Hardy, Carey, Chautin & Balkin, LLP
ATTORNEYS AT LAW

Broadcast Newsletter

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MORE TIME FOR COMMERCIAL STATION OWNERSHIP REPORTS

In light of the FCC's decision to completely shut down its CDBS filing system for 17 days during the October government shutdown, the FCC has decided – only after a request was made -- that commercial stations whose ownership reports were originally to be filed between October 1 – December 2, 2013 should still have a full 60-day period to prepare and file those reports. Those stations now have until **December 20, 2013** to file their biennial ownership reports. The FCC's order stresses that stations should not wait until the last minute to file, and that if there are any technical difficulties, stations should contact Commission staff well in advance of the deadline.

FCC LAUNCHES AM REVITALIZATION RULEMAKING PROCEEDING; DEADLINES SET

In response to growing pressure from AM station owners, and after a few pre-announcements that action was coming, the FCC has finally launched a rulemaking proceeding to relax certain AM technical rules and consider an AM station-only FM translator window. Every AM station owner should file comments in this proceeding. Comments are due January 21, 2014 with reply comments due February 18, 2014.

The NPRM tentatively concludes that it can and will hold a special filing window during which only existing AM radio stations and AM permittees will have an opportunity to obtain an FM translator permit to enhance their coverage. Eligible applicants will only be able to seek a single FM translator per AM station. Applications will still need to comply with the FM translator interference rules, and must strictly comply with the existing fill-in coverage area technical restrictions on FM translators for AM stations. Under the FCC's proposal, if an FM translator is authorized in the window, it will be permanently linked to the AM primary station acquiring it, and may not be assigned or transferred except in conjunction with the AM primary station that it rebroadcasts and with which it is commonly owned. The normal competitive bidding rules will apparently apply to the filing window, meaning that mutually exclusive applications -- if not settled through technical amendments -- will be required to go to auction with the highest bidder winning. The FCC believes the number of mutually exclusive filings will be limited because of the limited number of applicants and the restricted areas for which an application can be filed. The FCC's proposal does not include an expected time frame for the window.

A number of other technical rule changes have been proposed in the rulemaking, with most designed to give AM stations more flexibility in community coverage requirements and situations where transmitter sites are lost. The FCC swings the door wide open for any other proposed changes, inviting commenters to send in suggestions.

FCC Sounds an EAS Alarm – Enforcement Advisory Included

If your station airs commercial or other content that contains an EAS tone or something close to it as attention-getters, the FCC will hunt you down and fine you heavily. How serious is the FCC about this? Serious enough to more than triple the base forfeiture for false distress signals, and place a $25,000 price tag to Turner Broadcasting System for preparing and distributing to over 97 million households a promotion for the Conan show that included sounds that were similar to an EAS tone. The promotion generated multiple complaints from viewers, including one made to the FCC. And that's not all. On the same day, the FCC entered into a consent decree with a television station that had aired multiple false distress signals, with that station agreeing to pay $39,000 to the FCC in conjunction with a training and compliance program.

Simultaneously with these actions, the FCC issued both a news release and an FCC Enforcement Advisory containing stern warnings for those who misuse, or allow the misuse, of EAS tones to capture audience attention during advertisements and at other times when there is no emergency or test. The Enforcement Advisory included an interesting footnote about FCC rules that permit EAS participants to use PSAs or commercial sponsors to explain the EAS system to the public, but not even that material can simulate or attempt to copy alert tones or codes. Another clarifying and helpful sentence states that "general alarms or other loud noises, including bells, claxons, and police, fire or civil defense sirens, are not considered simulations of the EAS tones."

So, you are hereby forewarned. Screen your broadcast station content to make sure EAS tones or simulations are not included, except in connection with an actual EAS test or alert.

Digital Television Stations Must File Form 317

No later than December 2, 2013, all digital full power, Class A and low power television stations must file an annual Ancillary/Supplementary Services Report on Form 317 with the FCC. The form reports any ancillary/supplementary services provided on a station's excess digital capacity through September 30, 2013, along with any revenue received for such services. Five percent of the revenue received must then be remitted to the FCC.

Services that the FCC considers "ancillary/supplementary" are things like pay-per-view television service, teletext, computer software distribution, aural messaging, paging services, or interactive materials. Any video broadcast signal provided at no direct charge to viewers (i.e., free over-the-air) is <u>not</u> considered an ancillary/supplementary service.

Broadcast Station Foreign Ownership Restrictions Clarified

In the form of a declaratory ruling, the FCC has clarified its policies and procedures for reviewing broadcast station transactions that would result in non-U.S. citizens owning more than 25% of the station. Currently, the Communications Act imposes a 25% limit on foreign ownership of U.S.-organized entities that control broadcast licensees when the FCC finds that the limit is in the public interest. The FCC's ruling clarifies that the restriction is not a bar to higher foreign ownership, but rather a trigger for the FCC to exercise discretion to allow foreign ownership of more than 25%.

