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HCCB AT NAB IN VEGAS

Hardy Carey Chautin & Balkin, LLP's Managing Partner, Joe Chautin, will be at the National Association of Broadcasters Convention in Las Vegas during the first week of April. He can be reached at 504-439-2350 and will be there April 5-7. Have a great convention.

TV SPECTRUM AUCTION UPDATE

On the TV spectrum auction front, here's what we know (or have heard) in the past month. FCC Chairman Tom Wheeler's promise for a Spring 2014 Report & Order in the 14-month old Incentive Auction rulemaking proceeding is closer to reality, with a vote likely slated for the Commission's May or June meeting. However, that anticipated order may only address some of the issues, with additional orders filling in other specifics at a later date. That's a scenario we don't like, since it may create yet more uncertainty and leave important questions about repacking up in the air. But if accurate, it would confirm our belief that the FCC is still trying to figure out some of the more weighty questions (like valuation, interference, repacking and reimbursement)

Various rumors have floated a push back of the actual auction to 2016, contrary to Chairman Wheeler's early blogging that placed the auction in 2015. That rumor may have surfaced from a draft of the Spring 2014 Report & Order that may be circulating at the FCC. In a sign of what we see as a continuing (growing?) concern over broadcaster participation in the auction (which is the linchpin to its success), Chairman Wheeler has indicated that he wants to meet one-on-one with broadcasters to help them understand the value of their spectrum so that educated decisions can be made about auction participation. Meanwhile, the FCC did extend the deadline for comments in its most recently announced call for more information related to predicting potential interference between television and wireless services.

MULTILINGUAL EAS ON THE HORIZON?

The FCC has requested comments to refresh the record in a 2004 Public Safety and Homeland Security Bureau docket on the issue of the EAS and emergency information by non-English speakers. The effort originated from the filing of a petition just after Hurricane Katrina by minority and Spanish speaking broadcasters seeking to ensure access to emergency information for individuals who do not speak English as a primary language.

The FCC has twice before requested comment on the now 10-year old petition, and does so again in this most recent notice in response to more recent refinements of the broadcast organizations seeking the change. At the heart of the proposal would be a requirement for a station serving populations whose primary language is not English to step in as the substitute EAS station if the primary EAS station were not broadcasting during a disaster. Comments are due **April 28, 2014**, with reply comments due **May 12, 2014**.

RESULTS OF CHANNEL-SHARING TEST REPORTED

Late on Friday, March 28th (late on Fridays is when the FCC normally publishes things they don't want folks to pay attention to) Chairman Wheeler issued a brief statement on the channel-sharing experiment conducted by KLCS and KJLA in California, heralding the report of the test as making "a compelling case for channel sharing. In business, it is very rare to be able to have your cake and eat it too. It is my hope that broadcasters closely study the channel sharing pilot project report as they consider the once-in-a-lifetime opportunity offered by the upcoming incentive auction."

We agree with the "closely study" idea, but wonder why there was no link to the report included in Chairman Wheeler's announcement. After all, the stations were required -- as a condition of their testing -- to file a report with the FCC. Maybe they have, but we couldn't locate it on the FCC's website. It showed up in a google search on the CTIA's website at this link http://www.ctia.org/docs/default-source/fcc-filings/technical-report-of-the-klcs-kjla-channel-sharing-pilot.pdf.

It's worth reading, especially since the "rosy" picture of the report painted by Chairman Wheeler should actually have a few caveats about the potential limitations of channel-sharing, and an acknowledgment that the FCC may need to examine the transmission and technical aspects of channel-sharing to assure stations that they are not going to be restricted in the amount and quality of content they can air in a channel-sharing situation. Primary to that inquiry would be the MPEG-2 video and AC-3 audio compression method mandated by the FCC for at least one program stream which, according to the report, leads to a program stream model that needs to be delivered by a very sophisticated encoding pool. The technology and algorithms used for compression are the "gatekeepers of bitrate efficiency," according to the report. Interpretation? That means the compression technology used can take up a huge share of capacity on a channel, and therefore limit both the quality and amount of programming a channel-sharing station can transmit. The report discusses two alternative compression technologies.

