-72 infringement litigation, and the relevant provision of the MMA sweetens the pot. It dangles the carrot of immunity from **state** infringement suits to pre-72 webcasters if they act **as if** all performances of those recordings for the past three years had been compensable under **federal** law by providing notice of use of, and paying SoundExchange federal statutory royalties for, all such performances. In other words, the provision gives pre-72 copyright owners a windfall of three years of federal statutory royalties that they are not legally entitled to if the implicated webcaster chooses to accept the statute's offer of immunity from state law infringement suits.

Before you open your checkbook and go running off to SoundExchange, consider the following, which may cause many, if not most, webcasters to reject this offer:

1. If you did not stream pre-72 recordings at all in the last 3 ½ years, the provision is irrelevant, as you don't need to worry about a state infringement suit in the first place.
2. If you did stream pre-72 recordings in the last 3 ½ years but you already paid SoundExchange for them even though you were not obligated to, the provision also is irrelevant because you already unnecessarily paid SoundExchange for streaming those recordings.
3. If you did stream pre-72 recordings and excluded them from your SoundExchange statutory royalty payments, but your streaming was focused in States that do not recognize a public performance right in those recordings, such as New York or Florida, the provision similarly is irrelevant, as pre-72 owners have no basis to sue you for infringement in those States.

It is only those webcasters who stream numerous pre-72 recordings to States that recognize – or likely would recognize – a state public performance right in pre-72 recordings and have not paid SoundExchange or the relevant copyright owners for these performances who should even think about paying what can best be termed “protection money.” In this regard, we are not aware of any States where pre-72 recording owners have successfully litigated the pre-72 performance rights issue to a final, unappealable decision.

Even assuming that some States would recognize such a right (California remains a possible candidate), these webcasters still could make a business decision not to pay this protection money for the guarantee not to be sued under state law. Pre-72 recording owners would need to sue webcasters in each State where they believe they could establish a performance right, and, even if successful, they could only recover for the fraction of allegedly infringing performances made in that State. Given that those owners already have a federal right going forward, they may not be inclined to mount such an uphill – and fragmented – battle in the face of significant litigation uncertainty that such a right would even be recognized.

In summary, if you (a) streamed pre-72 recordings to States that may recognize a performance right, (b) excluded those recordings from your SoundExchange royalty calculations, and (c) are risk-averse, you may wish to pay the protection money for the protection from State infringement suits that this MMA provision offers. We urge you to consult a lawyer to receive advice specific to your circumstances. Remember that the clock is ticking – you only have until July 8 to decide how to respond, if at all, to this provision.

FCC Considers Repurposing the 1675-1680 MHz Band

by Don Evans
evans@fhhlaw.com
 (703) 812-0423

By a [Notice of Proposed Rulemaking](#) adopted on May 9, the FCC sought comment on whether it should open the 1675-1680 MHz band for non-federal government mobile use. This marks the very plodding next step in a process that began back in 2012 when Ligado (then still known as Light Squared) petitioned the FCC to reallocate this channel. Ligado leases the adjacent 1670-1675 MHz from Crown Castle on a long term basis. It makes no bones about its intent to pair this 5 MHz with its existing 5 MHz holding to create a more useful broadband channel group.

The wrench in the works here is that the band now being looked at is actively used by the federal government for a number of weather data gathering and distributing services, including the “radiosondes” – balloons which are launched daily to gather meteorological data. Users of these services have naturally balked at constraining or limiting the ability of the existing networks to continue to deliver the needed weather data. Conversely, proponents of the proposal suggest that such uses can be relocated into the upper adjacent bands, and ground stations could be geographically protected from conflicting non-federal uses.

This kind of quandary often leads to the kind of ponderously slow movement we’ve seen in this proceeding. However, the FCC’s new motto seems to be “all 5G, all the time.” Any proposal that promises to move the country ahead in the race to worldwide 5G supremacy wins rapid FCC approval. Although the 5 MHz at issue here is a relatively paltry snack to feed the 5G beast, it can be combined with other channels as planned by Ligado (or even with other bands not necessarily adjacent to the band) to form a useful 5G bandwidth. So the FCC has stirred itself to push the proposal forward to concrete consideration. It remains to be seen whether the legitimate needs of the weather data community can be reconciled with general terrestrial usage of the band by private operators, but the FCC seems to think it’s possible.

