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MEMORANDUM TO CLIENTS

July 2019

No. 19-06

EAS National Test Scheduled Earlier than Usual

The Federal Emergency Management Agency (FEMA) in coordination with the FCC, will conduct a nationwide test of the Emergency Alert System (EAS) on August 7th, at 2:20 pm EDT. If conditions such as a real emergency or other unforeseen circumstances occur on the day of the test, a backup date is scheduled for August 21st. All EAS participants should have already completed their 2019 Form One (it was due on July 3rd).

In recent years, FEMA has distributed the nationwide EAS test through both the broadcast-based "daisy chain" as well as over the Internet using the Integrated Public Alert and Warning System (IPAWS). This year, however, the Commission will be conducting the test using only the broadcast-based "daisy chain" (although participants are reminded that the FCC rules still require them to be able to receive alerts from IPAWS). Because the test will be disseminated this way, FEMA has indicated that full message text and multilingual messaging will not be available. The purpose of this change, according to FEMA, is "to determine the capability of the EAS to deliver messages to the public in the event that dissemination via the Internet is not available."

The EAS Test Reporting System (ETRS) is currently open for the 2019 filing period. As in the last two years, EAS participants must renew their identifying information on a participant's location, their EAS equipment and monitoring assignments, and contact information for EAS purposes. Each EAS participant must file a separate Form One for every EAS decoder, EAS encoder, or unit combining such decoder and encoder functions. Forms can be submitted on a station-by-station basis or on a batch filing basis for certain commonly-owned stations. Again, all Form Ones should have already been filed. On or before 11:59 pm EDT, August 7th, EAS participants also must file "day of test" information on Form Two; and on or before September 23rd, EAS participants must file detailed post-test data on Form Three. EAS participants are allowed 30 days after submission of all ETRS forms to review their filings and to correct errors.

The ETRS system can be accessed by the use of an FCC Username that is associated with your FCC registration number (FRN). For a review of how to get such a username if you don't have one, check our previous post here .

Supreme Court Rules that Public Access Television is Actually Private

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As we neared the end of the 2018-2019 Supreme Court term, I was watching with bated breath for the issuance of three opinions relevant to my work and, I assumed, to the interests of our CommLawBlog readers. The cases affected my interests in distinctly different ways: from my "extracurricular" activities to the participation of clients in the proceedings to my penchant for the occasional, intentionally disruptive profanity work on trademark and First Amendment issues.

In *Manhattan Community Access Corp. v. Halleck*, the question is whether "the operation of public access channels on a cable system a traditional, exclusive public function." If so the First Amendment restricts the Manhattan Community Access Corporation (MCAC) exercise of editorial discretion over the speech and speakers on the public access channels. My connection to this case is through my service for more than ten years as a board member for the Public Access Corporation of the District of Columbia ("DCTV"), which operates the public access television channels in D.C. Make all the "Wayne's World" jokes you want but I'm proud of what DCTV and other public access channels provide in terms of diverse programming, substantive, hands-on skills training across the city, and overall commitment to First Amendment principles (even as it wasn't clear that the First Amendment strictly applied to DCTV and other public access channels – at least until this case was resolved, though I expect that overall commitment to continue)

The Court, in a 5-4 opinion written by Justice Kavanaugh, who was joined by the Court's four traditionally conservative

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Justices (Roberts, Thomas, Alito, and Gorsuch), preserves editorial discretion for public access channels like MCAC and DCTV; for that, I am happy. At the same time, it clearly protects larger, more corporate entities as well; in that regard, I simply hope that later opinions will heed Justice Kavanaugh's warning that the decision be limited to the facts of this case.

And what are those facts?

Two individuals – DeeDee Halleck and Jesus Papoleto Melendez – who often produced programs shown on MCAC channels made a film about MCAC's alleged neglect of the East Harlem Community. MCAC televised the film (despite being the subject of heavy criticism in the film). MCAC later received several complaints about the content, after which it temporarily suspended the producers from using public access; they were later permanently suspended after another dispute.

The producers sued MCAC, alleging that a suspension based on the content of their film constituted a violation of their First Amendment rights. MCAC moved to dismiss the lawsuit on the basis that it is not a "state actor" and, as such, is not strictly subject to the First Amendment. The United States District Court for the Southern District of New York ruled that MCAC is not a state actor and granted the motion to dismiss. The United States Court of Appeals for the Second Circuit reversed this decision, holding that public access television channels are a "public forum" where the First Amendment applies.

Justice Kavanaugh's decision relied closely on the historical regulatory scheme applicable to public access television as well as the modern set up of these specific MCAC channels. In the 1970s the FCC's regulations required cable operators to set aside channels on their cable systems for public access. But, in 1979, the Supreme Court, in *FCC v. Midwest Video Corp*, ruled that the FCC lacked the authority to impose that mandate. Congress, in response, included provisions in the Cable Communications Policy Act of 1984 which *authorized* state and local governments to require cable operators to set aside channels for public access. New York did just that, requiring cable operators to set aside public access channels for use free of charge and on a first-come, first-served basis. Under New York's regulatory scheme, the cable operator is in charge of the channel unless (1) the local government chooses to operate or (2) the local government designates a private entity to operate the channel. In Manhattan, public access channels on Time Warner Cable System are privately owned by MCAC.

Justice Kavanaugh held that, under these facts, MCAC is not a state actor and therefore, can restrict access to its channels and exert virtually unlimited discretion on programming decisions without running afoul of the First Amendment which, like most individual liberties guaranteed in the Bill of Rights, only offers protection against actions by the government.

A private entity may be considered a state actor only when (1) it exercises a function traditionally exclusively reserved to the State, (2) the government compels the private entity to take a particular action, or (3) when the government acts jointly with the private entity.

Justice Kavanaugh quickly ruled that neither the second nor third categories were in play here. The government wasn't compelling MCAC to suspend the producers and there was no obligation for the government to operate these channels in the first place, meaning the government was not acting jointly with MCAC. He, therefore, focused on whether MCAC's public access channels are traditionally exclusively reserved to the state, concluding they are not.

It is not enough, Justice Kavanaugh held, that the government may have operated public access channels in the past or even that the public good or public interest are generally served. State action in this area is limited to those activities that are both ***traditional AND exclusive*** to the government, which is extremely narrow, things like running elections, operating prisons, having police forces, and operating "company towns." He provided a long list of activities falling outside the area of "traditional and exclusive" including running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and providing electricity.

