

Quality Standards Adopted For Closed Captioning

The FCC has adopted a comprehensive regime of quality standards for closed captioning in video programming. Closed captioning is the technology by which the audio portion of video programming is made accessible to the deaf and hard of hearing by way of added textual components. Over the last sixteen years, the FCC has required increasing levels of captioning in the programming released by video programming distributors (“VPDs”), including television stations and multichannel video programming distributors. The agency has now taken steps to improve the quality and usefulness of captioning. These actions are published in a *Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking* in Docket 05-231.

The Commission established four non-technical quality standards that it found to be necessary to ensure that captioning fully and effectively conveys program content to people who cannot hear:

- Accuracy. Captions must reflect the dialogue and other sounds and music in the audio track to the fullest extent possible based on the type of the programming, and must identify the speakers.

continued on page 2

Utah Court Rules To Enjoin Aereo

The U.S. District Court in Utah has granted motions by the licensees of local television stations for a preliminary injunction against Aereo, Inc. and its practice of retransmitting the broadcasters’ TV signals over the Internet. The injunction was to be effective throughout the federal appellate court system’s Tenth Circuit, which includes the states of Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming. However, the District Court subsequently temporarily stayed the injunction until March 11, pending Aereo’s appeal of the imposition of the injunction to the Circuit Court.

The broadcasters had sued Aereo for copyright infringement as it was commencing to offer its paid subscription services in the Salt Lake City market. Consistent with its business plan in other markets, Aereo was providing television programming from the local stations to subscribers via the Internet. This case followed the outline of similar litigation in various other courts around the country. The results in those other courts have been mixed. Most importantly, the Second

continued on page 7

Critical Information Needs Study Terminated

By way of a brief two-sentence Public Notice, the FCC has announced that it “will not move forward with the Critical Information Needs study.” This project was created in late 2011 in the context of gathering information for a report to Congress on barriers to entry into the communications marketplace faced by entrepreneurs. Outside research contractors were engaged to survey the informational needs of the public and the media’s informational offerings. Skeptics were always concerned about what legitimate connection there could be between the data that these studies would produce and the Commission’s regulatory agenda and jurisdiction. Congressional and industry critics asserted that this exercise would lead to a backdoor entry by regulators into broadcast newsrooms. Under mounting pressure from a variety of sources, the agency has pulled the plug on this effort. In the Public Notice, the Commission said it would “reassess the best way to fulfill its obligation to Congress” to identify entry barriers.

IN THIS ISSUE

FCC Reform.....	3
Channel Sharing Experiment.....	3
Deadlines To Watch.....	4-5
Incentive Auction Ex Parte.....	6
Video Programming Distribution Market.....	6

For more information about or help with any of the items reported in *ANTENNA*, please contact:

pillsbury

2300 N St. N.W.
Washington, DC 20037

Tel: 202.663.8184
Fax: 202.663.8007

E-mail: lew.paper@pillsburylaw.com

Quality Standards Adopted for Closed Captioning continued from page 1

- Synchronicity. Captions must coincide with their corresponding dialogue and other sounds to the fullest extent possible based on the type of programming, and must appear at a readable speed.

- Completeness. Captions must run from the beginning to the end of the program, to the fullest extent possible, based on the type of programming.

- Placement. Captions may not cover other important on-screen information, such as character faces, featured text, graphics or other information essential to the understanding of the program's content.

Pre-recorded programming must include captioning that complies strictly with these standards. Somewhat more leeway will be accorded live programming. While expecting that live programming will also be compliant, the Commission says that in evaluating compliance with the quality standards, it will "consider the challenges in captioning live programming, . . ."

Near-live programming, performed and recorded within 24 hours prior to broadcast, will be evaluated under the same standards applied to live programming.

While the ultimate legal responsibility for delivering captioning to the audience lies with the VPD, the Commission acknowledges that in most cases, captioning of pre-recorded programming is implemented by parties that supply programming to stations and other VPDs. The Commission is requiring VPDs to make their best effort to obtain certification from programmers that their programming either (1) complies with the captioning quality standards, (2) adheres to the set of Best Practices for the captioning industry set forth in the *Report and Order*, or (3) is exempt from the closed captioning rules.