Comments in Docket 19-116 will be due on June 21. Let us know if you need any more information on this proceeding or want to file comments.

FLETCHER, HEALD & HILDRETH, P.L.C.

1300 N. 17th Street - 11th Floor
 Arlington, Virginia 22209
 (703) 812-0400

On Twitter @CommLawBlog

E-Mail: Office@fhhlaw.com

Website: www.fhhlaw.com

Blog: www.commlawblog.com

Contributing Writers

Karyn Ablin
 Kevin M. Goldberg
 Jeff Mitchell
 Don Evans

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New Developments in Broadband—May

by Jeff Mitchell
mitchell@fhhlaw.com
 (703) 812-0450

Broadband on Capitol Hill

House Democrats have unveiled their \$2 trillion dollar infrastructure package called the “[Leading Infrastructure for Tomorrow’s America Act](#)” (LIFT America Act). [A House hearing was held May 22 with testimony from, among others, former FCC Commissioner Mignon Clyburn.](#) The legislation includes \$45 billion in broadband funding: – \$30 billion in reverse auction funds to be administered by the FCC, \$10 billion in reverse auction funds to be administered by the states, and \$5 billion in federal loans and loan guarantees to be administered by National Telecommunications and

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Information Administration (NTIA). Although President Trump has expressed general support for the package, political volatility between House Democrats and the President makes passage this year very uncertain.

Here are a few other broadband bills we are watching: Senator Roger Wicker (R-MS) has introduced the “[Broadband Interagency Coordination Act](#).” Co-sponsored by Senator Amy Klobuchar (D-MN), the bill would require NTIA, FCC, and United States Department of Agriculture (USDA) to coordinate broadband funding through a standardized set of broadband coverage data – but would give FCC primary responsibility for that data. A similar measure – [the ACCESS BROADBAND Act](#) – would establish an Office of Internet Connectivity and Growth within NTIA and passed the House by voice-vote on May 9. This bill would place

NTIA in a formal advisory role regarding the coordination of all federal broadband spending.



Senators Marsha Blackburn (R-TN) and Tammy Baldwin (D-WI) have introduced the “[Internet Exchange Act](#)” to provide

NTIA-administered matching grants for internet exchange (IX) facilities in certain core-based statistical areas and would permit Universal Service Fund (USF) E-rate and Rural Health Care (RHC) program recipients to use their funding to contract with an Internet Service Provider (ISP) to connect to an IX facility or pay the costs of maintaining a point of presence at a facility.

Finally, Reps. Markwayne Mullin (R-OK) and Collin Peterson (D-MN) have introduced the “[Rural Broadband Network Advancement Act](#)” (RBNA). The RBNA establishes a new FCC program outside of the existing universal service mechanisms that would collect network user fees from edge providers based on the data transported over the last mile of networks and these fees would be invested by rural broadband providers to help build, maintain and operate robust broadband networks in high-cost rural areas.

NTIA

On May 9, 2019, NTIA Administrator David Redl unexpectedly resigned. Although Redl has had policy disagreements with the FCC and State Department in his 18 months in the position, no obvious reason for his departure has emerged. Deputy Administrator Diane Rinaldo will be interim Administrator with no replacement nominee likely before the 2020 election cycle.

The next NTIA broadband webinar is Wednesday, June 19,

and will discuss [Building Smart Cities and Communities at the Regional Level](#). The archive for previous webinars are available [here](#). The BroadbandUSA Newsletter for May is available [here](#).

USDA – Rural Utilities Service

The ReConnect broadband funding program has come up for received criticism from some who have concluded the application process is too complex and not worth the effort given restrictions on where funding is available. OTELCO, – which owns a number of independent carriers in several states – [explained their problems with the program in Broadband Communities Magazine this month](#):

Identifying an area that has a population of only six per square mile but has a high enough density of community anchor institutions, farms and other businesses to score well on the first three criteria will be challenging indeed. It will also likely require service areas to be large, which will be problematic for community networks and small ISPs. Finding these things in an area that is 90 to 100 percent unserved by at least 10 Mbps/1 Mbps and is not funded by CAF is virtually impossible.