Under this framework, even though public access has been a regular feature of cable channels since the 1970s, these channels have been operated by a variety of public and private actors. Justice Kavanaugh dismissed the producers' argument that the proper analysis here is actually the "public forum" doctrine, which applies whenever space is traditionally used by the government for free speech activities, as a private entity does not transform into a state actor just because it provides a forum for speech. If that were the case, he noted, anyone who allows others to freely speak would become a state actor and lose the ability to control

the speech on their property, "[t]he Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on

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their property."

Nor does the fact that the city designated MCAC as the operator of these channels and regulates MCAC in several ways make MCAC a state actor. Justice Kavanaugh likened the relationship between New York City and MCAC as akin to having a government license or contract ("[i]f being heavily regulated were to make a company a state actor, individual liberty and private enterprise would be significantly endangered."). Both Time Warner Cable and MCAC are private entities, with all facilities and equipment are owned by MCAC; none of the cable franchise agreements give the government a property interest in the channels (in fact, the opposite is true: the city explicitly is prevented from holding such an interest in the channels under New York law).

As I noted above, Justice Kavanaugh cautioned against too broad a reading of his opinion, theorizing that a public access channel *could* be a state actor if (1) the government operated the channel or (2) the government took other steps to obtain a property interest in the channel.

Justice Sotomayor – a proud native New Yorker it must be noted – wrote in dissent for the more liberal wing of the Court (she was joined in her opinion by Justices Ginsburg, Breyer, and Kagan). She disagreed with the majority view that this case is simply about a private property owner opening up space to others; instead, she viewed MCAC as an organization appointed by the government to administer a constitutional public forum.

In Justice Sotomayor's view, New York City does have a property interest in these channels, acquired when the city granted a cable franchise to Time Warner Cable and reinforced when state law required those channels to be open to the public on terms that render them a public forum. The city has merely contracted out oversight to a private entity because a private company cannot enter the local cable market without a franchise agreement issued by the state because it is using the public rights of way. As a condition of getting this franchise agreement, the cable company must agree to set aside at least one channel for public access use, with the state requiring use on a first-come, first-served, nondiscriminatory basis. She also pointed to the fact that, historically, the initial seven board members of MCAC were chosen by the city and the city arranged for MCAC to be funded via franchise fees from cable operators. As Justice Sotomayor sees it, "if this were a theater, there would be no question that the government's long term lease would be sufficient to create a public forum."

While this case has major ramifications for MCAC, DCTV, and other public access channels – many of whom will enjoy greater independence in their programming decisions – are there any greater lessons we can take from Justice Kavanaugh's decision, especially in light of his admonition that it should be limited to the facts of this case?

Well, it certainly will expand the "state action" doctrine to some degree. Corporations will be loving this decision, especially the final paragraph, which reads:

"It is sometimes said that the bigger the government, the smaller the individual. Consistent with the text of the Constitution, the state-action doctrine enforces a critical boundary between the government and the individual, and thereby protects a robust sphere of individual liberty. Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise."

With this pro-corporation, anti-big government kicker, it's not surprising to see the Court split along conservative and liberal lines. In the First Amendment realm, social media platforms such as Facebook and Twitter will certainly cite this decision (even though I don't think anyone has necessarily called them "state actors") as further proof that they are to be the sole and final arbiters of what is or is not allowed on their sites. The issue to be watched is probably more outside this pure speech context: whether some even more traditional (but perhaps not exclusive) government functions that have been outsourced to private actors (like, perhaps prisons or detention centers) can operate even more freely of government intervention when restricting individual liberties.

Inside This Issue

Taking the Same Slant on the Lanham Act for the Second Time in Two Years, Supreme Court tells USPTO to Go Ask Congress to Try Again

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Let's get this out of the way: this blog post is going to include an unseemly, in my mind, profane, even obscene, term. I'm just going to put it out there up front, even though I think it's one of the worst things you can say. And no, the First Amendment doesn't protect it.

It's "viewpoint discrimination." Even writing it makes me uneasy.

"FUCT" on the other hand is OK. Protected by the First Amendment, as of now, entirely eligible for registration as a federal trademark, thanks to Erik Brunetti, an artist and entrepreneur who started the clothing line FUCT.

It's actually pronounced "F-U-C-T" though it clearly reads differently, which is why the application filed by Brunetti to register the term as a trademark in connection with various types of clothing and accessories was initially rejected by a United States Patent and Trademark Office (USPTO) (who deemed it "totally vulgar") and the Trademark Trial and Appeal Board (TTAB) (who declared the mark to be "highly offensive, vulgar," and with "negative sexual connotations.").

These rejections were officially issued under the statutory language of the Lanham Act, specifically 15 USC 1052(a) which the USPTO uses to refuse registration marks consisting or comprised of immoral or scandalous matter. In applying the Lanham Act, the USPTO, TTAB, and federal courts have looked at whether a substantial composite of the general public would find the mark shocking to the sense of truth, decency, or propriety or whether it would give offense to conscience or moral feelings, calling out for condemnation, disreputable or vulgar.

Brunetti appealed this rejection to the United States Court of Appeals for the Federal Circuit, which found this prohibition on immoral or scandalous marks to be in violation of the First Amendment. In reaching this conclusion, the Federal Circuit relied heavily on a relatively recent decision by the Supreme Court in the case of *Matal v. Tam*, which I wrote about after it was issued. In that case, the Court struck down another portion of 1052(a) that forbids registration of marks that are disparaging in nature. (The mark in question was "The Slants", listed as a band name.)

Justice Kagan wrote for the Court but was joined by an interesting cross-section of her brethren: one liberal member of the Court, Justice Ginsburg and four conservative Justices Thomas, Alito, Gorsuch, and Kavanaugh. There were, however, four concurring and/or dissenting opinions that I'll also briefly discuss below.

The Court, in this case, was not nearly as fractured as it was in *Tam* where, as Justice Kagan noted in setting the framework for her conclusion, the Court was split between two opinions that each garnered the support of a mere plurality of the Court. The Court in *Tam* did not reach consensus on a key issue of whether the Lanham Act as a whole merely conditions the receipt of a government benefit (the various rights afforded by registering a trademark) having a registerable mark (in this case, not running afoul of Section 1052(a)) or whether the Lanham Act constitutes an actual restriction on speech. The former would make it more likely that the Lanham Act's provisions might be sustained against a constitutional challenge; the latter would likely make it impossible.

But Justice Kagan was able to sidestep that question again because both opinions in *Tam* agreed that, if the Lanham Act bar on registration of these types of marks discriminates on the basis of viewpoint, then it is clearly unconstitutional.