With that clarification, the FCC specified the filing procedures for applicants and petitioners seeking approval for foreign ownership above the 25% benchmark, and the detailed information that must be provided in connection with such an application. The clarification does not remove the FCC's responsibility to work with Executive Branch agencies on national security, law enforcement, foreign and trade policy in reviewing proposals for broadcast foreign investment.

FCC Admits Error For Granting Matoon Waiver to FM Station

Rarely does the FCC admit an error, and when they do, it is often in fine print. The last footnote of an October 31, 2013 decision by the FCC is where the latest error admission can be found.

That decision considered the petition for reconsideration of a request for waiver of the FCC's major change rule to allow the relocation of an FM translator so that the translator could rebroadcast the signal of a licensed FM station. The FCC had earlier denied the request and dismissed the application, because the proposal did not meet the 4th criterion for a *Mattoon* Waiver.

First, a little background on *Mattoon* Waivers. In late-2011, the FCC granted a waiver of its minor modification rules to permit a "single-step" relocation of an FM translator for use as a fill-in translator by an AM station. The FM translator community of license was Mattoon, Illinois, and the waiver is now known as the "*Mattoon* waiver." Here's how *Mattoon* waivers work. Under Section 74.1233(a) of the FCC's rules, the 60 dBu contour of the existing and proposed FM translator facilities must overlap to be considered a minor change. If they do not, then the modification sought is "major" and can only be sought during a filing window. Often, facility relocations of an FM translator to allow use by an AM station require greater distance moves than the minor modification rules permit. To avoid making several incremental moves at substantial cost or waiting for a filing window to open, applicants seek a waiver of the major change rule to allow the facility relocation in one step or application. Waiver requests face a high hurdle and require specific showings to warrant a grant. For *Mattoon* waivers, the FCC has defined the criteria it will consider in acting on the waiver request. A *Mattoon* Wavier applicant must show that: (1) it does not have a history of filing "serial" FM translator minor modification "multiple hop" applications; (2) the proposed facility is mutually exclusive to its licensed facility; (3) the proposed move does not implicate LPFM spectrum scarcity concerns; and (4) while not alone dispositive, the translator will rebroadcast an AM station as an AM fill-in translator.

Now back to the FCC decision. On reconsideration, the applicant argued that even though its translator was going to rebroadcast the signal of an FM station, instead of the required AM station under the *Mattoon* Waiver 4th criteria, it nevertheless should be granted as being in the public interest. The applicant cited to the FCC's grant of an earlier application granted by the FCC similar to its own, where the translator was to rebroadcast the signal of an FM station, and the applicant cited to the *Mattoon* decision in its request. The FCC nevertheless declined to grant the petition for reconsideration, stating in a footnote that because the grant of the earlier application had occurred by public notice and did not discuss the waiver request, it was not binding precedent. It then went the extra step, stating "we conclude that our grant of that application was in error. However, that grant is final and cannot be rescinded." And with that, the FCC denied the petition for reconsideration because the proposed translator would have rebroadcast an FM, not an AM station.

Here's what this decision tells us. First, the FCC has now made it abundantly clear that *Mattoon* Waivers will only be granted if the FM translator is going to serve an AM station, and are therefore limited to the FCC's efforts to revitalize the AM band (side note – in the AM Revitalization NPRM, the FCC has asked whether it should continue its *Mattoon* Waiver policy after it holds an FM translator filing window exclusive to AM stations).

Second, this is only the latest in a series of decisions over the last few years where the FCC has pointed out that what applicants include in an application does not necessarily form the basis of the FCC's decision on that application unless they write a decision that so declares. So don't put all of your chips on what you view as the FCC's "reasoning" for granting an application unless they have rendered a decision that clearly relies upon that reasoning. Third, the FCC admits errors in fine print, so always read the fine print. There, wasn't that fun?

AM Auction 84 Scheduled

It only took about 10 years, but the FCC has scheduled a "closed" auction for certain applicants that filed new AM station applications in a 2004 window. Closed auctions limit qualified bidders to the original qualified applicants identified by the FCC, so unless you are one of those, you cannot bid. The Auction is slated to being on May 6, 2014 and will include 22 AM construction permits. We note that the opening bid amounts for these permits – assuming that the qualified applicants remain interested in them – are unusually low.

Incentive Auction Update

The only update this month is that the FCC's new chairman, Tom Wheeler, has publicly stated that he has immersed himself in incentive auction issues and will soon decide how best to move the process forward. The next logical step is the issuance of a long-awaited Report & Order from the Incentive Auction NPRM issued by the FCC almost a year ago.

Children's Commercial Limits Reminder

These days, the FCC issues fines on a weekly basis to television stations that have not filed, or not timely filed, the quarterly FCC Form 398 Children's Television Report, which is designed to ensure that stations are airing at least a minimum of 3 hours/week of informational/educational programming for children under the age of 16. But every now and again, a different kind of children's television issue rears its head – ones that restrict the inclusion of certain types and amounts of commercial matter in programming directed to children that are 12 years old and younger. The primary rule there limits the amount of commercial matter that can be aired during such programs to 10.5 minutes per hour on weekends, and 12 minutes per hour on weekdays. There are at least two trap doors with that rule. The first is that an entire children's program can become "commercial matter" if the program is associated with a product during which commercials for that product are aired. The second involves host-selling, where program-related characters are used to promote any product during the airing of the program. Tricky to apply? Yes. Well, here is one application of the host selling trap door that helps to eliminate the trickiness.