The filing deadline for ReConnect Program 100% grant applications was **May 31, 2019**.

Federal Communications Commission

Chairman Ajit Pai has announced the terms under which he is willing to recommend approval of the Sprint/T-Mobile merger. That issue is beyond the scope of this blog post but it has large implications for the country. The approval is largely being driven by the purported benefits the merger will have for 5G rollout. It also will have implications on the Educational Broadband Service proceeding (see below) given the a large number of EBS licenses are held by Sprint.

The tentative agenda for the Commission’s next meeting on June 9 can be found [here](#). A recording of the May 9, 2019, open meeting can be streamed [here](#). Among other things, the Commission unanimously voted to deny on national security grounds an application by China Mobile Telecom to provide international telecommunications services in the U.S.

Rural Digital Opportunity Fund

No new details regarding the \$20.4 billion “[Rural Digital](#)

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[Opportunity Fund](#)” (RDOF) have emerged since it was announced by Chairman Pai in April. The new fund will apparently repurpose a portion of existing High Cost program universal service funding (*i.e.*, the Connect America and Mobility Funds) over a ten-year period in order to connect up to 4 million rural homes and businesses to high-speed internet. A draft NPRM on the RDOF is expected to emerge later this year.

USF Spending Cap NPRM

The Commission has released a [Notice of Proposed Rulemaking \(NPRM\) to consider rules to cap overall USF spending](#) – this would be in addition to the program-specific caps that may be in place. The idea of an overall USF budget has been championed by Commissioner Michael O’Rielly for years and [he is the item’s principal proponent](#). The two Democratic Commissioners (Geoffrey Starks and Jessica Rosenworcel) dissented from approving the NPRM. Initial comments will be due 30 days after the item is published in the Federal Register with reply comments due 30 days later.

E-rate

Commissioner O’Rielly’s efforts to address “overbuilding” in the E-rate program have culminated in a [petition for rulemaking filed by two rural Texas carriers](#) to modify E-rate rules. The Texas carriers proposed the following language be added to the rules: “Category One services shall not include special construction costs for the construction of fiber where it has been demonstrated that fiber already exists, unless the existing fiber owner is unwilling to negotiate in good faith to lease that fiber at reasonable market-based prices.” The Wireline Competition Bureau is now [seeking public comments on the petition](#).

With no chance of the “Save the Internet Act” passing the Republican-controlled Senate, Republicans and some Democrats are focusing on potential compromises

Reports are that an NPRM is circulating at the Commission that would make permanent the current E-rate Category 2 budget process. This NPRM has been widely expected since the Bureau released its [report on Category 2 budgets](#) earlier this year.

Rural Health Care Program

The [FCC has released an expected order](#) which allows the release of long-delayed Healthcare Connect Fund (HCF) consortium funding commitments held by Universal Service Administration Company. The commitments were held because multi-year requests and upfront costs (*i.e.*, fiber and special construction) in funding year (FY) 2018 (July 1, 2018 through June 30, 2019) exceeded the \$150 million HCF sub-cap (FY 2018 funding demand details [here](#)). The FCC’s order reduces all three-year funding requests to a single-year and fully funds them along with requests for upfront costs. While the overall program demand was below the overall program cap for FY 2018, the trend suggests the overall cap may be exceeded in FY 2019.

The Schools Health & Libraries Broadband (SHLB) Coalition is sponsoring an [event in Dirksen Senate Office Building](#) on June 10, 2019, entitled “Improving Rural Healthcare with Broadband and Telehealth.”

Educational Broadband Service (EBS)

We are past the one-year anniversary of the FCC’s EBS NPRM (background at the end of this item) and, with an order expected soon, Chairman Pai is reportedly leaning toward endorsing auctions of the remaining unused EBS spectrum.

Net Neutrality

The House passed the “[Save the Internet Act](#)” legislation in April which would restore the FCC’s 2015 net neutrality rules including classifying broadband as a regulated telecommunications service under Title II of the Communications Act. With no chance of that bill passing the Republican-controlled Senate, Republicans and some Democrats are focusing on potential compromises. Senators Roger Wicker (R-MS) and Kyrsten Sinema (D-AZ) formed a bi-partisan working group

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in March on the Senate side to focus on creating legislation capable of passing both houses. Reports are that a similar working group is possible on the House side.