And that's the case here, where Justice Kagan reviewed a long history of similar applications, finding that:

> "the PTO has refused to register marks communicating "immoral" or "scandalous" views about (among other things) drug use, religion, and terrorism. But all the while, it has approved registration of marks expressing more accepted views on the same topics."

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In this case, the USPTO and TTAB both reached their conclusions, in part, on their perception of Mr. Brunetti's website as containing "extreme nihilism and anti-social behavior."

The USPTO argued that the immoral or scandalous provision of the Lanham Act should be construed narrowly, to apply only to those marks deemed offensive or shocking to a substantial segment of the public because of their mode of expression, independent of any views that they may express. But Justice Kagan refused to engage in such narrowing of the statute, refusing to twist the statute to read that way which effectively constitutes the drafting of a new statute entirely.

Justice Alito concurred in the result. While agreeing that the current statute violates the First Amendment in a way that cannot be saved by this Court, he wrote separately to invite Congress to take another crack at this. He suggested the decision should not be read to prevent Congress from adopting a more carefully focused statute that precludes registration of marks containing vulgar terms that play no real part in the expression of ideas.

Justice Roberts also wrote separately. He reiterated that the "immoral" provision cannot be narrowed to save its constitutionality, though he felt differently about the "scandalous" portion of this section, saying it could be read to only reach marks that offend because of the ideas they convey – marks that are obscene, vulgar or profane. He also reached back to reiterate his view expressed in *Tam* that the Lanham Act does not serve as a restriction on speech but instead only denies a government benefit to a class of speakers.

Justices Breyer and Sotomayor largely went the other direction, albeit in separate opinions. They both agree that the statute should only reach highly vulgar or obscene modes of expression. Under such a standard, they both agree, the USPTO could refuse registration under the Lanham Act to reject the application for "F-U-C-T." Both also appeared to side with Justice Robert's view from *Tam* that the Lanham Act only restricts noncash benefits otherwise available to trademark holders who register their mark.

So what can we take away from *Iancu v. Brunetti*? In the short term, there's likely to be a rush to the USPTO to register any and every possible term that previously might have been deemed "immoral and scandalous," especially the worst of the worst in that regard.

That's because, if you read closely and count the numbers, there seem to a very-near majority of the Court (Alito, Roberts, Breyer, and Sotomayor) who would welcome the opportunity to review another, more narrowly tailored version of this section of the Lanham Act that is focused on scandalous terms, should Congress take up the challenge.

Supreme Court SNAPS back Against Access to Information

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I was one of many who traveled (in my case, on foot) to the United States Supreme Court on April 22, 2019 to watch oral arguments in the case of *Food Marketing Institute, Inc. v. Argus Leader*. I was there because two of my clients joined an amicus brief in support of the newspaper's fight for access to records about the Supplemental Nutritional Assistance Program (SNAP) and because the case held a greater meaning for anyone interested in the Freedom of Information Act (FOIA), as this was the first time the Court would be exploring the breadth of FOIA Exemption 4 (which I'll describe in greater detail below). I had a distinctly negative feeling about the likely outcome of the case when the hour was up; my gut instinct was confirmed on June 24, 2019, when the court, in a written decision by Justice Gorsuch, not only narrowed the scope of Exemption 4 but also appeared to attempt to redefine the fundamental nature of the law itself.

The case actually goes back several years, when the South Dakota paper filed a FOIA request with the United States Department of Agriculture (USDA) in 2011 seeking the names and addresses of retailers participating in SNAP program and each store's SNAP redemption during the years 2005-2010. SNAP, in case you're not already aware, is the federal "food stamp" program which allows individuals to receive monthly supplements from the federal government to purchase nutritional food. The USDA agreed to provide the names and addresses of each participating retailer, but not the financial data involving retail sales on a store-by-store level, citing FOIA Exemption 4, which allows the government to withhold information containing (1) trade secrets or (2) commercial or financial information obtained from a person and privileged or confidential in nature. This case involves the second category of documents.

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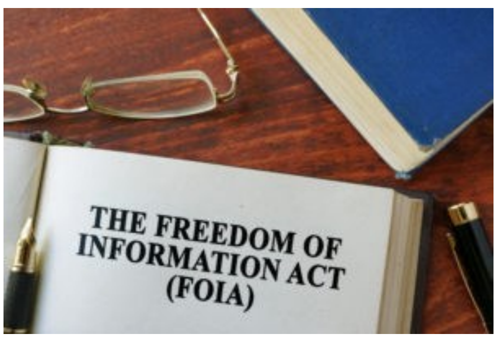
The Argus Leader availed itself of the right to judicial review under FOIA, successfully filing suit in the United States District Court for the District of South Dakota. The District Court held that Exemption 4 requires demonstration that the commercial or financial information involved is not only privileged or confidential in nature but also that release of the information is likely to cause *substantial harm* to the competitive position of the person from whom the information was obtained.

What happened next was interesting – and integral to the case. The USDA did not appeal the District Court decision but the Food Marketing Institute (FMI), who is an advocate for the retail industry, moved to intervene in the case. In arguments to the United States Court of Appeals for the Eighth Circuit, FMI advocated for discarding the substantial competitive harm requirement in favor of simply applying the ordinary public meaning of the term "confidential." The United States Court of Appeals for the Eighth Circuit rejected this argument, at which point FMI asked the Supreme Court to take the case.



Justice Gorsuch wrote for a six-member majority of the Court (he was joined by Justices, Roberts, Thomas, Alito, Kavanaugh, and Kagan). His opinion addressed 2 issues: (1) whether FMI had the necessary legal "standing" to step into the shoes of the USDA in defending against the release of this information and (2) whether Exemption 4 was properly applied. The answers to those questions were "Yes" and "No."

The issue of whether FMI had the standing to represent the interests of the USDA turned on the finding that its members had suffered an actual or imminent injury that is (1) fairly traceable to the judgment below and (2) could be redressed by a favorable ruling. Justice Gorsuch found the existence of both. First, FMI had convincingly shown that release of this information would constitute actual harm to its members, due to the highly competitive nature of the grocery industry and the fact that stores could use information to better position themselves against competitors in terms of opening new stores, marketing to customers and product selection. On the second part of this test, the Argus Leader argued that this harm was not redressable because all the Court could do is restore the government's discretion to withhold this data, not actually mandate its disclosure. Justice Gorsuch deferred to the fact that the USDA said it would withhold this information if given the opportunity to do so (which was met with significant distress by FOIA advocates who understand that this position is unnecessarily secretive at best, potentially illegal at worse).

