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MEMORANDUM TO CLIENTS

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# A Primer on the CBD Interim Rules: What Broadcasters and Media Companies Need to Know

Cannabidiol ("CBD") oil, a product that can be derived from hemp or marijuana plants, is an undeniably hot commodity right now. You may have seen CBD gummies, CBD topical creams, and even CBD-infused pillows for sale at your local store. At this point, you are wondering if your broadcast station can advertise these products. CommLawBlog covered CBD advertising back in late February of 2019, and in that article, we recommended that broadcasters hold off on accepting such advertising until more rules governing CBD were put into place, anticipating that broadcasters would be able to advertise CBD in the near future. Well, friends, the future is (at least in part) here, although not without complications. The United States Department of Agriculture ("USDA") on October 31, 2019, published interim rules on the "Establishment of a Domestic Hemp Production Program" – which you can read in the Federal Register. The Comment date for these rules is December 30, 2019, meaning that the USDA will be in a position to adopt final rules for production of hemp and, therefore, CBD derived from hemp, by early 2020.

These rules should help alleviate the concerns about advertising CBD, even though they do not address advertising specifically. However, before you go off and start advertising this product, it's important to delve into the implications of these interim rules.

The legal production of hemp products began with the passage of the 2014 Farm Bill, which authorized *experimental* production of hemp and hemp-derived products such as CBD. This was followed by the 2018 Farm bill, which widened legal hemp production and is where these new rules originated. In addition to the USDA rules, states and tribal authorities will also be able to regulate the distribution and use of CBD within their jurisdiction if they have a regulatory plan approved by the USDA. Some states and Native American tribes have adopted plans and have submitted them to the USDA for approval already. But don't get too excited yet! None of these state/tribal plans have yet been approved by the USDA, and may well be modified from the form submitted before they are approved. There is also the possibility that the final USDA rules could differ from the current interim rules.


Another point of consideration is that certain aspects of CBD advertising come under the auspices of federal agencies other than the Federal Communications Commission ("FCC"). Those who have viewed our webinar on Controversial Advertising know that regulatory agencies can be very punitive when it comes to the airing of false claims in particular. The Federal Trade Commission, for example, can hold broadcasters liable for advertising claiming that any non-Food and Drug Administration ("FDA") approved product can treat specific symptoms or diseases. Any claims regarding a CBD product's effectiveness or curative properties should be reviewed very carefully.

Thinking about advertising CBD oil-infused potato chips? The FDA is in charge of regulating CBD food and beverage products. As of the writing of this article, the FDA has approved of only one CBD-based drug, Epidiolex, which is used to control seizures. Until they have conducted further research on its effects, the FDA will continue to prohibit CBD in food, drugs, and some cosmetics, and some state and local health departments (including in New York City and California) have followed the FDA's lead by confiscating edible CBD products from stores. Arguably, by advertising those stores as selling CBD products, the broadcaster could be facilitating a crime.

Also worth remembering is that while many CBD oil products use CBD legally derived from hemp, CBD may also be derived from marijuana, which would make the product illegal under the Controlled Substances Act. Because the sale, use, and distribution of

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marijuana and its derivatives remain entirely illegal at the federal level, accepting advertising for marijuana-derived CBD products could subject a broadcast station to enforcement actions by the Drug Enforcement Agency or Department of Justice.

So what's a broadcaster's bottom line? For now, continued caution remains the watchword. While the interim USDA rules are in effect, no businesses or producers have actually had time to obtain the licenses and approvals required under those rules and as such, there are still no legally-approved hemp producers in the United States – outside of the pilot programs authorized under the 2014 Farm Bill. Even as producers do become authorized under those rules, broadcasters should carefully review the rules and regulations of their own states to ensure that they do not produce a contrary result. As a reminder, a broadcast license is a federal license. Technically, until the CBD in a product is derived from a legally authorized hemp producer, that product remains illegal. Take heart, though - once hemp producers begin to be approved under the USDA regulations, or state or local plans, the CBD advertising world will be your oyster.