New requirements are adopted for stations that are allowed to employ Electronic Newsroom Technique ("ENT") to convert teleprompter scripts into captions. Affiliates of the four major television networks in the top 25 markets are not permitted to rely on ENT to produce captioning. Broadcasters that do use ENT must take steps to script as much programming as possible for the teleprompter, including sports, weather and late-breaking news. Segments for which ENT is not utilized must include crawls or other visual information.

The Commission adopted rules to require VPDs to monitor and maintain their captioning equipment and make repairs promptly when necessary. Periodic equipment checks are required. VPDs must keep records of their activities related to the maintenance, monitoring and technical checks of captioning equipment.

An exemption from captioning obligations is available with respect to any channel that produces less than \$3 million in revenue per year. The Commission clarified that for

the purposes of qualifying for this exemption, each multicast program stream of a digital television station is considered a separate channel.

In the *Declaratory Ruling* segment of this action, the Commission responded to questions that have been posed by parties in this rulemaking proceeding.

The Commission confirmed that bilingual English/Spanish programming is subject to the same captioning requirements as programming that is entirely English or Spanish. All new bilingual programming not subject to an exemption must be captioned, and 75% of pre-rule programming must be captioned.

VPDs are generally required to designate a contact person for captioning issues and identify that contact to the Commission and to the public. The Commission clarified that all VPDs must designate a contact – including those that may be exempt from captioning obligations.

The Commission continued the rulemaking process by including a *Further Notice of Proposed Rulemaking* in this release. Among the proposals and issues discussed are the following.

Responding to comments submitted earlier in the proceeding, the Commission asks whether some of the burden for ensuring the quality of captioning should be shifted to or at least shared by video programming providers and owners. Currently the FCC's enforcement structure is focused on VPDs and not programming providers.

The Commission seeks information on technical solutions for improving the synchronicity of captioning in live and near-live programming. Further, should the rebroadcast of recorded programming that was originally broadcast live or near-live be required to employ offline captioning so as to ensure better quality?

The agency's rules exclude advertisements of five minutes duration or less from captioning requirements. Certain categories of programming have self-implementing exemptions, including late night programming, locally produced and distributed non-news programming with no repeat value, interstitials, promotional announcements, and public service announcements of ten minutes or less in length. In January, 2011, the FCC received a petition for rulemaking from consumer interests proposing to subject all of these types of programming to the captioning requirements. The Commission asks commenters to address the merits, costs and benefits of these proposals.

The agency solicits public comment on these and other captioning issues. Such comments will be due 90 days after publication of notice of this proceeding in the Federal Register. Replies are to be filed within 120 days of Federal Register publication.

FCC Proposes to Reform its Processes

The FCC has published a Report on Process Reform in which proposals are offered for streamlining many of the agency's regulatory and rulemaking processes. The Report was drafted by a staff working group chaired by a Special Counsel to Chairman Tom Wheeler. Based on both internal and external suggestions, the Report identifies initial steps in what the Commission says will be an ongoing process of reexamining and revising the way the agency does business. The Report proposes over 150 recommendations for process reforms covering a wide range of topics. If implemented, it is predicted that these reforms would enable the Commission to work faster, smarter, more efficiently and more transparently. Strikingly, many of the proposals include timelines, or "shot clocks," with deadlines that the agency would impose on itself to complete certain tasks and dispose of certain matters. The Commission invites public input. Comments should be filed in Docket 14-25 by March 31.

In a Public Notice announcing the Report and requesting public comment, the Commission said that the Report's recommendations are intended to advance the following goals:

- Improving the efficiency and effectiveness of the FCC's decision-making process by streamlining the internal FCC review process, improving tracking accountability, and reducing backlogs.

- Processing items before the agency more quickly and more transparently by accelerating the overall speed of disposal of both routine and complex matters, and ensuring that the public is provided more information regarding the status of matters.