Justice Gorsuch thus moved to the merits of the case, the application of FOIA Exemption 4. He noted that the Act itself does not define the word "confidential." Under his view of statutory construction – shared by many conservative jurists – this requires looking at the "ordinary, common meaning," of the term, at the time Congress enacted FOIA in 1966. He noted that confidential was understood to mean "private or secret," with two conditions generally present: (1) the information is customarily closely held and (2) the receiving party promises confidentiality, both of which exist here.

More importantly, there was no evidence that for information to be "confidential" it required a demonstration of substantial competitive harm. That requirement was inserted into the Exemption 4 equation via a 1974 decision of the United States Court of Appeals for the District of Columbia Circuit in the case of *National Parks & Conservation Assn v. Morton*. In that case, the D. C. Circuit read through legislative history and said that confidentiality only exists if disclosure: (1) is likely to impair government's ability to obtain necessary info in the future or (2) will cause substantial harm to the competitive position of the person from whom the information was obtained.

Though a number of other federal appellate courts quickly adopted this formulation, Justice Gorsuch rejected it: [w]e cannot approve such a casual disregard of the rules of statutory interpretation" going on to say "[i]n statutory interpretation disputes a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself."

The Argus Leader also argued that the Court should adopt the "substantial competitive harm" requirement as a matter of policy to comport with the usual narrow construction of FOIA exemptions. Again, Justice Gorsuch disagreed, going in the entirely opposite direction:

FOIA expressly recognizes that "important interests" [are] served by [its] exemptions and [t]hose exemption[s] are as much a part of [FOIA's] purpose[s and policies] as the [statute's disclosure] requirement.

He went on to say that "Congress sought a 'workable balance' in enacting FOIA, including the need to assure private parties that their proprietary information will be protected if shared with the government.

Justice Breyer, writing for himself, with Justices Ginsburg

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and Sotomayor concurring in part and dissenting in part. He agreed that, though the *National Parks* substantial competitive harm standard goes too far, Exemption 4 requires that release must cause "genuine harm" to the owner's economic or business interests before information can be withheld. Such a requirement, he wrote, is more consistent with the purpose of FOIA:

"The whole point of FOIA is to give the public access to information it cannot otherwise obtain. So the fact that private actors have 'customarily and actually treated' commercial information as secret, cannot be enough to justify nondisclosure. After all, where information is already publicly available, people do not submit FOIA requests—they use Google. Nor would a statute designed to take from the government the power to unilaterally decide what information the public can view put such determinative weight on the government's preference for secrecy (what the majority calls the government's 'assurance of privacy')."

For the majority, a business holding information as private and submitting it under an assurance of privacy is enough to deprive the public of access. But a tool used to probe the relationship between government and business should not be unavailable whenever government and business wish it so. And given the temptation, common across the private and public sectors, to regard as secret all information that need not be disclosed, I fear the majority's reading will deprive the public of information for reasons no better than convenience, skittishness, or bureaucratic inertia. The Exemption's focus on "commercial" or "financial" information, for instance, implies that the harm caused by disclosure must do more than, say, simply embarrass the information's owner. It must cause some genuine harm to an owner's economic or business interests.

The unfortunate result, in this case, will have several impacts. Corporations may cheer or bemoan the broadening of Exemption 4 (or both). This case will make it harder to obtain information on competitors (a not-uncommon use of the Freedom of Information Act and its state counterparts) so those who are seeking a competitive advantage lose out while those with plenty to hide gain more protection. Overall, the public seeking to hold corporations accountable on matters of health and safety issues, as well as waste, fraud, and corruption, will be the biggest losers here. Public oversight of corporate malfeasance has been significantly crippled.

More importantly, this case might turn a core principle regarding FOIA on its head. Justice Gorsuch's view that FOIA Exemptions are as much a part of the law as the disclosure requirements is flat wrong. As the Supreme Court stated in its very first case interpreting FOIA, *EPA v. Mink*, "[The] limited [FOIA] exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." Thus, in this case, Justice Gorsuch is fundamentally rewriting this law in a way that will have profound consequences on the public's right to know.

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FCC Makes Leased Access Rules More Cable Operator Friendly, Opens the Door to Eliminating Them

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On June 7, 2019, the FCC released a Report and Order revising the Commission's rules under which independent programmers may lease cable TV channels to retransmit their programming (Leased Access Rules). Leased Access has rarely been used, due to concerns by both cable operators and programmers, and the recent revisions may make Leased Access even less attractive to programmers. Furthermore, in a Second Further Notice of Proposed Rulemaking (FNPRM) attached to the Report and Order, the Commission seems to be opening up a proceeding to eliminate the Leased Access Rules in their entirety based on the widespread availability of Internet platforms for distribution of video programming.

Congress established commercial leased access as part of the Cable Communications Policy Act of 1984 ("1984 Act"). Cable operators are required to set aside capacity for use by unaffiliated programmers. Cable operators with more activated channels are required to set aside a greater number of leased access channels than those cable operators with fewer activated channels. Congress created commercial leased access to "promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems."

In addition to establishing a requirement to set aside channels, Congress subsequently required the Commission to adopt maximum reasonable rates that cable TV operators could charge for providing Leased Access. The Commission created complex rate rules whereby operators had to calculate the "average implicit fee" that they charge other programmers for channel space. These rates were never satisfactory to cable operators (who claimed the rates were too low to recover their full costs), or to programmers, who generally thought that the rates were too high to make leasing economically feasible. As a result, there has been little actual use of Leased Access, to the chagrin of potential programmers, and the satisfaction of cable operators.

In 2008, the Commission revised the rules to, among other things, modify the rate formula to lower rates for many programmers, and shortened the deadline for cable operators to respond to access requests from programmers. The Office of Management and Budget (OMB) declined to approve the rules, finding that the FCC had failed to make the required showings under the Paperwork Reduction Act. As a result, the rules remained in limbo for almost 11 years. Implementation of those new rules was then stayed as a result of an appeal in the U.S. Court of Appeals for the Sixth Circuit, and that stay remained in effect until now. (The FCC is now asking the Court to dismiss the appeal as moot.) In addition, The FCC's recent Report and Order addresses the pending remand and OMB disapproval by vacating the 2008 Order.