This article may have created new questions on CBD advertising. Should that be the case, make sure to contact your legal counsel. FHH attorneys, in conjunction with a number of state broadcast associations, will be presenting a webinar in January discussing CBD and marijuana advertising. Please reach out to your state association for details. And, as always, continue to check CommLawBlog for further developments.

# What to Do If Your EAS IPAWS Tests Aren't Working

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Your Emergency Alert System (EAS) equipment may have stopped passing through tests received *via* the equipment's Internet connection to the Integrated Public Alert & Warning System (IPAWS) because one of the trust root certificates used to validate digital signatures associated with alerts expired over a month ago. If your EAS equipment is rejecting IPAWS alerts, here is what to do about it.

As we hope everyone knows, broadcasters and other kinds of mass media distributors are required to maintain operating EAS equipment that receives and transmits weekly and monthly EAS tests. Broadcasters are required to monitor both other broadcast stations over the air and IPAWS via the Internet.

Tests received via IPAWS come with digital signatures that must be validated before the EAS receiver will pass the test through for rebroadcast. Validation occurs by comparing the digital signature on the alert with a chain of certificates stored in the EAS device. One of the certificates from the Federal Emergency Management Agency expired on November 8, 2019. A replacement certificate was issued on October 28, 2019; but that certificate must be added to the database in your EAS receiver before the receiver will recognize it.

If you have not heard from your EAS manufacturer about updating the certificate database in your device, you should reach out now and get an update.

Sections 11.35(b) and (c) of the FCC's Rules allow broadcasters to remain on the air despite malfunctioning EAS equipment for up to 60 days without FCC authority. The 60-day grace period is now in effect and will expire on January 7, 2020. If your EAS system has been updated by then and is fully functional, you need do nothing further.

If you have not completed an update by January 7, you should send an email to alerting@fcc.gov that includes three elements: (1) a request for an extension of the 60-day deadline to repair or update your EAS receiver, (2) an explanation of what you have done and are doing to complete the update, and (3) the anticipated date by which you expect the update to be completed.

The FCC's Rules normally require requests for extension of the 60-day repair deadline to be sent to the station's relevant FCC Enforcement Bureau Regional Field Office. For this situation only, you should notify alerting@fcc.gov and should not send notices to the Regional Field Office.

You can read the FCC's Public Notice providing the guidance described above here.

# In an Emergency: Which Door Should First Responders Kick In?

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About 80% of the 240 million phone calls received by 911 public safety answering points (PSAPs) come from wireless callers. The goal of regulators is that technology automatically identify the location of callers even if callers don't know where they are or are unable to speak the information because of injury or constraint by an attacker. The idea is to convey a "dispatchable location," enabling first responders to figure out "which door to kick in" when they arrive on the scene of an emergency. The FCC has now adopted rules to help locate callers in terms of callers not only by the street address but also by the vertical location within a multi-story building.

The FCC has rules in place for automatic transmission of the street address where a call originates; but in the case of a multi-story building, street address is not enough to locate the caller. You also need to know on which floor to look for the caller. The height is called the "z-axis," based on the traditional "x-y-z-axis" labelling of a three-dimensional graph.

Technology for determining z-axis information has improved, and the FCC has now adopted rules mandating an accuracy of plus or minus 3 meters in reporting vertical location. That is not enough accuracy to be sure of pinpointing the exact floor on which a caller is located, and some have argued that being one floor too high or too low is simply not good enough for first responders. Others have argued that we have to start somewhere, and we should start with a level of accuracy that has a good chance of be ing achievable in practice.

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Think a minute about the complexity of determining height above ground. Should the determination be handset-based or network-based? It is mostly handset-based today, because a network-based system would require sensing equipment of some kind installed on almost every floor of every building. A handset most often determines height with a built-in barometer. But what if the building has a mezzanine, and the "first floor" is one or two floors above ground? What if 13 is skipped in numbering the floors of a building, which is true in some buildings but not others?