- Streamlining agency processes and data collections, including reworking essential processes such as licensing activities, internal distribution and release procedures, handling of informal consumer complaints, compliance with statutory requirements, and examining the agency data collection practices to reduce burdens where possible, while ensuring that data collection practices are tailored to evolving market conditions.

- Eliminating or streamlining outdated rules.

- Improving interactions with external stakeholders by enhancing the FCC's public outreach and transparency, innovating new mechanisms for developing policy proposals and updating the drafting process for policy documents.

- Maximizing the Commission's resources by ensuring effective internal communications, human resource management and training.

- Modernizing the Commission's information technology infrastructure to improve its website functionality, data management and tracking capability.

TV Stations to Experiment on Shared Channel

In a harbinger of what the future may hold, the FCC has granted Channel Sharing Experimental Authorizations to KLCS, Los Angeles, and KJLA, Ventura, California. The stations voluntarily requested the temporary pilot arrangement to demonstrate the possibilities for the cooperative sharing of a six megahertz channel by two full service digital television stations. The authorizations are valid for six months.

During the experimental operations, PBS affiliate KLCS will host operations of commercial station KJLA on a portion of its assigned spectrum. KJLA will also continue to operate normally on its own assigned channel without disruption. There will be no loss of service to the KJLA audience during the experiment.

Under the Pilot Agreement that the licensees have entered into, the parties will explore the feasibility and practicality of various aspects of over-the-air channel sharing, including:

- Technical feasibility for multiplexing of signals on a single bitstream off-air involving a variety of content combinations, such as multiple HD streams and HD/SD stream combinations.

- Transmissions in the H.264 video compression format as well as the standard MPEG-2 format.

- The development of methods for ensuring that the Program and System Information Protocol ("PSIP") information is not disrupted for consumers during the testing.

- A variety of configurations for channel sharing. KJLA will provide content to KLCS, and KLCS will transmit the shared bitstream to determine the level of reception of the shared channel streams. During tests, KLCS will continue to transmit its unaltered signal with all of its broadcast streams pursuant to its license.

- Implementation of full-time channel sharing by way of a shared bitstream with content from both stations using different virtual channels. At each phase of the testing, the parties will evaluate the effect of the operation on their output, and agree to parameters for the next phase so as to keep video degradation within acceptable bounds.

In granting these authorizations, the Commission said that such a pilot operation is in the public interest because it may demonstrate the feasibility of the channel sharing envisioned for the future after the reverse spectrum auction.

The experimental authorizations were granted subject to the following conditions:

continued on page 7



DEADLINES TO WATCH



License Renewal, FCC Reports & Public Inspection Files

- March 1 & 16, 2014 Radio stations in **New Jersey** and **New York**, and television stations in **Kansas**, **Nebraska** and **Oklahoma** broadcast post-filing announcements regarding license renewal applications.
- March 1 & 16, 2014 Radio stations in **Delaware** and **Pennsylvania** and television stations in **Texas** broadcast pre-filing announcements regarding license renewal applications.
- April 1, 2014 Deadline to file license renewal applications for radio stations in **Delaware** and **Pennsylvania** and television stations in **Texas**.
- April 1, 2014 Deadline to file Biennial Ownership Report for all noncommercial radio stations in **Delaware** and **Pennsylvania**, and for noncommercial television stations in **Texas**.
- April 1, 2014 Deadline to place EEO Public File Report in public inspection file and on station's Internet website for all nonexempt radio and television stations in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas**.
- April 1, 2014 Deadline for all broadcast licensees and permittees of stations in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee** and **Texas** to file annual report on all adverse findings and final actions taken by any court or governmental administrative agency involving misconduct of the licensee, permittee, or any person or entity having an attributable interest in the station(s). Stations for which this is the license renewal application due date will submit this information as a part of the renewal application.
- April 1 & 16, 2014 Radio stations in **Delaware**, **New Jersey**, **New York** and **Pennsylvania**, and television stations in **Kansas**, **Nebraska**, **Oklahoma** and **Texas** broadcast post-filing announcements regarding license renewal applications.
- April 1 & 16, 2014 Television stations in **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah** and **Wyoming** broadcast pre-filing announcements regarding license renewal applications.
- April 10, 2014 Place Issues/Programs List for previous quarter in public inspection file for all full service radio and television stations and Class A TV stations.
- April 10, 2014 Deadline to file quarterly Children's Television Programming Reports for all commercial television stations.