Federal Courts

- Mozilla Corporation, et al. v. FCC (DC Circuit Court of Appeals challenge to the 2017 Restoring Internet Freedom Order) – Final briefs have been filed and oral arguments occurred in early February.
- Eastern District of California. On October 3, 2018, SB 822, the California Internet Consumer Protection and Net Neutrality Act of 2018 was [challenged in federal district court in California by the Department of Justice \(DOJ\)](#) and several industry groups ([in a separate suit](#)). DOJ sought a preliminary injunction but on October 26 the court agreed to a request by all parties to stay the case after California agreed not to enforce the law pending outcome at the DC Circuit decision on the FCC’s “Restoring Internet Freedom” order.
- Vermont District Court. On October 18, 2018, the same industry groups – American Cable Association (ACA), CTIA - The Wireless Association (CTIA), NCTA - The Internet & Television Association (NCTA), and USTelecom [challenged Vermont’s net neutrality law and executive order](#) in federal district court there and in January 2019 [sought summary judgment](#). The [parties in March 2019 agreed to stay further proceedings](#) pending a decision in the DC Circuit case (above).

States

The National Conference of State Legislators (NCSL) features an up-to-date summary of state net neutrality efforts by state legislators for 2019 [here](#) (updated May 6, 2019).

Peter Tannenwald Honored by WAMU Radio

We are very proud to congratulate our own Peter Tannenwald on being recognized by American University Radio in Washington, DC for his many years of work with radio station WAMU, the local NPR affiliate found on 88.5 FM. Peter was presented with a ceremonial (but functioning) microphone at the WAMU Community Council meeting on May 8 and was feted with some very kind words from station leadership.

J.J. Yore, general manager of WAMU expressed that, “no one has served WAMU longer, through more peaks and valleys, than Peter. For fifty – yes, fifty - years, he has quietly, patiently, and diligently helped WAMU increase its significance to Washingtonians.”

“It has been both a pleasure and an honor to serve seven General Managers of WAMU over the past fifty years,” said Tannenwald. “Through helping WAMU, I have tried to put my specific professional skills to work in support of a vital community institution. I’m very pleased that someone as skilled as Matt McCormick will be continuing this tradition of public service, as WAMU grows and evolves into a multi-platform 21st-century information service.”

This is simply the latest in a series of radio accolades for Peter after being inducted into the WBRU Hall of Fame last year at his alma mater, Brown University.



Upcoming FCC Broadcast and Telecom Deadlines for June - August

Broadcast Deadlines:

June 1, 2019:

License Renewal Pre-Filing Announcements – Radio stations located in North Carolina and South Carolina must begin broadcasts of their pre-filing announcements with regard to their applications for renewal of the license. These announcements must be continued on June 16, July 1, and July 16.

Radio Post-Filing Announcements – Radio stations located in the District of Columbia, Maryland, Virginia, and West Virginia must begin broadcasts of their post-filing announcements with regard to their license renewal applications on June 1. We would suggest, however, that those licensees filing renewal applications on the filing deadline of June 3 delay the post-filing announcements until June 3. These announcements then must continue on June 16, July 1, July 16, August 1, and August 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be posted to the online public file within seven days.

June 3, 2019:

License Renewal Applications Due – Applications for renewal of license for stations located in the District of Columbia, Maryland, Virginia, and West Virginia must be filed in the Commission's Licensing and Management System (LMS). These applications must be accompanied by Schedule 396, the Broadcast Equal Employment Opportunity (EEO) Program Report, also filed in LMS, regardless of the number of full-time employees.

EEO Public File Reports – All radio and television station employment units with five or more full-time employees located in 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 online public inspection file (OPIF). 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.

July 10, 2019:

Repack Transition Progress Report – All full-power and Class A television stations repacked as a result of the incentive auction, other than those in Phases 1-3 that have completed the repack process, including filing reports of completion, must file a report in the LMS to detail their progress toward completion of the transition.