The tentative solution is to report "height above ellipsoid" (HAE). Maybe you know what that is, but maybe your mathematical knowledge isn't so good. HAE is close to, but not exactly the same as, height above ground or above sea level. An ellipsoid is a mathematical model of the shape of the earth. HAE information has the strong virtue of being determinable by today's devices – it's the result you get from a GPS receiver, for example. However, raw HAE information is not going to pinpoint an exact vertical location of without refining it with information about the specific building, such as the height of each story (are the ceilings high or low?) and the way floors are named or numbered (the top floor of the FCC's building, which has 11 floors, is still called the "8th Floor" for nostalgic reasons, because Commissioners' offices were on the "8th Floor" of their previous two office buildings). In other words, to make the information really useful, you need a database that tells you something about the design of every multi-story building in town. Some cities have that, but a lot of places don't. The FCC has left it to the PSAPs to figure out how to use raw HAE; the phone carriers only have to report the information. Among the things PSAPs can do is to compile databases of buildings, not an

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inexpensive proposition; but there may also be devices that can be carried by first responders that, upon arrival at the scene of an emergency, will mimic the data reported by the caller and thus enable responders to go up into the building until their devices match what the caller is reporting.

So the deal is that existing rules which have required wireless carriers to meet phased-in horizontal location accuracy requirements since 2012 will be expanded to require z-axis information for 80% of wireless calls by April of 2021 in the top 25 markets and 2023 in the next 25 markets. The z-axis requirement will apply to all handsets that can support the requirement without a hardware upgrade and will not be limited to devices with barometers or to new devices. It seems that most handsets in use today will work with a software upgrade, which will have to be provided, and the cost of which the FCC finds to be nominal.

Just to make sure that the data miners of the world don't find a new way to make a bundle off of this information, the FCC's rules will forbid the use of E911 call data for any purpose except public safety.

The new z-axis requirements are subject to approval by the Office of Management and Budget (OMB), a process which takes an uncertain amount of time but should be completed well before the 2021 initial compliance deadline. Further comments are invited (deadline not set yet) on when and to what extent the 3-meter accuracy requirement can be tightened. The FCC also wants to hear what people think about how location determination will work during electric power failures if it becomes dependent on externally powered mini-cell sites and Wi-Fi access points. If you can find a caller in a burning building only if the power stays on, the effectiveness of the system might be considered by some people to be a bit impaired.

The FCC's new rules are an attempt to address the conflicting views among those who say that technology is still evolving, and it doesn't work all that well yet; public safety officials who strongly desire more help right now in locating callers in distress; and people who ask who will pay the cost of creating new databases and developing techniques for translating raw HAE information into usable information to pin down which door to kick in at the scene of a crisis.

Petitions for reconsideration are likely. Hopefully, progress will be made in developing and implementing achievable rules, and lives will be saved.

# Displacement Application Window for Pending Rural LPTV Applicants Now Open

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If you filed any applications for new Low Power Television (LPTV) stations during the 2009 application window, your applications have not yet been granted, and channels you requested have been displaced by a full power or Class A TV station as a result of the spectrum repack, you now have an opportunity to request new channels. Until January 31 2020, you may amend your applications to change channels.

The spectrum repack reduced the television broadcast band from Channels 2-51 to Channels 2-36. Channels 38-51 were reallocated and auctioned to wireless service providers. (Channel 37, never used for TV, continues to be reserved for radioastronomy and will also serve as a "guard band" between TV and wireless services.) The last time that applications for new LPTV stations were accepted by the FCC was in 2009, before anyone knew that Channels 38-51 would be taken away from TV. Many applicants requested channels from 38 to 51. Other applicants requested channels from 2 to 36; but in some cases, their channels are no longer available because of channel changes by full power and Class A stations during the repack.