Deadlines for Comments In FCC Proceedings

Docket	Comments	Reply Comments
(All proceedings are before the FCC unless otherwise noted.)		
Docket 11-154; NPRM Application of IP Closed Captioning rule to video clips		Mar. 5
Docket 02-27; Public Notice Request for comment on Petition for Declaratory Ruling to clarify aspects of Telephone Consumer Protection Act		Mar. 10
Docket 14-16; NOI Status of competition in the market for delivery of video programming	Mar. 21	April 21
Docket 12-3; NPRM Repeal of sports blackout rules		Mar. 25
Docket 14-25; Public Notice Request for comment on FCC's process reform	Mar. 31	N/A
Docket 05-231; FNPRM Closed captioning	FR+90	FR+120
FR+N means that the filing deadline is N days after public notice of the proceeding is published in the Federal Register.		

Rulemakings to Amend Digital TV Table of Allotments

The FCC is considering the following additions and deletions (indicated with a "D") to the DTV Table of Allotments. The deadlines for filing comments and reply comments are shown. An asterisk indicates that the channel has been reserved for noncommercial use.

Community	Channel	Comments	Reply Comments
South Bend, IN	46(D)		March 10
South Bend, IN	48		March 10

Requests for Exemption from Closed Captioning Rules

The following video programmers have requested exemption from the FCC's closed captioning rules. Interested parties may file comments and reply comments in Docket 06-181 about these requests by the deadlines shown below.

Programmer	Location	Docket No.	Comments	Reply Comments
Los Angeles Unified School District(KLCS-TV)	Los Angeles, CA	CGB-CC-0269	Mar. 12	April 1
River of Life Christian Center	Orlando, FL	CGB-CC-0493	Mar. 12	April 1
Outdoorsmen Productions	Hartington, NE	CGB-CC-0639	Mar. 12	April 1
Faith Center of Paducah	Paducah, KY	CGB-CC-0731	Mar. 12	April 1
First United Methodist Church	Tupelo, MS	CGB-CC-1224	Mar. 12	April 1
SJTV, LLC	Whitesboro, NY	CGB-CC-1226	Mar. 12	April 1
Peace is Possible, NC, Inc.	Asheville, NC	CGB-CC-1295	Mar. 12	April 1



DEADLINES TO WATCH



Lowest Unit Charge Schedule for 2014 Political Campaign Season

During the 45-day period prior to a primary election or party caucus and the 60-day period prior to the general election, commercial broadcast stations are prohibited from charging any legally qualified candidate for elective office (who does not waive his or her rights) more than the station's Lowest Unit Charge for advertising that promotes the candidate's campaign for office and includes a "use" by the candidate. Lowest-unit-charge periods are imminent in the following states.

