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

Broadcast Newsletter

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WHAT TRUMP'S ELECTION MIGHT MEAN AT THE FCC

Nothing is certain of course, but we thought it worth some space in our newsletter to at least muse on what the election of Donald Trump means for the FCC, and more specifically, for broadcasters who are regulated by the FCC.

First, and most obvious, is that the FCC Chairman and two other Commissioners will be Republican appointees, resulting in a 3-2 majority that was last held eight years ago. Current Chairman Tom Wheeler will likely resign effective upon Donald Trump's inauguration in January. By the end of 2016, Democrat FCC Commissioner Jessica Rosenworcel's current term will expire (her pending re-appointment as a Commissioner had been blocked by Republican Senators). With Wheeler and Rosenworcel out, that leaves Ajit Pai (likely the interim Chairman) and Michael O'Reilly, both Republican appointees, along with Mignon Clyburn, a Democrat appointee. Those three are likely to be serving together until the Senate approves a new Chairman and other appointees, which probably won't be completed until summer of 2017.

Their duties and potential actions during this interim period won't be insignificant. Commissioner Clyburn herself served as interim Chair several years ago, and she moved along several items during a few short months. We expect Interim Chairman Ajit Pai to do the same thing – he will control the docket for meetings and can bring items up for a vote that have been languishing or decide to delay votes on various items.

Mr. Pai will also be overseeing what will likely be the end of the incentive auction for broadcasters, and scrutinizing or having significant input over the post-auction repack plan, an ongoing proceeding that has been delegated to the staff for adoption. An FM translator auction for AM stations that did not participate in the 2016 250-mile waiver modification windows is also something he could press for quickly. The FCC staff has supposedly been working on transitioning all noncommercial broadcasters to the same December 1st biennial ownership report and migrating the report into the

License Management System (LMS), some of which likely requires OMB approval because of information gathering. Depending on the progress of that effort, ownership reporting for NCE stations on the current schedule could be suspended, with new reports due by December 1, 2017. The migration of all radio stations to online public files hosted at the FCC is also still percolating, with deadlines for that in early-2018.

All of that could become even more interesting if Mr. Pai is nominated for and appointed to the Chairmanship, which is a distinct possibility. Let's just say that Mr. Pai will need plenty of coffee in the next several months.

A Republican controlled FCC is generally seen as being driven less by government regulation, and more accepting of market-based solutions. For that reason, the existing multiple ownership rules – which were recently left virtually unchanged by the Democratically-controlled Commission and were legally challenged – are likely to be relaxed in the next few years.

Congress is wary of any last minute regulations adopted by the current FCC, and warned/asked Chairman Wheeler to cancel votes on any controversial items. Commissioners Pai and O'Reilly issued statements in support of that letter. Although Chairman Wheeler did remove certain more controversial proceedings from the Commission's December agenda, there are others – such as EAS – that remain ripe for a vote. For any regulation or order adopted that is considered an overreach, House Bill 5982, appropriately named the Midnight Rules Relief Act, has been introduced to override the enactment of last minute votes by agencies controlled by the Obama Administration. That would include our beloved FCC.

Well, those are our musings for now. But we would be remiss without issuing a closing statement (being lawyers, and all). So, here goes. Just in case any Trump administration folks or friends might be readers of this newsletter, Commissioner Pai has been a staunch advocate for broadcasters, and while there are others qualified to hold the Chairmanship, we put our support behind Mr. Pai for FCC Chairman.

FCC Anticipates Stage Three Reverse Auction Will End December 1st

The FCC has announced that it anticipates the reverse auction currently underway in stage three of the TV incentive auction will end on December 1st, with up to five rounds occurring that day if necessary. As soon as it ends, the FCC will announce the total asking price from the broadcasters for their voluntarily relinquished spectrum. The broadcasters' two previous asking prices -- $86 billion and $55 billion -- were too high for the forward auction bidders, triggering another stage of the auction.