<u>Overview of the Report and Order</u>

The recent Report and Order modifies the existing Leased Access rules:

- The Commission eliminated the requirement that cable operators make Leased Access channels available on a <u>part-time basis</u>. Instead, they may choose to lease channels only to programmers that purchase channel capacity on a full-time basis for at least a <u>one-year contract term</u>. The Commission concluded that the costs to cable operators from part-time leasing are not outweighed by the rates recovered.
- The Commission revises section 76.970(i) of the rules to provide that all cable operators, and not just those that qualify as "small systems" under that rule, are required to <u>respond only to bona fide requests</u> from prospective leased

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access programmers. "Bona Fide Requests" are those from a prospective programmer that include: "(i) the desired length of a contract term; (ii) the anticipated commencement date for carriage; and (iii) the nature of the programming." In essence, the Commission extended this relief from small operators to big ones.

- In response to those bona fide requests, the Commission also extended the timeframe within which cable operators must respond to prospective leased access programmers, from 15 calendar days to 30 calendar days for cable operators generally, and from 30 calendar days to 45 calendar days for operators of small systems.
- The new rules also permit cable operators to impose a maximum leased access application fee of $100 per system-specific bona fide request, payable before the operator must respond to the request, but the rules also require cable operators to provide potential leased access programmers with contact information for the person responsible for leased access matters.
- The Report and Order deems as reasonable under the Commission's rules, a security deposit or prepayment equivalent of up to 60 days of the applicable lease fee. This has been a heated issue for years, with programmers claiming that unnecessarily high deposits (and insurance requirements) are barriers to entry, and cable operators claiming that they need reasonable protection in the case of programmers who fail to pay lease fees once their programming is carried. The Commission refused, however, to give cable operators the right to charge "closing fees" upon finalization of a lease, or to refuse to enter into an agreement with a programmer that had previously been dropped for non-payment. The Commission also refused a proposal by programmers to enact a specific limit on the amount of insurance that programmers must have as part of the leasing arrangement.

The Report and Order declined to require cable systems to carry Leased Access programs in high definition (HD) format and declined to require operators to carry Leased Access programming on only a portion of their system (and thus reduce lease fees).

The new rules will be effective July 22, 2019, except for the requirement that cable operators provide contract information for leasing requirements and a new 30-day deadline for cable operators to respond to complaints, both of which must be approved by the Office of Management and Budget.

The First Amendment, and the Future of Leased Access

Any government regulations that require a speaker (here, a cable TV operator) to deliver the content of others (here, independent programmers seeking Leased Access) triggers First Amendment freedom of speech concerns. But, as the Report and Order explains, "[w]hen leased access was first mandated in 1984, consumers had access only to a single pay television service, and Congress and the courts recognized cable's monopoly power in this regard. Today, in contrast, the marketplace has become far more competitive. Media platforms, including online platforms that programmers can utilize for free to distribute their content, have multiplied. As a result, consumers are able to access video programming via means other than traditional broadcast and cable television, and the Internet is widely available for this purpose." According to the cable operators and the Commission, we must now recognize that with the presence of YouTube, Facebook, Vimeo, Roku, and Apple TV, along with proprietary websites and apps, cable TV no longer has the same dominant position as a platform for programming. Thus, cable operators and the Commission have called for a re-evaluation of whether the impact of Leased Access requirements on cable operators' First Amendment rights is still necessary to promote the stated governmental interest in promoting competition and diversity through the distribution of programming from independent programmers.

In the FNPRM, the Commission seeks comments (due **July 22, 2019**, with replies due **August 5**) on this First Amendment question, but in reality, the Report and Order explicitly endorses the position that Leased Access Rules can no longer be justified under the First Amendment. So, while commenters are invited to argue otherwise, it certainly appears that the FCC or at least its majority will conclude in the next Order in this proceeding that the Leased Access rules must be eliminated.

FCC Adopts New FM Translator Interference Complaint Procedures

By Dan Kirkpatrick & Keenan Adamchak
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On May 9, 2019, the FCC issued a Report and Order in which it adopted new procedures used to resolve interference complaints against FM translator stations. We previously blogged about the proposed reforms to the complaint procedures in a May 21, 2018 article. Sections 74.1203(a) and 74.1204(f) of the Commission's rules outline the procedures required for resolving complaints of actual and potential interference, respectively, against FM translators. The new rules are designed to streamline and shorten the highly contentious and protracted FM translator interference complaint process and to consolidate the disparate procedures for actual and potential interference complaints. As explained more fully below, we expect the new rules to go into effect by mid-August. This article breaks down the changes to the FCC's existing FM translator interference complaint procedures.

<u>New FM Translator Interference Complaint Requirements:</u>

Minimum Number of Listener Complaints. The FCC adopted a requirement for a minimum number of *bona fide* (*i.e.*, actionable) complaints ranging from 6 to 25 depending on the population served by a complaining station. The Commission based the complaint minimums on an approximate increase of 1 complaint for every 100,000 people in the complaining station's service area – *i.e.*, 6 complaints for a population of 1-199,999 to 25 complaints for a population of 2,000,000 or more. Previously, FM translators could be forced off the air as a result of a single unresolved interference complaint brought against the station, or multiple unresolved interference complaints from a single location. As a result, the FCC now requires translator interference claims to be based on "separate receivers at separate locations" – whereby multiple listener complaints from a single location will not count beyond the first complaint towards the prescribed complaint minimum.

Contents of Each Listener Complaint. Under the FCC's existing complaint procedures, there are separate requirements for demonstrating that individual potential and actual interference complainants are *bona fide*. This has resulted in protracted and contentious proceedings as to which individual complaints had to be resolved by the translator licensee – many times before the technical aspects of the interference complaints were even addressed.

In the Report and Order, the Commission streamlined the individual complaint requirements by defining an actionable listener complaint as a complaint that is signed and dated by the listener and contains the following information:

- The complainant's full name, address, and phone number
- A clear, concise, and accurate description of the location where interference is alleged to occur (*e.g.*, map coordinates, street addresses, street intersections, etc.)
- A statement that the complainant listens to the complaining station using an over-the-air-signal at least twice a month to demonstrate that the complainant is a regular listener
- A statement that the complainant has no legal, employment, financial, or familial affiliation with the complaining station (social media contacts with, participation in promotions/contests held by, volunteering for, or donating to a complaining station are no longer deemed as disqualifying) to demonstrate that the complainant is disinterested

Complaints adhering to the above requirements enjoy a presumption of validity – which the translator licensee bears the burden of rebutting.

The FCC also eliminated the requirement that listener complainants must cooperate with translator licensees in resolving their interference complaints. In the past, listener cooperation was essential for the complaint to be *bona fide* – thus resulting in protracted and contentious proceedings as to the level of the listener's cooperation.