State	Election Event	Date	LUC Period
Alabama	State Primary	June 3	Apr. 19 - June 3
Arkansas	State Primary	May 20	Apr. 5 - May 20
California	State Primary	June 3	Apr. 19 - June 3
Colorado	State Primary	June 24	May 10 - June 24
Georgia	State Primary	May 20	Apr. 5 - May 20
District of Columbia	District Primary	April 1	Feb. 15 - April 1
Idaho	State Primary	May 20	Apr. 5 - May 20
Illinois	State Primary	March 18	Feb. 1 - Mar. 18
Indiana	State Primary	May 6	Mar. 22 - May 6
Iowa	State Primary	June 3	Apr. 19 - June 3
Kentucky	State Primary	May 20	Apr. 5 - May 20
Maine	State Primary	June 10	Apr. 26 - June 10
Maryland	State Primary	June 24	May 10 - June 24
Mississippi	State Primary	June 3	Apr. 19 - June 3
Montana	State Primary	June 3	Apr. 19 - June 3
Nebraska	State Primary	May 13	Mar. 29 - May 13
New Jersey	State Primary	June 3	Apr. 19 - June 3
New Mexico	State Primary	June 3	Apr. 19 - June 3
New York	State Primary (Federal candidates only)	June 24	May 10 - June 24
North Carolina	State Primary	May 6	Mar. 22 - May 6
Ohio	State Primary	May 6	Mar. 22 - May 6
Oklahoma	State Primary	June 24	May 10 - June 24
Oregon	State Primary	May 20	Apr. 5 - May 20
Pennsylvania	State Primary	May 20	Apr. 5 - May 20
Puerto Rico	Commonwealth Primary	March 16	Jan. 30 - Mar. 16
South Carolina	State Primary	June 10	Apr. 26 - June 10
South Dakota	State Primary	June 3	Apr. 19 - June 3
Texas	State Primary	March 4	Jan. 18 - Mar. 4
Utah	State Primary	June 24	May 10 - June 24
Virginia	State Primary	June 10	Apr. 26 - June 10
West Virginia	State Primary	May 13	Mar. 29 - May 13

Paperwork Reduction Act Proceedings

The FCC is required under the Paperwork Reduction Act to periodically collect public information on the paperwork burdens imposed by its record-keeping requirements in connection certain rules, policies, applications and forms. Public comment has been invited about this aspect of the following matters by the filing deadlines indicated.

Topic	Comment Deadline
Operating power and mode tolerances, Section 73.1560	Mar. 24
Rebroadcasts, Sections 73.1207, 74.784, 74.1284	Mar. 24
Accessibility of Emergency Information, Sections 79.2, 79.105, 79.106	Mar. 24
Satellite delivery of network signals to underserved homes for purposes of the Satellite Home Viewer Act	April 1
Carriage of television station signals by cable systems, Sections 76.56, 76.1708, 76.1614, 76.1620	April 11
Auction licensing disclosures, Sections 1.2110, 1.2111, 1.2112	April 11

Cut-Off Dates for AM and FM Applications to Change Community of License

The FCC has accepted for filing the AM and FM applications identified below proposing to change each station's community of license. These applications may also include proposals to modify technical facilities. The deadline for filing comments about any of the applications in the list below is **April 14, 2014**. Informal objections may be filed anytime prior to grant of the application.

Present Community	Proposed Community	Station	Channel	Frequency
Monroeville, AL	Brantley, AL	WEZZ	N/A	920
Ledyard, CT	Bradford, RI	WSKP	299	107.7
Shelbyville, IL	Assumption, IL	WINU	N/A	870
Haynesville, LA	Heflin, LA	KIMW	288	105.5
Orangeburg, SC	Swansea, SC	WHXT	280	103.9
Ft. Worth, TX	Benbrook, TX	KFLC	N/A	1270
Robert Lee, TX	Rotan, TX	New	289	105.7
Arlington, VA	Capitol Heights, MD	WZHF	N/A	1390
Westport, WA	Hoquiam, WA	KCFL	208	89.5

Rulemakings to Amend FM Table of Allotments

The FCC is considering the following additions and deletions (indicated with a "D") to the FM Table of Allotments. The deadlines for filing comments and reply comments are shown.

Community	Channel	MHz	Comments	Reply Comments
Haynesville, LA	286A	105.1	April 21	May 6
Haynesville, LA	288A(D)	105.5	April 21	May 6

CLOSED AM AUCTION 84

**SHORT-FORM 175
REMEDIAL FILING WINDOW
FEBRUARY 19 – MARCH 4, 2014**

**UPFRONT PAYMENTS DUE
APRIL 7, 2014**

**BIDDING BEGINS
MAY 6, 2014**

Ex Parte Rules Relaxed for Incentive Auction Proceeding

The FCC's Media Bureau has temporarily modified provisions of the Commission's *ex parte* rules for broadcasters who wish to make anonymous presentations to Commission personnel about the proposed incentive auction. During "permit-but-disclose" rulemaking proceedings, interested parties are generally permitted to contact Commissioners and other key agency personnel to present their positions. Immediately after such meetings, the participants are required to file a written notice listing everyone who attended or participated in the meeting and describing the issues that were discussed. The information in such written notices is made available to the public.