Pending applicants whose channels are no longer available must either file for new channels by January 21, 2020, or face permanent dismissal of their applications.

The FCC provided two previous opportunities for displaced LPTV stations to seek new channels, but only entities with granted licenses or construction permits were eligible to apply. The first window was in April-

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May of 2018, and was open only to stations that were operating as of April 13, 2017. Next, the FCC ended a freeze on displacement and digital companion channel applications and announced that it would accept those two types of applications from both operating and non-operating stations that had been granted licenses or construction permits, but not from applicants who had never received a grant of any kind. Now the door is open to amendments to pending applications that have never been granted.

The first window was limited in time, and all applications filed during the window were deemed to have been filed on the same day (the final day of the window) for purposes of determining mutual exclusivity. After the freeze was lifted, applications were accepted on a first-come, first-served basis, with every applicant required to protect not only granted authorizations but also previously filed pending applications. Today's window will again be limited in time. All applications filed at any time before the window closes at 11:59 p.m. on January 31, 2020 will be deemed to have been filed on that date. Therefore, there is no need to rush and be the first to file, because there will be no benefit to doing so in terms of application processing priority.

All applications filed during the new window will be processed together to determine which ones are mutually exclusive. Once that determination has been made, an opportunity will be provided for further engineering amendments or settlements. Ultimately, in the absence of voluntary resolutions, the FCC may have to hold an auction among the remaining mutually exclusive applicants; but it has previously indicated a strong desire to encourage settlements and to avoid any LPTV auctions. Indeed, after the first window in 2018, all applicants whose applications were compliant with FCC requirements ultimately reached settlements of one kind or another, and no auction was ever held.

Only amendments to pending applications filed in 2009 will be accepted during this window. Applications for new stations will not be accepted. Amendments will have to protect all previously filed applications, whether granted or still pending. Moreover, the FCC will retain the rural location limitation from the 2009 window. Applications filed in 2009 had to specify transmitter locations at least 121 km/75 miles from the center of a list of top 100 cities specified by the FCC (based on 2008 Nielsen data) and could not be moved to within 75 miles until after the application was granted and the station constructed. Amendments filed during the new window may propose transmitter site changes of up to 48 km/30 miles, but any proposed new sites must remain outside of the same top 100 cities. A list of those cities and the geographic coordinates for measuring 75-mile distances is attached to the public notice announcing the window.

All amendments must be filed through the FCC's online Licensing and Management System (LMS) even though the original applications were filed through the Consolidated Database System (CDBS). The CDBS TV application database has been migrated to LMS. You must access LMS using your FCC Registration Number (FRN) and password, not your CDBS account number and password.

It's time to dust off those old 2009 filings, figure out which ones are still viable, determine whether they are displaced, and file for new channels for displaced proposals. As indicated above, the new window is not first-come, first-served, so you don't have to drive yourself crazy to file early. However, those who wait to file until the last-day risk bumping up against what will likely be an overloaded and unforgiving online FCC filing system on that day and might miss the deadline.

# Fixed Wireless Communications Coalition Honors Julius Knapp

The Fixed Wireless Communications Coalition (FWCC) has adopted a resolution commending Julius Knapp of the FCC on his long and distinguished career. Mr. Knapp announced his retirement recently after over 40 years in government service, most recently as the FCC's Chief Engineer and head of its Office of Engineering and Technology. Mr. Knapp established a strong record of letting science be the FCC's guide in resolving sometimes contentious debates, including those about the benefits of proposed spectrum usages vs. the adverse effects on other spectrum users. He and his staff have been reliable sources of expert engineering input for generations of Commissioners who may not themselves be technically trained. He could always be counted on to carefully consider and evaluate competing claims and render a sound judgment, while also never losing sight of the importance of advancing the potential of new technologies, improving public safety, and making communications more efficient and reliable.

