

Reverse Auction Commitment Window: March 28-29; Media Bureau Denies Requests for Stay

The FCC's Wireless Telecommunications Bureau has announced the schedule for the initial commitment window for television licensees participating in the reverse spectrum auction. Each applicant in Auction 1001 whose Form 177 application has been deemed complete will be eligible to make an "initial commitment." The brief online filing window for submitting this commitment will begin at 10:00 a.m. Eastern Time on March 28 and close at 6:00 p.m. Eastern Time on March 29. Failure to submit a commitment for any station during this filing window will exclude that station from any future participation in the auction.

The commitment will involve selecting the level of spectrum relinquishment that the applicant is willing to accept for the price being offered by the Commission. The relinquishment

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Video Programmers to Share Captioning Responsibilities

The FCC has amended its rules governing the closed captioning of video programming to more clearly allocate responsibilities for captioning between video programming distributors ("VPDs," including broadcast television stations) and video programmers (including program producers and owners). Significant new provisions impose on programmers the obligations to insert captioning in their nonexempt programs and to file a statement annually with the Commission to certify compliance with the closed captioning rules. These rule changes were adopted in the *Second Report and Order* in Docket 05-231.

A video programmer is defined as any entity that provides video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks and the owners of such programming. Methods for distributing such programming include broadcast television, cable and satellite systems and Internet protocol.

The Commission's rules currently require all new

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LMA Crosses the Line

The licensee and the operator under a local marketing agreement ("LMA") of KCHE(AM) and KCHE-FM, Cherokee, Iowa, have entered into a Consent Decree with the FCC's Media Bureau to resolve an investigation into whether the parties to the LMA had improperly and without Commission consent transferred control of the stations from the licensee to the LMA operator.

The parties entered into the LMA in December 2011. They eventually agreed to an assignment of the stations and filed an application for FCC consent to that assignment in July 2015. In the course of processing the assignment application, the Media Bureau became aware of the LMA and investigated it.

While arrangements such as the LMA are not prohibited, the station licensee must retain ultimate control throughout. A transfer of control is permitted only with the FCC's prior consent. The Commission has repeatedly held that the licensee must control the station's programming, personnel and finances. In this case, the Bureau found that the licensee had given up control by improperly delegating core licensee

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Video Programmers to Share Captioning Responsibilities

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nonexempt English and Spanish television programming and 75 percent of nonexempt pre-rule English and Spanish programming to be closed captioned. Until now, the primary responsibility for ensuring compliance with this requirement rested on VPDs. Theoretically, VPDs are able to encourage programmers to insert captioning via contractual mechanisms and market forces. However, the record in this proceeding has persuaded the Commission that this is an ineffective and inefficient regime for ensuring that programming reaching the public includes good quality captioning. Therefore, the Commission has divided the responsibility for captioning between the VPD and the programmer, allocating to each those parts of the process over which it has the most control.

The Commission noted that video programmers are typically the entities with the most direct control over the production and quality of the captioning for their programming.

The agency has previously adopted standards for the nontechnical quality of captioning that include the elements of accuracy, synchronicity, completeness and placement. By the time a captioned program reaches the VPD, those elements are usually fixed and it may be impractical to expect the VPD to be able to adjust them. The Commission has previously recognized the primary role of programmers in this process by allowing VPDs to satisfy their obligations for captioning quality by obtaining certifications of compliance from the programmer. However, programmers were not absolutely required to produce these certifications and coverage was inconsistent. The new rule assigns the obligation for nontechnical quality control of

captioning to the programmer, and programmers will now be required to submit certifications of their compliance to the FCC annually.

In this mandatory certification, each programmer must certify that its programming (1) is in compliance with the obligation to provide closed captioning and (2) either complies with the captioning quality standards of Section 79.1(j)(2) of the Commission's rules or adheres to the Commission's captioning quality Best Practices set forth in Section 79.1(k)(1). If some or all of a programmer's programming is entitled to any of the exemptions set forth in the rules, the programmer must attest to that eligibility and specify each category of exemption that is claimed. The programmer must file the certification with the FCC upon launching its programming operation and annually thereafter on or before July 1. The certification need not be updated during the interim if new or different programming comes to be offered. However, an update will be required if a new or different exemption is claimed mid-year. Certifications will be filed electronically on the FCC's website and available for public review under procedures to be

developed by the Consumer and Government Affairs Bureau. The Bureau will establish the process and the first filing deadline for these certifications.