Contour Limit on Interference Complaints. The Commission adopted a contour limitation on translator interfer-

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ence complaints, setting the complaining station's 45 dBμ signal contour as the outer limit for both actual and potential interference complaints. In order words, all individual interference complaints must now allege interference from a location within the complaining station's 45 dBμ contour to be actionable. Under the FCC's existing complaint procedures, there are no geographic limitations on actual interference complaints, and the existing rules only require that each individual complainants' address fall within the translator's 60 dBμ service contour in order to be *bona fide*. The Commission adopted the 45 dBμ contour limit due to concerns that out-of-market stations were using the lack of geographic limitations on complaints to extend their reach into markets which they otherwise would not have.

In the Report and Order, however, the FCC stated that waivers of the 45 dBμ contour limit would be granted in extremely limited circumstances. To obtain a waiver, the complaining station would have to include at least 20 individual complaints from outside the 45 dBμ contour. In reviewing such requests, the FCC would also take into account relevant factors including a demonstration that: (1) geographic features enhance reception at the relevant listener locations; and (3) the listener expectation of service is well-established.

Other Complaint Requirements. Under the new procedures, complaining stations must also include the following with their interference complaint:

- A map plotting the specific locations of alleged interference in relation to the complaining station's 45 dBμ contour
- A statement that the complaining station is operating within its licensed parameters (not including pursuant to Special Temporary Authority (STA))
- A statement that the complaining station's licensee has used commercially reasonable efforts at resolving the interference issue with the translator's licensee
Undesired/Desired (U/D) data demonstrating that at each listener location the ratio of undesired to desired signal strength thresholds (co-channel and first, second, and third -adjacent stations as appropriate) are satisfied

Previously, the map and the technical showing requirements only applied to potential interference claims – not claims of actual interference. Moreover, the Commission noted that the certification that the complaining station was operating pursuant to its licensed parameters was necessary because operating outside of the station's licensed parameters "could affect its actual versus its licensed 45 dBμ signal contour and therefore alter the permissible scope of its interference claim." Nevertheless, the FCC failed to state in the Report and Order whether the actual or licensed 45 dBμ contour was required for an interference complaint. Finally, the Commission noted that the certification regarding the private resolution of interference complaints would encourage parties to resolve complaints before a complaint proceeding was initiated at the FCC.

New Complaint Remediation Procedures

The Commission also drastically changed the existing translator interference complaint procedures to speed up and streamline the process. Under the new rules, translator licensees may resolve each listener complaint by either working with: (1) a willing listener to resolve reception issues; or (2) the complaining station to resolve signal interference issues using suitable techniques.

Working with Willing Listener Complainants. Translator licensees are permitted to resolve individual listener complaints by adjusting or replacing the listener's equipment. This option, however, is only available if: (1) the listener's equipment is determined to be the primary cause of the interference issue; and (2) the listener is willing to cooperate with efforts to eliminate the interference. Otherwise, translator licensees are required to work directly with the complaining station to resolve interference complaints.

Working with Complaining Stations. The vast majority of translator interference complaints must now be resolved by translator and complaining station licensees working together using suitable techniques to resolve the interference issue. Such suitable techniques include, but are not limited to usage of: (1) the U/D ratio methodology previously applicable only to potential interference complaints; (2) the FCC's standard contour predicted methodology specified in Section 73.313 of the Commission's rules; (3) on/off testing; and (4) on-site field strength measurements. The FCC noted that lack of interference may be demonstrated by either on/off testing or on-site field strength measurements, and alternative translator technical parameters that would eliminate interference could be derived from on/off testing.

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The Commission intends to provide translator and complaining station licensees flexibility in the interference testing and remediation techniques and therefore leaves it to the parties to settle upon mutually-acceptable techniques. If the translator and the complaining station licensees are unable to agree on which methodologies to employ, the parties may engage a third-party engineer to conduct interference testing and remediation. The results, however, are to be jointly submitted to the FCC – which will make a final determination as to whether interference has been resolved. Unilateral or contested data, however, will not be permitted to be presented to the Commission as a remediation showing – or to dispute such a showing.

The FCC declined to adopt a universal interference resolution deadline, instead deferring to the Media Bureau to establish specific deadlines for each interference complaint. The Commission, however, established a target deadline of 90 days from the date the Bureau completes its initial review of an interference complaint to resolve complaints. In practice, the Bureau will issue a letter notifying the translator licensee that the interference complaint has passed its initial review, and will set a specific remediation deadline along with any necessary intermediate deadlines (*e.g.*, remediation plan deadline). If all interference complaints are not resolved by the set deadline, the FCC may order the immediate suspension of translator operations or power reduction.

Channel Changes

The Commission adopted the proposal to allow FM translator stations to remediate interference issues (either caused to or received from another station) by changing channels to any available same-band frequency. Such channel changes would now be deemed minor changes and would be permitted upon a showing of actual or predicted interference to or from any other broadcast station. Previously, translators were only permitted to move to first, second, and third or intermediate frequency channels to resolve interference. The expanded channel-change options will provide translator licensees with increased options for resolving interference – without having to undergo protracted complaint proceedings or being forced off the air for failing to eliminate interference.

Treatment of Pending Complaint Proceedings

The Commission explicitly stated that any FM translator interference complaints pending as of the effective date of the new rules would be decided under the new rules. Once the new rules become fully effective, the Commission will permit parties to pending complaint proceedings to submit supplemental materials to address the revised rules. Presumably, this will serve as an opportunity for complainants to make the necessary modifications to their complaints to adhere to the new complaint requirements, and for defending translator licensees to seek dismissal of the complaints for their failure to adhere with the new procedural requirements.

The amended rules should become effective in mid-August. The Report and Order was published in the Federal Register on June 14, which would make the effective date of the rule amendments that do not constitute "information collections" August 13 (we note that the initial Federal Register publication reported the effective date as July 15, but FCC staff has confirmed that was in error, and a correction will be published). As stated in the Report and Order, however, the bulk of the new complaint procedures deal with "information collections" and therefore require the further approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA), and will become effective only after the FCC publishes a notice of OMB approval in the Federal Register. FCC staff has indicated that they expect that approval to also be obtained by mid-August, so that all of the rule amendments can take effect at the same time.