The Commission recognizes that some broadcasters may have legitimate reasons for not wanting to disclose their potential interest in participating in the reverse auction. Nonetheless, the agency wants to encourage participation so that the record will be as useful as possible in the

Commission's decision-making process. The Commission believes that allowing limited anonymity will encourage broadcasters to engage in candid discussions with FCC staff that will lead to more informed deliberations.

Broadcasters who make *ex parte* contacts with Commission personnel about the reverse auction may omit from their required written notices identification of the participants at such meetings. However, the Commission does demand that such notices provide sufficient basic information to allow the FCC and the public to understand and evaluate the arguments offered. This might include the market(s) in which the station(s) operates and whether the station(s) is a network affiliate. All other information otherwise required to be in the written notice, such as data presented and arguments put forward, must be provided to the extent that it would not identify the filer.

Annual Study of Video Distribution Market Launched

As required by statute, the FCC has initiated its 16th annual study of the status of competition in the delivery of video programming in preparation for submitting a report to Congress on this topic. The Commission has issued a *Notice of Inquiry* in Docket 14-16 soliciting data, information and comment.

Following the same analytic framework that it has employed in these studies in recent years, the Commission has divided the industry into the categories of broadcast television, multichannel video programming distributors (such as cable and satellite systems), and online video distributors. Within each category, the Commission plans to research and describe the following:

(1) Providers, which may include the number, size, and footprint of the entities in the group, horizontal and/or vertical concentration, regulatory and market conditions affecting entry, and any recent entry or exit from the group.

(2) Business models and competitive strategies, which may include the technologies entities use to deliver programming, pricing plans, and differences in products and services.

(3) Selected operating and financial statistics, which may include data about the number of subscribers, viewers, revenue and other financial indicators.

While the Commission requests data and information from industry participants and sources in each of these sets, it also asks whether this manner of categorization is sensible and the most likely to produce a true picture of the current state of competition in the industry. If not, commenters are asked to suggest alternative approaches to structuring the study.

The deadline for filing comments is March 21. Reply comments should be submitted by April 21.

AM Tower Tool Now Available

Construction or modification of towers near AM broadcast arrays can be problematic because inserting new structures into the environment around an AM antenna can affect that antenna's performance and the AM station's signal pattern. In a recent rulemaking in Docket 93-177, the FCC adopted rules to provide a single protection plan for developing towers near AM radio stations. The "moment method" of computing modeling was established as the principal means for determining whether a nearby tower has an impact on an AM radiation pattern. The last segments of these rules to achieve finality did so on February 20.

The FCC's Wireless Telecommunications Bureau has developed AM Tower Tool to help parties proposing construction or modification of towers to determine whether the proposed construction would affect a nearby AM station. Upon input of the location for the new or modified tower, the tool will calculate whether there are any operating AM stations or AM construction permits within the coordination distances specified in Section 1.30002 of the Commission's rules.

The AM Tower Tool is available on the FCC's website at <http://fcc.gov/am-tower-tool>.

Utah Court Rules to Enjoin Aereo continued from page 1

Circuit Court of Appeals in New York has ruled in favor of Aereo, and the broadcaster plaintiffs in that case have appealed to the Supreme Court, which has agreed to hear it. The parties before the Supreme Court are in the midst of their briefing schedule, and oral argument is set for April 22. The parties in the Utah case have agreed upon a stay of the proceedings on the merits in their case pending resolution of the Supreme Court appeal.

A preliminary injunction is a temporary remedy imposed on the parties by a court before the substantive proceedings on the merits of the case have been completed.

A party requesting a preliminary injunction must demonstrate to the court (1) the likelihood of success on the merits; (2) the likelihood that it would suffer irreparable harm in the absence of the preliminary relief; (3) that the balance of equities tips in its favor; and (4) that the injunction is in the public interest.