VPDs will retain exclusive responsibility for the technical elements of captioning, including pass-through of all the captioning they receive from programmers and final delivery to the viewer without adversely affecting the nontechnical quality. To be clear, the rules will still mandate that all nonexempt programming distributed by a VPD includes captioning that meets the Commission's quality standards. Distribution of nonexempt programming that fails to include captioning is a rule violation. A VPD can satisfy its obligation to comply with the rule by determining that the programmer has an appropriate certification on file with the FCC, and then passing that programming and its captioning through to viewers.

The Commission has established a system for facilitating and addressing consumer complaints related to captioning. Consumers may submit complaints either directly to the VPD or to the Commission. The Commission will refer the complaints to the VPD and the programmer (if the programmer can be identified). The VPD must investigate and respond immediately. The programmer can commence its own investigation then also, but it is not required to do so. The VPD will be required to exercise due diligence to identify the source of the problem. At a minimum, this means the VPD must check the program stream, check its processing equipment, and check the consumer equipment at the complainant's premises. If the investigation reveals

that the problem is within the VPD's control, the VPD must correct it and inform the Commission, the consumer and the programmer within 30 days of when the Commission referred the complaint to the VPD. If the VPD's investigation reveals that the problem is not under its control, it must certify to that effect to the Commission, the consumer and the programmer.

Thereupon, the burden of resolving the complaint shifts to the programmer. It must undertake an investigation of its equipment and practices, correct any problems that it finds, and respond in writing within 30 days that it has cured the problem or that it cannot find any problem within its control.

At any time during the complaint resolution process, if the VPD's investigation reveals that the problem arises from a third-party source not under the control of either the VPD or the programmer, it must report that finding to the Commission, the consumer and the programmer.

If the investigations of the VPD and the programmer fail to lead to a resolution of the problem, the Commission expects them to continue to cooperate with each other to resolve the

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...programmers will now be required to submit certifications of their compliance to the FCC annually.

FCC Studies Video Programming Diversity

The availability of diverse and independent sources of video programming is the focus of a new rulemaking proceeding launched by the FCC with a *Notice of Inquiry* in Docket 16-41. The Commission describes this as a fact-finding exercise on the current state of programming diversity. The agency says that its goal is to assess how the Commission or others could foster greater consumer choice and enhance diversity in the evolving video marketplace by eliminating or reducing barriers to entry.

The Commission observed that patterns of access and viewing of video programming have changed dramatically since enactment of the Cable Television Consumer Protection and Competition Act of 1992. Most American households then had access to only one pay television service. Today many consumers can receive programming over multiple competing platforms. Although competition has grown, traditional multi-channel video programming distributors (“MVPDs”) remain important for the introduction and growth of emerging programmers. The Commission has learned that some independent (i.e., not vertically integrated with an MVPD) video programmers are concerned that certain carriage practices of MVPDs may limit their ability to reach viewers. Those concerns are to be considered in this proceeding.

The Commission asks for data about the current state of the

marketplace for independent programming. How many independent programmers are there? Are their numbers increasing or decreasing? How is their programming distributed? How do variables in the size and nature of the distributor affect the degree to which independent programming is carried by them? Is independent programming more likely to be distributed by an over-the-top (“OTT”) distributor rather than a traditional MVPD? To what extent does competition among MVPDs affect bargaining positions for independent programmers?

The Commission has become aware of certain carriage practices by MVPDs that may impede independent programmers from obtaining distribution channels. The Commission requests information on the prevalence of these practices and how they may adversely affect programmers.

Such practices include the following:

(a) Most Favored Nation Provisions. This type of provision in a carriage contract entitles the distributor to modify a carriage agreement to incorporate more favorable terms that a programmer may subsequently agree to with another distributor.

(b) Alternative Distribution Method Restrictions. This provision in a carriage contract restricts or prohibits the programmer from distributing its programming on an alternate platform (such as on the Internet), sometimes for specific

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complaint. The VPD, in consultation with the programmer, is required to submit a report of their efforts to address the problem to the Commission and the complainant within 30 days of the programmer’s certification.

In an effort to foster solving problems rather than hastily casting blame for them, the Commission established a “compliance ladder” to address violations of the captioning quality rules. The ladder will be invoked in situations where complaints received by the Commission indicate a continuing pattern or trend of noncompliance by a VPD or programmer. The Commission clarified that multiple complaints about the same incident would not be viewed as a pattern or trend. The ladder has three steps:

1. The Commission will notify a VPD or programmer that it has identified a pattern or trend of possible noncompliance. The VPD or programmer must then respond within 30 days, describing corrective measures it has taken, including measures it may have taken in response to informal complaint or inquiries from viewers.