The stage three forward auction will follow the end of the stage three reverse auction, probably beginning sometime next week. Whether that forward auction will take several days or end in a single day, like the last one, remains to be seen. If the forward auction bidders are not willing to pay the reverse auction total, we'll be headed to a fourth stage where the reverse auction clearing target will be 84 Mhz – a drop of 24 Mhz (four TV channels) from the stage three clearing target of 108 Mhz.

From a timing perspective, the FCC could begin a stage four reverse auction in December, but that substantially depends on how long the forward auction takes, and how close we get to the Christmas holiday. If the forward auction is short, it would not surprise us if a stage four reverse auction started in December, was suspended for the holidays, and then re-started in early January.

Anti-collusion rules remain in effect. Exercise caution in your discussions. Some third parties are out soliciting already for channel share partners after the auction. Those types of inquiries are fraught with potential anti-collusion rule violations, so be careful.

The auction repack procedure is still being debated, with NAB weighing in heavily to secure additional flexibility on the construction buildout periods for affected stations. The task of adopting a repack procedure has been delegated to the FCC staff. We fully expect to see the finally adopted procedures before the end of the auction.

Confirm your TV Contact Information

A month ago, we wrote about the FCC's Media Bureau having issued a notice reminding all television licensees of the importance of having accurate contact information on file with the FCC. We wanted to re-emphasize that, and therefore include this explanation and reminder for those who might have missed it.

When the auction ends, the FCC will send a confidential notice to TV stations about channel reassignments. For stations that filed a Form 177 to become eligible to participate in the auction, the confidential notice will be sent to the contact address provided in that form. Any stations that did not file a Form 177 will receive channel reassignment information at the address contained in the Licensing and Management System (LMS). Contact information can be easily changed by either amending the Form 177 or logging in to LMS. At a minimum, check your station's contact information to be sure it is accurate.

DTV Ancillary/Supplementary Report Due December 1st

Owners of digital LPTV, Class A or full power television stations that are reading this and have not yet filed their required annual DTV Ancillary/Supplementary Report have one more day to do so. The report requires stations to declare whether they have provided any ancillary or supplementary services during the last 12 months. Those include computer software distribution, data transmissions, teletext, interactive materials, aural messages, paging services, audio signals, or subscription video -- basically anything other than free over-the-air broadcasts. If a station has done so, it must remit 5% of any revenue received from such services to the FCC via a separately filed fee remittance.

The form is known as Schedule 2100(g) and can be found in the list of forms available for filing in the Licensing Management System. Log in with your FRN and password.

Renewal Application Scheduled For Hearing

The FCC has taken the unusual step of designating a radio station renewal application for hearing before an administrative law judge. As you might have perceived, that is bad. It essentially means that the station did not meet the minimum public interest standards necessary to have the application granted and, therefore, whether its license is renewed is now a question for a judge to decide. The FCC will act on the judge's recommendation after the hearing proceedings are complete.

The designation of a renewal application for hearing is rare, and it is usually for some grievous error that calls into question the licensee's fitness to be a licensee. In this case, the station sponsored a contest that involved drinking copious amounts of water, and one of the participants later died. As you may have surmised, the actions of the employees of the station – over whom the licensee is supposed to exercise control – are imputed to the licensee.

How the judge rules here will be interesting, as we are unaware of a prior license renewal hearing involving the outcome of a contest ending in the death of a participant. The potential outcome includes fines, a short-term renewal, or no renewal. The licensee's oversight of the station and its employees will be a central issue as to whether it fulfilled its duties as an FCC licensee. In addition, the appropriateness of the contest rule disclosures made by the station – which did not include any mention of risks associated with the contest or water intoxication – will be examined closely. There is a separate lawsuit pending related to the death of the participant, a mother of three. The precise details of the case can be found in the 36-page hearing designation order.

This case is a good reminder that licensees are required to oversee station personnel and are responsible for the actions they take in any area of station operations. The consequences for not doing so can be severe. In addition, compliance with the FCC's contest disclosure rules should be paramount in any contest a station conducts.