The parties offered arguments essentially identical to those presented in the other cases involving Aereo. The broadcasters claimed that Aereo's retransmission of their programming without their consent was a blatant copyright violation. Aereo relied on its theory derived from the 2008 holding in *Cartoon Network LP v. CSC Holdings, Inc.* (known as the *Cablevision* decision). It claimed that its system of assigning a small antenna and electronic storage to each individual subscriber makes the transmission and playback of programming a private rather than a public performance subject to copyright restrictions. In *Cablevision*, the court held that a cable TV system's remote recording and playback facilities offered to subscribers was essentially equal to the private recording and playback that a subscriber could

perform at home without copyright restrictions.

As was the case elsewhere, the issue in Utah turned on the court's interpretation of the "Transmit Clause" in the Copyright Act defining whether a performance is "public." The court mused that "The definitions of the Act contain sweepingly broad language and the Transmit Clause easily encompasses Aereo's process of transmitting copyright-protected material to its paying customers." The court observed that Aereo's practices differ from those at issue in *Cablevision* because the cable systems were operating with legitimate copyright licenses, whereas Aereo has none and its use of the broadcasters' content is completely unauthorized. Accordingly, the court found that the broadcasters were likely to succeed on the merits.

The court also found that the continuation of Aereo's operations during the pendency of the litigation would irreparably harm the plaintiffs' relationships with legitimate licensees of their content, advertisers and the public.

The court also easily decided that the balance of harms tipped in the broadcasters' favor in view of the prospect that Aereo would likely be declared an infringer. Likewise, there is strong public interest value in upholding copyright principles.

Now the parties await a ruling from the Tenth Circuit on Aereo's appeal of the injunction, and most importantly, on the Supreme Court's ruling – which will probably come this summer.

The decision is *Community Television of Utah, LLC, dba KSTU Fox 13, et al. v. Aereo, Inc.*, Consolidated Case No. 2:13CV910DAK (D.C.UT, Feb. 19, 2014).

TV Stations to Experiment on Shared Channel continued from page 3

(1) Reports required by Part 5 of the Commission's rules concerning experimental authorizations must be timely filed. Unusual problems or conditions must be reported to the Commission as soon as they occur.

(2) KJLA is expressly authorized to operate on a portion of the KLCS digital stream to the extent necessary to conduct the test.

(3) During the experimental period, Channel 41 (KLCS's regular channel) will be deemed to be separately

licensed to both stations. Each station will be separately subject to the Commission's rules and policies. Because KLCS is a noncommercial station, it cannot broadcast any advertisements on its portion of the shared channel.

(4) All operations must comply with the Commission's RF radiation rules.

(5) The experiment may be terminated at any time upon notice to the FCC. Otherwise, the authorizations expire six months from the date of the authorizing letter.



The Million Dollar Trailer

The FCC has proposed to impose very large forfeitures on three operators of multiple cable television networks for violations of the agency's rules concerning proper use of the Emergency Alert System ("EAS") tones. The Commission accused Viacom, Inc., NBCUniversal Media, LLC and ESPN, Inc. in a single combined *Notice of Apparent Liability for Forfeiture* ("NAL") because all three cases exhibited the same fact pattern. The problem for each of them arose from airing the *No Surrender Trailer* in advertisements for the movie *Olympus Has Fallen*. The Commission's investigation revealed that the trailer included a recording of actual EAS tones – not merely a simulation of the tones or similar sounding tones, as was the case in other recent EAS enforcement proceedings. This violates Section 11.45 of the Commission's rules which prohibits the transmission of the EAS tones in the absence of an actual emergency or an authorized test. The Commission proposes to fine Viacom \$1,120,000; NBCUniversal, \$530,000; and ESPN, \$280,000.