Children's Television Programming Reports – For all commercial television and Class A television stations, the second quarter 2019 children's television programming reports must be filed electronically with the Commission. These reports then should be automatically included in the OPIF, but we would recommend checking, as the FCC bases its initial judgments of filing compliance on the contents and dates shown in the online public file. Please note that the required use of the LMS for the children's reports means that you should have the licensee FCC registration number and password at hand before you start the process.

Commercial Compliance Certifications – For all commercial television and Class A television stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to substantiate compliance with those limits, must be uploaded to the OPIF.

Website Compliance Information – Television and Class A television station licensees must upload and retain in their OPIF record sufficient to substantiate at license renewal time a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

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 last quarter must be placed in the station's OPIF. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

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

August 1, 2019:

License Renewal Pre-Filing Announcements – Radio stations located in Florida, Puerto Rico, and the Virgin Islands must begin broadcasts of their pre-filing announcements with regard to their applications for renewal of the license. These announcements must be continued on August 16, September 1, and September 16.

Radio Post-Filing Announcements – Radio stations located in North Carolina and South Carolina must begin broadcasts of their post-filing announcements with regard to their license renewal applications on August 1. These announcements then must continue on August 16, September 1, September 16, October 1, and October 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be posted to the online public file within seven days.

License Renewal Applications Due – Applications for renewal of license for stations located in North Carolina and South Carolina must be filed in the Commission's LMS. These applications must be accompanied by Schedule 396, the Broadcast EEO Program Report, also filed in LMS, regardless of the number of full-time employees.

EEO Public File Reports – All radio and television station employment units with five or more full-time employees located in California, Illinois, North Carolina, South Carolina, and Wisconsin must place EEO Public File Reports in their OPIF. 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.

Telecom Deadlines:

August 1, 2019

Quarterly Telecommunications Reporting Worksheet (FCC Form 499-Q) – FCC rules require telecommunications carriers and interconnected Voice over Internet Protocol (VoIP) providers to file quarterly revenue statements reporting historical revenue for the prior quarter and projecting revenue for the next quarter. The projected revenue is used to calculate contributions to the Universal Service Fund (USF) for high cost, rural, insular and tribal areas as well as to support telecommunications services for schools, libraries, and rural health care providers. USF assessments are billed monthly.

Numbering Resource Utilization Forecast (NRUF) (FCC Form 502) – Twice a year, service providers with numbers from the North American Numbering Plan Administrator (NANPA), a Pooling Administrator, or another telecommunications carrier must file a numbering resource utilization forecast. Subscriber toll-free numbers are not included in the report. Interconnected VoIP providers are subject to the reporting requirement along with other service providers who receive NANPA numbers, such as wireless carriers, paging companies, incumbent local exchange carriers, and competitive local exchange carriers.



FHH - On the Job, On the Go



On June 7, **Kevin M. Goldberg** and **Michelle McClure** will speak at the New Mexico Broadcasters Association Summer Convention in Albuquerque, NM. Kevin will present a session on requesting public records under federal and state freedom of information laws and a session on copyright. Michelle will be on an engineering panel as well as the “Ask a Lawyer” panel.

On June 9, **Dan Kirkpatrick**, **Frank Montero**, and **Kathleen Victory** will attend the NAB Leadership Foundation' Broadcast Leadership Training program's graduation in Washington, DC.

From June 12-13, **Frank Montero** will attend the New Jersey Broadcasters Association board meeting and awards dinner in Atlantic City, NJ.

On June 14, **Kevin M. Goldberg** will be a panelist at a session titled “Let the Sun Shine In: Using Open Records Laws to Find Stories and Expose Government Secrets” at the Public Radio News Directors Conference in Washington, DC.

From June 18-20, **Frank Montero** and **Bob Winteringham** will attend the National Federation of Community Broadcasters conference in San Diego, CA.

From June 26-27, **Frank Montero** and **Davina Sashkin** will attend the the Florida Association of Broadcasters conference in Fort Lauderdale, FL.

From July 18-19, **Davina Sashkin** will be speaking twice at the Arkansas Broadcasters convention in Little Rock, AR. Davina will be doing a fireside chat with Patrick McFadden of the National Association Broadcasters and Luke Story, the executive director of the ABA. The other will be a license renewal tutorial.