Restrictions to Be Lifted from Educational Broadband Service, as FCC Hunts for more Mid-Band Wireless Spectrum

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The Federal Communications Commission (FCC) has released a tentative Report and Order, scheduled for a vote on July 10, which, if adopted, will lift many restrictions from the Educational Broadband Service (EBS), including allowing educational institutions to sell their licenses to commercial entities and eliminating the requirement that 5% of system capacity be reserved for educational use.

The FCC's quest for more spectrum for wireless broadband, characterized as ongoing, endless, relentless, or frantic (depending on your point of view) has accomplished one objective by making high-bandwidth frequencies above 24 GHz available through auctions. But these high-in-the-sky frequencies propagate over only short distances, which means that deployment will be economically realistic in only densely populated areas. To facilitate bringing new service to areas where your next door neighbor lives more than a baseball pitch away from you, the FCC is now turning to "mid-band" frequencies, which do not require as dense packing of cell sites. The EBS band – 2500-2690 MHz – is what many would call "prime real estate" in terms allowing the broadband march to escape urban enclaves.

EBS signals currently reach only about half the country. License eligibility is limited to educational entities. They are permitted to lease up to 95% of their spectrum capacity to commercial entities for up to 30 years. Most licensees do just that, with Sprint and its Clearwire affiliate the largest lessee.

The new rules will not require termination or modification of any existing EBS spectrum leases; but for unleased systems, or leased systems where both parties agree, it will now be permissible for the educational licensee to sell its license to almost anyone it wishes. The FCC tried to open up EBS eligibility many years ago but backed down in the face of strong opposition from educational entities. Instead, the FCC permitted leasing, guessing correctly that many educational licensees would jump at the opportunity to generate cash income.

In the intervening years, technology has improved, and broadband use by consumers has exploded; so EBS spectrum is likely worth more now. Moreover, the growth of the Internet has given educational entities an arguably better way to distribute their content than using EBS spectrum. The FCC is betting that in today's market, educational licensees will choose to take cash and sell or lease all of their EBS capacity to commercial operators.

The FCC looked at the possibility of getting EBS spectrum back through an "incentive" auction, like the one it used to buy back television broadcast channels, as well as at the possibility of opening a new application window for educational entities to apply for more licenses. It decided against both of those approaches, partly because of the time they would take but also because of statutory restrictions on the use of auctions for noncommercial spectrum.

There will be two opportunities for filing applications for new licenses. The first will be an opportunity for certain Native American tribal entities to apply for unused EBS spectrum in "rural" areas, defined by the U.S. Census Bureau as outside urbanized areas and urban clusters with a population of 50,000 or more persons. If you think that this opportunity will be limited to areas where the buffalo roam, and the deer and the antelope play, think again. There are areas even in the densely populated northeast that are not in any urbanized area or urban cluster.

After the tribal window, the FCC will accept applications from almost anyone for "overlay" licenses, to be sold at auction on a county-by-county basis. An overlay license is a license to operate throughout a county, even if the county has existing EBS service. The trick is that the overlay licensee may operate only where it does not cause interference to the existing system. In other words, it is authorized to fill in gaps in existing service. Whether or not overlay licenses will be economically viable will depend in part on how many EBS licensees have constructed systems with poor coverage within their licensed 35-mile radius service area. It also seems that interference disputes may increase significantly, depending on the care with which existing systems and new overlay systems are engineered. In some cases, an overlay licensee might enter into a business relationship an incumbent and coordinate operations for their mutual benefit.

EBS licensees will have a lot to think about in terms of the

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economics of selling vs. leasing and how to value their spectrum. Prospective buyers of licenses can expect Clearwire to be at the front of the line, as its existing leases commonly include a right of first refusal to buy if the FCC's rules change. For Native American tribes, this may be the best chance, and the last one for a long time, to bring wireless broadband to places that now lack service. And for those who think that they can make money shoehorning networks into gaps in service by existing licensees, it is time to make plans to file applications and to raise capital to buy overlay licenses at FCC auctions.

The opportunity to lobby the FCC for last-minute changes closes on July 3, a week before the FCC votes. It looks to us like the FCC has made up its mind, but you never know what tweaks may be made before the new rules go into effect.

New Developments in Broadband – June

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Capitol Hill

We continue to expect that House Democrats will pass their "Leading Infrastructure for Tomorrow's America Act" (LIFT America Act) infrastructure proposal, however, any deal with President Trump on infrastructure remains on hold. The House bill 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 Information Administration (NTIA).

Here are links to some additional broadband bills we are following:

- The Broadband Deployment Accuracy and Technological Availability (Data) Act (Sens. Roger Wicker (R-MS) and Gary Peters (D-MI)) would require the FCC to issue rules to collect more "granular" broadband coverage data.
- The Broadband Interagency Coordination Act (Sens. Roger Wicker (R-MS) and Amy Klobuchar (D-MN)) 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.
- The ACCESS BROADBAND Act would establish an Office of Internet Connectivity and Growth within NTIA and place NTIA in a formal advisory role regarding coordination of all federal broadband spending.
- The Internet Exchange Act (Sens. Marsha Blackburn (R-TN) and Tammy Baldwin (D-WI)) would provide for 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.
- The Rural Broadband Network Advancement Act (Reps. Markwayne Mullin (R-OK) and Collin Peterson (D-MN)) would establish a new FCC program outside of the existing universal service mechanisms to collect network user fees from edge providers based on the data transported over the last mile of networks to be invested by rural broadband providers to help build, maintain and operate robust broadband networks in high-cost rural areas.

NTIA

NTIA has released a searchable database featuring 50 federal broadband funding opportunities across a dozen federal agencies. The June 19 NTIA broadband webinar discussing Building Smart Cities and Communities at the Regional Level is available in the archive here. The BroadbandUSA Newsletter for June is available here.

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USDA – Rural Utilities Service

With the deadline for ReConnect grants now passed, the status of proposed projects can be viewed on an interactive map available here. Reports are that demand substantially outstripped available funds for all components of the program (grants, loan/grants, and loans).

In April, USDA issued a report on rural broadband infrastructure focused on next-generation precision agriculture. Relatedly, the FCC has announced the formation of a federal advisory committee on precision agriculture. Nominations for people to serve on this advisory committee are due to PrecisionAgTF@fcc.gov by July 17.

Federal Communications Commission

The tentative agenda for the Commission's next meeting on July 10 can be found here. Two items we have been following will be voted on: Educational Broadband Services (EBS), and the $100 million Connected Care pilot program. Those are discussed briefly below.

USF Contributions

On June 13, the FCC announced that the expected third quarter USF contribution factor would rise to 24.4% -- the largest quarterly factor in the history of the program. The spike appears to be driven by the shrinking base of interstate and international telecommunications revenue rather than growing programs.