In the NAL, the Commission relates that it began receiving complaints in March of 2013 about the *No Surrender Trailer*. The piece was reportedly transmitted on several cable TV networks, variously owned and operated by the three companies named in the NAL. In the most adamant of these (at least of those described in the NAL), the complainant alleged that EAS tones were audible in a commercial on the SyFy Channel for *Olympus Has Fallen*. The complainant wrote that "[t]his is misleading and had our entire family running to the TV to find out what was going on, only to find it was a commercial. Very tricky, misleading, and potentially dangerous when people get used to 'tuning out' the EAS tones." The complainant further stated that the audio tone in the commercial was "similar enough that one of my children started to quickly get out of the bathtub thinking there was an emergency. . . . Around here in southwest Missouri . . . we are always on high alert for EAS tones due to tornadoes, especially approaching spring."

The Commission's Enforcement Bureau sent Letters of Inquiry to each company seeking explanations. From the responses it became apparent that the *No Surrender Trailer* was supplied by an independent film company, FilmDistrict Distribution, LLC, through its media agency, Horizon Media, as part of national promotional campaign for *Olympus Has Fallen*. After an initial burst of exposure, the trailer was eventually pulled from circulation because it became generally known in the industry that it included prohibited content. However, that was not before, according to the Commission's count (including time-shifted retransmissions to the West Coast), Viacom's networks had aired the spot 108 times; NBCUniversal's networks, 38 times; and ESPN-owned channels had transmitted it 13 times.

All of the companies acknowledged that the EAS tones in the trailer had not been transmitted in connection with an actual emergency or authorized test. However, they variously argued that they were not subject to Section 11.45 because they are not EAS participants. The rules identify "participants" in the EAS process as the entities at the end of the distribution chain that transmit content directly to the public – i.e., broadcast stations and cable and satellite systems. These three companies operate channels that distribute programming to cable and satellite systems, such as BET, Comedy Central, MTV, USA, ESPN and regional sports networks. They viewed themselves as merely conduits, transporting content to the ultimate distributors. The Commission was unmoved by this argument. It cited the language in Section 11.45 which states that "No person may transmit or cause to be transmitted" the EAS audio unless there is a bona fide emergency or test. The prohibition is not limited to participants. The companies also suggested that the original distributor of the offending spot, Horizon Media, should be liable. The Commission did agree with that either. Horizon Media had only produced and copied the audio in question. The companies' programming networks had originated the electronic transmissions that sent the spots throughout the United States.

The Commission also categorized each broadcast of the spot as a violation of Section 325(a) of the Communications Act which prohibits the transmission of false distress signals. The complainants indicated their distress at hearing the EAS signal in the trailer. The video in the spot included scenes of destruction and chaos in Washington (as illustrative of the plot line for *Olympus Has Fallen*). This only heightened the sense that a real emergency was occurring and further created an air of distress among viewers, at least temporarily.

The base amount of the forfeiture for false distress communications in the Commission's *Forfeiture Policy Statement* is \$8,000. The Commission can adjust that figure as warranted, taking into account the circumstances, extent and gravity of the violation. In this case, the Commission considered the following specific factors: (1) the number of networks over which the transmissions were sent; (2) the number of repetitions; (3) the duration of the violation; (4) the audience reach of the networks; and (5) the extent of the public safety impact. Importantly, the reach was nationwide and the public safety impact was crucial in that the false alarm EAS signals desensitize the public and dull the impact of the real signal if and when an emergency occurs. On the basis of these factors, the Commission said that the substantial amounts of the proposed fines is appropriate.

The companies have the right for 30 days to request the reduction or cancellation of these fines.

The Pillsbury Law ANTENNA is an information service about current events in communications law published by Atlantic Star Media, Inc. This publication is produced only to report on current events and factual matters in the field of communications law. Publication and dissemination of this material is not intended to constitute the practice of law or the rendering of legal advice. No attorney-client relationship shall be deemed to exist between the provider and the reader or between the publisher and the reader as a result of the publication, dissemination, distribution or other use of this material. The publisher makes its best effort to ensure that the information reported is correct, but no warranty, express or implied, is given as to the accuracy or completeness of any information or statement published herein. Copyright 2014 by Atlantic Star Media, Inc. All rights reserved.