"Julie has been the very model of a dedicated, unbiased, and knowledgeable civil servant," said Fletcher Heald's Mitchell Lazarus, longtime counsel for the FWCC. "We at FWCC have appreciated his long body of work and wish him well in his future endeavors."

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# Upcoming FCC Broadcast and Telecom Deadlines for December – February


Broadcast Deadlines:

**January 10, 2020**

*Issues/Programs Lists* - For all commercial and noncommercial radio, television, and Class A television stations, a listing of each station's most significant treatment of community issues during the past quarter must be placed in the station's online public inspection file. 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 with a brief description of the program.

*Class A Television Stations Continuing Eligibility Documentation* – The Commission requires that all Class A Television Stations maintain in their online public inspection files documentation sufficient to demonstrate that the station is continuing to meet the eligibility requirements of broadcasting at least 18 hours per day and broadcasting an average of at least three hours per week of locally produced programming. 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.

**January 30, 2020**

*Children's Television Programming Reports* - For the first time, all commercial television and Class A television stations must file electronically annual children's television programming reports with the Commission, although the first one will cover only the portion of the year which began with the effective date of the revised rules (September 16-December 31, 2019). These reports then should be automatically included in the online public inspection file, 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.

*Commercial Compliance Certifications* – Assuming OMB approval in time, all commercial television and Class A television stations must upload an annual 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, to the online public inspection file. Again, this "annual" report will cover only the period from September 16 through December 31, 2019.

*Website Compliance Information* - Television and Class A television station licensees must upload and retain in their online public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under. Again, this is an annual requirement but covers only the period during which the revised rule was effective; *i.e.*, September 16-December 31, 2019.

**January 31, 2020**

*Biennial Ownership Reports* **-** All licensees and entities holding an attributable interest in a licensee of one or more AM, FM, TV, Class A TV, and/or LPTV stations must file a biennial ownership report reflecting information as of October 1, 2019. Please recall that not only corporations and limited liability companies, but also sole proprietorships and partnerships composed entirely of natural persons (as opposed to a legal person, such as a corporation) are included in the entities that must file reports. Please also recall that noncommercial

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and commercial entities are required to file by the same date. Additionally, all persons holding an attributable interest in a commercial licensee must have acquired either an FRN or Restricted Use FRN.

**February 1, 2020**

*License Renewal Pre-Filing Announcements* – Radio stations licensed in Indiana, Kentucky, and Tennessee must begin broadcasts of their pre-filing announcements with regard to their applications for renewal of the license. These announcements must begin February 1, and on February 16, March 1, and March 16.

*Radio Post-Filing Announcements* – Radio stations licensed in Arkansas, Louisiana, and Mississippi that have filed license renewal applications must begin broadcasts of their post-filing announcements with regard to their license renewal applications on February 1. If the renewal application is not filed until the February 3 deadline, wait until then to begin the post-filing announcements. Either way, these announcements must continue on February 16, March 1, March 16, April 1, and April 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.

**February 3, 2020**

*License Renewal Applications Due* – Applications for renewal of license for radio stations located in Arkansas, Louisiana, and Mississippi must be filed in the Commission's License and Management System. 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 and located in Arkansas, Kansas, Louisiana, Mississippi, Nebraska, New Jersey, New York, and Oklahoma must place EEO Public File Reports in their 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.

Telecom Deadlines**:**

**February 1, 2020**

*Numbering Resource Utilization Forecast (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 Voice Over Internet Protocol (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. The next biennial reporting deadline is February 1, 2020.

*Quarterly Telecommunications Reporting Worksheet (FCC Form 499-Q)* – FCC rules require telecommunications carriers and interconnected 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.

### *FHH - On the Job, On the Go*

From January 26 -30, **Bob Winteringham** will be attending the NETA Conference in Washington, DC.

On January 15, **Peter Tannenwald** will attend a meeting of the Board of Directors of Brown Broadcasting Service, Inc. at Brown University in Providence, RI.  He is a Director Emeritus of the corporation.