Also clear from the report is that a sharing arrangement that simply splits a 6 megahertz channel into two 3 megahertz channels will be much more limiting on both parties than will a dynamic model where the 6 megahertz is shared based on many factors, including whether a program is in high or standard definition, and the program schedules of the two stations. The report does provide a good guide to the kinds of technical provisions that

would have to be included in any channel-sharing agreement.

The bottom line of the test is that channel-sharing is possible (which we knew already), but its viability as a solution to the FCC's spectrum reallocation priorities will turn largely on the willingness and investment of two stations to craft an arrangement where neither is sacrificing content or future programming opportunities. Not directly answered by the report – whether newer program content features like 3D will really be feasible in a channel-sharing environment.

As we see it, the channel-sharing report is yet another in a dizzying array of factors the FCC must weigh in crafting a spectrum auction that follows Congress' mandate for TV broadcasting to be preserved.

AM Revitalization Proceeding: Waiting For FCC Action

The comments and reply comments on how to revitalize the AM band are all filed, and now the FCC has to read them and make some decisions. The biggest question is how quickly AM stations might see relief. The second biggest question is how far the FCC will go in granting that relief.

An AM-only FM translator filing window seems all but certain, though the scope and specifics of participation and eligibility will prove challenging. Other technical rule changes are likely, though the FCC will probably begin there by adopting more moderate and practical changes first. A slew of more comprehensive technical and interference rule changes could come later, but will likely not be decided when the FCC issues what we hope will be the first of many orders in this proceeding.

We'd be surprised if the FCC acted before this fall in this proceeding, but we hope it will be earlier, perhaps summertime.

Report Presents Most Honest TV Spectrum Repacking Picture Yet

A few months ago, the FCC hired an outside contractor to answer some weighty questions on the costs associated with repacking TV stations into few channels after a spectrum auction. The report is now done, and the FCC wants to know what you think. The report can be accessed at http://www.fcc.gov/article/da-14-389a2. Comments are due **April 21**, with reply comments on **May 6**.

To identify potential expenses (but not yet determine which ones are reasonable and will be reimbursed), the report is fairly comprehensive, and therefore examines several complex issues that will arise in any repacking. For example, a significant number of towers may need to be studied and strengthened to enable antenna changes. For NCE TV stations, tower ages present a more acute problem, and could cause delays. The report acknowledges but skips past any assessment of the cost or length of time for zoning approvals that may be necessary. A shortage of tower crews is identified. The report makes clear that the speed of the repacking will vary from as short as 12 months for some stations, to as long as 5 years for others, especially those currently located on towers with multiple users.

We hope the FCC is paying attention because this report presents information that should shape how they structure aspects of the incentive auction. Remember that the auction must pay for itself, but the funds to reimburse repacked TV stations is capped. It would make sense to us that somewhere in the forward auction software, a station-by-station estimated cost for repacking would be taken into account

to ensure that they remain within the capped reimbursement fund amount and do not extend the repacking process for years.

FCC Modifies TV Ownership Attribution Policy

In a move that FCC Commissioner Ajit Pai called a change in policy and an abuse of delegated authority, the Media Bureau issued a March 12th public notice providing "guidance" on how the FCC would be processing assignment applications for TV stations. The Notice stated that TV license assignment applications involving both a shared or joints services agreements and a contingent financial interest will now be "closely scrutinized" to determine if the arrangements should be attributable under the FCC's multiple ownership rules. Some proposals would not be approved if, under the new standard, they are found to be attributable.

Commissioner Pai issued a press release on the same day the notice was published, questioning the need for the Media Bureau's new "guidance" because he had requested but not been given any instance where a TV assignment application involving the issues had been denied, such that clarification of policies would be necessary. Instead, Pai argued, the "guidance" announced a change in policy before a vote by all FCC commissioners on the issue scheduled for March 31. Pai minced no words, claiming "if a majority of the Commission wanted to turn the screws still further on broadcasters, the substance of today's Public Notice easily could have been included in [the meeting]. Instead, our policy has been changed without a Commission vote. That's not the way we should do business.