USF Spending Cap NPRM

The USF spending cap Notice of Proposed Rulemaking (USF NPRM) was released May 31 after being approved on a party-line vote (both Democratic Commissioners opposing) earlier in the month. The proposed cap would apply to all four programs in the aggregate, in addition to program-specific caps or budgets that currently exist. The USF NPRM also seeks comment on whether to allow the E-rate and RHC programs to access unused funding from the other programs. Comments are due July 15, 2019; reply comments are due August 12, 2019.

$100 Million Connected Care Pilot Program

The FCC has released a draft NPRM seeking comment on how to implement a three-year $100 million universal service pilot program that would fund broadband costs associated with providing "connected care" to low-income Americans and veterans. Connected care is generally the remote patient monitoring and telehealth services needed to provide care for chronic health conditions to patients in their homes. This item is expected to be approved. We will explore this item further next month.

2019 Broadband Deployment Report and Mapping

The annual Broadband Deployment Report for 2019 is out, triggering the perennial criticism about the accuracy of the underlying data and whether the FCC is meeting its statutory obligations to ensure broadband is being deployed on a reasonable and timely basis. Relatedly, USTelecom and major industry groups reported on their efforts to establish new mapping protocols. If you are interested in where broadband mapping may be headed, you can review their recent filing here.

Rural Digital Opportunity Fund

No new details regarding the $20.4 billion "Rural Digital Opportunity Fund" (RDOF) have emerged since it was announced by FCC Chairman Ajit 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.

E-rate

"Overbuilding"

The FCC is seeking comment on a petition for rulemaking in the E-rate program filed by several small Texas telcos that claim E-rate rules are supporting improper overbuilding of their networks. Comments were due July 1; replies are due July 16.

Category 2 Budgets

An NPRM that proposes to make Category 2 budgets a permanent feature of the E-rate program is reported to be circulating for a vote. This was an expected development after the Wireline Bureau issued its report earlier this year finding that the Category 2 budget approach was working well. You will recall that the 2014 E-rate Modernization Order adopted a five-year interim approach for the budget ap-

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proach – with that five-year period over this year. The NPRM also requests comments on further ways to improve E-rate administrative burdens.

Rural Health Care Program

The FCC announced on June 10 that it was directing USAC to carry forward $83 million in unused support from prior years and make that available for Funding Year (FY) 2019 (July 1, 2019 through June 30, 2020). This means there will be $677 million ($594 million plus $83 million) available for FY 2019. By comparison, 2018 funding demand was $648 million.

Educational Broadband Service

The draft EBS order which was just released proposes to auction the reallocated the 2.5 GHz band, arguing the spectrum is needed for rural 5G deployment and that too much of the spectrum is lying fallow.

Net Neutrality

Federal legislative efforts to address net neutrality appear to have reached a stalemate. 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. Subsequent efforts to create a bi-partisan House-Senate working group are likely dead due to lack of support from House Democrat leaders who believe the House's Save the Internet Act would pass the Senate if allowed to come up for a vote. Senate Majority Leader Mitch McConnell (R-KY) has refused to allow such a vote.

In the meantime, The Internet Society's Net Neutrality Experts' Roundtable has released a process report addressing its attempts to convene and facilitate a workable consensus.

States

The National Conference of State Legislators features a reasonably up-to-date summary of state-by-state net neutrality efforts for 2019 here (last updated May 6, 2019).

Upcoming FCC Broadcast and Telecom Deadlines for July-September

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 License Management System (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 Online Public Inspection File (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.

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 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 (5) or more full-time employees located in California, Illinois, North Carolina, South Carolina, and Wisconsin must place EEO Public File Reports in their

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online public inspection files. 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.

August 7, 2019:

EAS National Test - Participants' ETRS Form Two Due - All EAS participants must be prepared for the national EAS test on August 7 at 2:20 p.m. EDT. Additionally, all participants must prepare and file in the ETRS a Form Two for each station by 11:59 p.m. EDT on August 7. This form is scheduled to become available at 2:20 p.m. EDT, immediately following the EAS test, and will provide information as to results of the test. As we have previously reported, the FCC has opted to eliminate the Equal Employment Opportunity Mid-Term Report form.

September ??, 2019:

Annual Regulatory Fees – On a date not yet determined but certainly before September 30, 2019, annual regulatory fees will be due. These will be due and payable for Fiscal Year 2019, and will be based upon a licensee's/permittee's holdings on October 1, 2018, plus anything that might have been purchased since then and less anything that might have been sold since then. The fees must be paid through the FCC's online Fee Filer, and once again this year, the FCC will not accept checks as payment of the fees but will require some form of electronic payment (credit card, ACH transfer, wire transfer, and the like). Please keep in mind that timely payment is critical, as late payment results in a 25 percent penalty, plus potential additional interest charges.

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 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.

August 14, 2019:

Quarterly Percentage of Internet Usage (PIU) Certification – USF prepaid calling card providers must file a certification stating that it is making the required USF contributions. The certification must be signed by an officer of the company under penalty of perjury and can be filed electronically using the FCC's Electronic Comment Filing System (ECFS). The Quarterly PIC Certification due August 14, 2019 will cover the Second Quarter of 2019 (April 1, 2019 through June 30, 2019).

September 1, 2019:

FCC Form 477 – FCC Form 477 is filed online biannually on March 1 and September 1. The Commission collects a variety of information about broadband deployment and wireless and wired telephone service on Form 477. Broadly speaking, the following providers must fill Form 477: 1) facilities-based providers of broadband connections to end users, 2) providers of wired or fixed wireless local exchange telephone service, 3) providers of interconnected VoIP service; and 4) facilities-based providers of mobile telephony (mobile voice) services. If you have any questions about whether your company must file Form 477 or what information your company is required to submit in the filing, you should contact your telecommunications counsel.

FHH – On the Job, On the Go

<u>On July 10</u>, **Frank Montero** will be presenting an FCC license renewal seminar to the members of the Puerto Rico Broadcasters Association in San Juan, PR.

<u>On July 11</u>, **Kevin Goldberg** will be speaking on copyright issues including Fair Use and Responding to Demand Letters at the Association of Alternative Newsmedia Convention
in Boulder, CO.

<u>From July 18-19</u>, **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.

<u>On August 7</u>, **Davina Sashkin** and **Kevin Goldberg** will be doing a Legal Update at the Tennessee Association of Broadcasters Annual Convention in Murfreesboro, TN.