Those Pesky FCC Application Questions Can Bite You

Answering questions on an FCC application of any kind can sometimes seem tedious and a bit bewildering, depending on the wording of those questions, which is not always a model of clarity. But if you don't pay close attention, a wrong answer can lead to scrutiny and consequences from the FCC.

A low power FM station application recently found this out the hard way, failing to disclose the ownership interest of one of the licensee's principals in another broadcast station, something that would have disqualified the applicant absent a commitment for that individual to divest the ownership interest as a condition of the LPFM permit grant. Someone objected to the grant of the permit and pointed out the issue to the FCC. After some digging and a few *mea culpas*, the applicant came clean, disclosing the interest and agreeing to divest it. But that didn't resolve the matter.

The FCC granted the application, but ordered the Media Bureau to commence an investigation and enforcement proceedings against the applicant for originally misrepresenting the ownership issue in the application. Commissioner Pai would have gone one further. In his concurring statement, he called for the matter to be designated for hearing to determine whether the applicant possessed the character and qualifications to hold an LPFM license. You can read the entire decision here, and Commissioner Pai's statement here.

The lesson here is pretty straightforward – answer any question on any FCC application with absolute candor and only after understanding exactly what is being asked. Answers to application questions are representations to the FCC that are taken seriously. If there is any doubt, err on the side of caution in selecting your answer, and disclose any relevant information in an explanation or exhibit.

Dates To Remember

December 1, 2016

ALL digital Full Power TV, Class A and TV Translator Stations must electronically file FCC Form 317, Annual DTV Ancillary/Supplementary Services Report.

AM & FM Stations in Alabama, Georgia, Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont: if five (5) full-time station employment unit employee threshold is met, complete EEO public file report and post same in public file as well as post on station website.

AM & FM Stations in Colorado, Minnesota, Montana, N. Dakota and S. Dakota: if five (5) full-time station employment unit employee threshold is met, complete EEO public file report and place same in public file as well as post on station website. **If station employment unit has 11 or more full-time employees**, also prepare **and** electronically file mid-term EEO Form 397 and place copy of filed report in your public inspection file. **NCE Stations Only**: also file biennial ownership report via Form 323-E and place copy in public file.

TV & Class A Stations in Alabama and Georgia: if five (5) full-time station employment unit employee threshold is met, complete EEO public file report and post same in online public file as well as on station website **and** prepare and electronically file mid-term EEO Form 397. **NCE Stations Only**: also file biennial ownership report via Form 323-E.

TV & Class A Stations in Colorado, Minnesota, Montana, N. Dakota, S. Dakota, Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont: if five (5) full-time station employment unit employee threshold is met, complete EEO public file report and post same in online public file and station website. **NCE Stations in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont**: also file biennial ownership report via Form 323-E.

February 1, 2017

AM & FM Stations in Kansas, Nebraska and Oklahoma: if five (5) full-time station employment unit employee threshold is met, complete EEO public file report and post same in public file as well as post on station website. **If station employment unit has 11 or more full-time employees**, also prepare **and** electronically file mid-term EEO Form 397 and place copy of filed report in public inspection file.

February 1, 2017 (cont'd)

NCE Stations Only: also file biennial ownership report via Form 323-E.

AM & FM Stations in Arkansas, Louisiana, Mississippi, New Jersey and New York: If five (5) full-time station employment unit employee threshold is met, complete EEO public file report and place same in public file as well as post on station website.

TV & Class A Stations in Arkansas, Louisiana, Mississippi, if five (5) full-time station employment unit employee threshold is met, complete EEO public file report and post same in online public file as well as on station website **and** prepare **and** electronically file mid-term EEO Form 397. **NCE Stations Only**: also file biennial ownership report via Form 323-E.

TV & Class A Stations in Kansas, Nebraska, Oklahoma, New Jersey and New York: if five (5) full-time station employment unit employee threshold is met, complete EEO public file report and post same in online public file and station website.

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