We agree with Commissioner Pai's characterization of the FCC's guidance as a change in policy (thus the title of this article). Commencing March 12, the Media Bureau will likely refuse to grant TV license assignments unless the proposed licensee continues to bear a significant amount of the economic risk and reap a significant amount of any reward in running the station. Transactions where both parties to the sharing agreement share a financial institution, or where the services provider guarantees a loan, or where it seems that the loan is not an arms-length transaction face a strong likelihood of being denied because the proposed assignment will be seen as a "sham" arrangement instead of a divestiture, and therefore as violating the current restrictions on station ownership in a TV market.

Regardless of the action taken at the March 31 meeting, the FCC's "guidance" has already required the substantial amendment of a then pending application for TV license assignment – one that has not yet been granted. In the past two weeks Commissioner Pai issued additional notices, warning that making sharing agreements attributable would slam the door on minority ownership opportunities. Pai's office used publicly available sources to conclude that an estimated 43% of female-owned and 75% of African-American-owned full power commercial television stations were currently parties to joint sales agreements.

At its March 31st meeting, the agenda states that the Commission will be considering a Report & Order making certain TV joint sales agreements attributable for ownership purposes. By the time you are reading this, that vote will likely have already been made, with an order in the wings.

FCC Fines FM Station That Decided Nighttime Operation Unnecessary

Claiming that it thought a reduction in service at night "was permissible without prior authorization" an FM station that could not certify to operating for the FCC's minimum daily required hours will now get to pay $5,000

to the US treasury. The certification is required in connection with a station's license renewal application. This licensee answered the question "no" with an explanation that for a period of about 3 years, it ceased daily programming at 7 pm each day. Oops.

Since it is not an easy question to answer, we thought it would be appropriate to ask just what the minimum operating schedule is for an FM station. The answer is: Two-thirds of the total hours they are authorized to operate between 6 a.m. and 6 p.m. local time and two-thirds of the total hours they are authorized to operate between 6 p.m. and midnight, local time, each day of the week except Sunday. By the way, it's the same for AM stations, except for day-timers (who only have to meet the first part)

Ok, that's pretty confusing by itself, so let's recap. An FM station is typically authorized for 24 hour operation. So under the rule, a station would have to transmit at least 8 of the 12 hours between 6 am and 6 pm Monday through Saturday (that's 48 hours). And the station would also have to operate at least 4 of the 6 hours between 6 pm and midnight, Monday through Saturday (that's another 24 hours). The FCC wouldn't care if the station were off the air between midnight and 6 am, or all day on Sunday. In total, that translates to a total of 72 hours of on-air operation per week, or 3 days out of every week.

So in the end, the station that shut down at 7 pm every night for 3 years received a fine of $5,000 for missing the daily minimum by 3 hours each Monday-Saturday night between 6 pm and midnight. That's 15 hours a week for 3 years, or 2,340 hours – which equates to about $2 of penalty for every hour of missed airtime.

Just in case you're wondering, the required minimum operating hours for a full power TV station is 28 hours per week, with at least 2 hours in each day. And TV stations don't have to certify to the minimum hours in their license renewal. But for a Class A television station, a minimum of 18 hours of daily operation is required, and they must certify to that minimum by not only placing proof in their public file showing that the minimum is met, but also certifying to the minimum at license renewal time. Now that's wacky.

TV Closed Captioning Rule Changes

TV stations will take on even more responsibilities related to the closed captioning of programming, pursuant to an order adopted by the FCC in the past few weeks.

Starting on **April 28, 2014**, TV stations "must take all steps to monitor and maintain their equipment and signal transmissions associated with the transmission and distribution of closed captioning to ensure that the captioning included with video programming reaches the consumer intact."