A TV station license renewal applicant disclosed that a Cocoa Pebbles commercial aired during the Xiaolin Showdown program contained glimpses of characters from the program on the screen. The licensee admitted that it might have violated the FCC's children's television advertising rules, but argued that the characters actually appeared in the commercial during a segment that addressed a contest, as apposed to a "promotional" segment of the commercial. The FCC did not like that distinction, but issued an admonition instead of a monetary forfeiture, and renewed the station's license for a full 8-year term.

In finding that the circumstances constituted "host-selling," the FCC repeated earlier statements that "host-selling encompasses any character endorsement – not just direct vocal appeals – that has the effect of confusing a child viewer from distinguishing between program and non-program material." Even "advertisements featuring the same type of animation that are regularly featured in the accompanying program constitutes host-selling."

For more info, contact Joe Chautin, Mark Balkin, or Elise Stubbe.

Phone 985.629.0777

Fax 985.629.0778

www.hardycarey.com

DATES TO REMEMBER

<u>**December 1 & 16**</u>: **TV, Class A & LPTV Stations in Iowa & Missouri**: air your POST-filing announcements

AM & FM Stations in Alaska, American Samoa, Guam, Hawaii, Oregon & Washington: air your POST-filing announcements.

<u>**December 1 & 16, 2013 and January 1 & 16, 2014**</u>: **TV, Class A & LPTV Stations in Kansas, Nebraska & Oklahoma**: air your PRE-filing announcements

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

<u>**December 2, 2013**</u>: **AM & FM Stations in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, & Vermont**: 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.

TV, Class A & LPTV Stations in Colorado, Minnesota, Montana, North Dakota & South Dakota: 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 Alabama & Georgia: 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 TV Stations in Alabama, Georgia, Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island & Vermont: if full time employee threshold is met, complete EEO public file report and place same in public file as well as post on website.

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

<u>**December 2, 2013**</u>: **Digital TV, Class A TV & LPTV Stations**: prepare and file your Form 317 declaring any ancillary and supplementary services provided on your station for the period ending September 30, 2013.

<u>**December 2 & 16, 2013, January 1 & 16, 2014, and February 1 & 16, 2014**</u>: **AM & FM Stations in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, & Vermont**: air your POST-filing announcements.

TV, Class A & LPTV Stations in Colorado, Minnesota, Montana, North Dakota & South Dakota: air your POST-filing announcements.

<u>**December 20, 2013**</u>: all commercial AM, FM, TV, Class A & LPTV Stations: complete and file your ownership report with information current as of October 1, 2013.

<u>**December 23, 2013**</u>**: AM & FM Stations in Alaska, American Samoa, Guam, Hawaii, Oregon & Washington**: complete and post to your public file documents relating to pre- and post-filing broadcast renewal announcements.

TV, Class A & LPTV Stations in Iowa & Missouri: complete and post to your online public file documents relating to pre- and post-filing broadcast renewal announcements.

<u>**January 1, 2014**</u>: TV stations intending to claim an exemption from Closed Captioning based on 2013 revenue: verify with accounting department that 2013 revenue did not exceed exemption levels. If not, consult counsel for new captioning obligations.

<u>**January 10, 2014**</u>: **TV, Class A TV, AM & FM Stations (commercial & non-commercial)**: complete 4th quarter 2013 issues/program lists. TV & Class A stations post to your online public file. AM & FM stations place in your public file.

<u>**TV & Class A Stations (commercial only**</u>) complete and electronically file FCC Form 398 Children's TV Programming Report for 4th Quarter 2013. Link to your report should be made automatically by FCC to your online public file. Also compile and post to online public file records relating to station's compliance with children's programming commercial limits.

<u>**Class A Stations only**</u>: complete and post to your online public file certification of ongoing Class A eligibility.

<u>**January 21, 2014**</u>: comments on AM revitalization NPRM due.

<u>**January 31, 2013**</u>: minimum fees due to SoundExchange for 2014. Renewal of royalty plan may also be required.

February 1 & 16, 2014 and 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.

February 3, 2014: **TV, Class A & LPTV Stations in Kansas, Nebraska & Oklahoma**: 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 New Jersey & New York: 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 Arkansas, Louisiana & Mississippi: 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 TV Stations in Arkansas, Louisiana, New York, New Jersey & Mississippi: if full time employee threshold is met, complete EEO public file report and place same in public file as well as post on website.

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

February 18, 2014: reply comments on AM revitalization NPRM due.

Hardy, Carey, Chautin & Balkin, LLP
ATTORNEYS AT LAW
1080 West Causeway Approach
Mandeville, Louisiana 70471-3036