Starting **January 15, 2015** (unless OMB approval hasn't been obtained yet), TV stations must begin to "maintain records" of those monitoring and maintenance activities, which must include at least "information about the station's monitoring and maintenance of equipment and signal transmissions to ensure the pass through and delivery of closed captioning to viewers, and technical equipment checks and other activities to ensure that captioning equipment and other related equipment are maintained in good working order." On that same date, TV stations will also have to begin reviewing posted certifications from programmers related to the captioning or exemption of those programs, and if not available, reporting those programmers to the FCC.

Other rules related to the quality of captioning using Electronic Newsroom Techniques will take effect June 30, 2014.

The FCC's recent action also confirmed the application of its $3 million per channel annual revenue exemption on a per-channel basis for stations that are multicasting, but has separately taken up that exemption and others to consider whether they are still needed.

DATES TO REMEMBER

March 1 & 16, 2014: **TV, Class A & LPTV Stations in Texas**: air your PRE-filing announcements.

AM & FM Stations in Delaware & Pennsylvania: air your PRE-filing announcements.

March 1, 2014, March 16, 2014, April 1, 2014 & April 16, 2014:

TV, Class A & LPTV Stations in Kansas, Nebraska & Oklahoma: air your POST-filing announcements.

AM & FM Stations in New Jersey & New York: air your POST-filing announcements.

March 20, 2014: reply comments on AM revitalization NPRM due.

April 1, 2014: **TV, Class A & LPTV Stations in Texas**: file your renewal application electronically via Form 303-S. Also file EEO Form 396 with, if applicable, two most recent EEO public file reports. Post current EEO public file report to online public file and post copy on station website, if applicable. **NCE Stations Only**: also file biennial ownership report via Form 323-E.

AM & FM Stations in Delaware & Pennsylvania: file your renewal application electronically via Form 303-S. Also file EEO Form 396 with, if applicable, two most recent EEO public file reports. Place current EEO public file report in public file and post copy on station website, if applicable. **NCE Stations Only**: also file biennial ownership report via Form 323-E.

AM & FM Stations in Indiana, Kentucky & Tennessee: if full time employee threshold is met, complete EEO public file report and place same in public file as well as post on website. **NCE Stations Only**: also file biennial ownership report via Form 323-E.

TV, Class A & LPTV Stations in Delaware, Indiana, Kentucky, Pennsylvania & Tennessee: if full time employee threshold is met, complete EEO public file report and post same in public file as well as on website.

AM & FM Stations in Texas: if full time employee threshold is met, complete EEO public file report and place same in public file as well as post on website.

April 1 & 16, 2014; May 1 & 16, 2014: **TV, Class A & LPTV Stations in Arizona, Idaho, Nevada, New Mexico, Utah & Wyoming**: air your PRE-filing announcements.

April 1 & 16, 2014; May 1 & 16, 2014; and June 1 & 16, 2014: **TV, Class A & LPTV Stations in Texas**: air your POST-filing announcements

AM & FM Stations in Delaware & Pennsylvania: air your POST-filing announcements.

April 10, 2014: **TV, Class A, AM & FM Stations (Commercial and NCE)**: complete 1st quarter 2014 issues/program lists and place in your inspection file (online for TV & Class A and paper for radio).

TV & Class A Stations (commercial only): complete and electronically file FCC Form 398 Children's TV Programming Report for 1st Quarter 2014. The report should automatically link to your online public file. Also compile and post to online public file records relating to station's compliance with children's TV programming commercial limits.

Class A Stations Only: complete and post to online public file records relating to station's continuing Class A eligibility.

April 23, 2014: **AM & FM Stations in New York & New Jersey**: complete and post to your public file documents relating to pre- and post-filing broadcast renewal announcements.

TV & Class A Stations in Kansas, Nebraska & Oklahoma: complete and post to your public file documents relating to pre- and post-filing broadcast renewal announcements.

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Actual resolution of legal issues depends upon many factors, including variations of facts and applicable Federal laws. This publication is not intended to provide legal advice on specific subjects, rather, it seeks to provide insight into legal developments and issues that we feel could be useful to our clients and friends.

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