2. Subsequently, if the Commission receives additional evidence to indicate that the noncompliance pattern or trend is continuing, it will notify the VPD or programmer for the second time. The VPD or programmer will then have 30 days in which to submit a written action plan describing additional measures it will take to bring its closed captioning performance into compliance. The VPD or programmer will be

required to conduct spot checks of its captioning performance, and report the results of its action plan and spot checking 180 days after the action plan is submitted.

3. If, after the date for submission of the action plan results report, the Commission finds evidence of a continued pattern or trend of noncompliance, the agency’s Enforcement Bureau will get involved and possibly take enforcement action, such as admonishments, forfeitures or other corrective measures as it may deem necessary.

In 2009, the FCC created a registry on its website where VPDs could list their contact information for receipt of complaints about captioning from the Commission and from consumers. VPDs had already been obligated to provide their contact information to the Commission in other formats. Completing a webform and uploading it directly to the registry was one option. The Commission has now eliminated other submission methods and made the self-completed webform mandatory for all VPDs – and for programmers as well. This searchable registry will be available to the public. Consumers can use the registry to identify the proper channels for addressing their complaints to VPDs. The contact information about programmers on the registry is intended primarily for the use of FCC staff and VPDs in their role of forwarding complaints to programmers. The primary conduits for consumer complaints remain the Commission and the VPDs.



DEADLINES TO WATCH



License Renewal, FCC Reports & Public Inspection Files

- April 1, 2016 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, 2016 Deadline to file Biennial Ownership Report for all noncommercial radio stations in **Delaware, Indiana, Kentucky, Pennsylvania and Tennessee,** and noncommercial television stations in **Texas.** (The FCC has amended its rules so as to reschedule this filing date for December 1, 2017, pending review by the Office of Management and Budget. As of this writing, that review has not been completed. Until OMB approves the new forms, the prior rule and schedule will remain in effect.)
- April 1, 2016 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).
- April 1, 2016 Deadline to file EEO Broadcast Mid-term Report for all radio stations in employment units with more than 10 full-time employees in **Indiana, Kentucky and Tennessee.**
- April 10, 2016 Deadline to 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 11, 2016 Deadline to file quarterly Children's Television Programming Reports for all commercial full power and Class A television stations.

Deadlines for Comments In FCC and Other Proceedings

Docket	Comments	Reply Comments
(All proceedings are before the FCC unless otherwise noted.)		
Docket 02-278; Public Notice Lifetime Entertainment Services' request for Declaratory Ruling re prerecorded telephone calls to cable subscribers	March 7	March 21
U.S. Copyright Office Docket 2015-7; NOI Effectiveness of DMCA provisions for takedown notices	April 1	N/A
Docket 16-50; Public Notice Report to Congress re impact of privatization of international satellite services	March 21	April 4
Docket 13-249; FNPRM and NOI Revitalization of AM radio	March 21	April 18
U.S. Copyright Office Docket 2015-8; NOI Exemptions to DMCA prohibition on circumvention of controlled access technologies		April 1
Docket 16-41: NOI Diversity in video programming	March 30	April 19
Docket 15-94; NPRM Emergency Alert System enhancements	FR+45	FR+75
Docket 16-16; Public Notice Termination of dormant proceedings including 29 media proceedings	FR+30	FR+45
Docket 16-42; NPRM Competition in provision of television set-top devices	FR+30	FR+60
Docket 16-56; NPRM Unlicensed white space devices	FR+45	FR+75

FR+N means the filing deadline is N days after publication of notice of the proceeding in the Federal Register.

**SCHEDULE FOR AUCTION 1001
REVERSE TELEVISION SPECTRUM
INCENTIVE AUCTION**

**Review Period for Initial Commitment Module
Begins March 24, 2016, 10:00 AM ET**

**Filing Window for Initial Commitments
March 28, 2016 10:00 AM ET to
March 29, 2016 6:00 PM ET**

Rulemakings to Amend Digital TV Table of Allotments

The FCC is considering amendments to the Digital Television Table of Allotments as shown below. The deadlines for filing comments and reply comments are indicated.

Community	Present Channel	Proposed Channel	Comments	Reply Comments
Scottsbluff, NE	7, 17, 29	17, 29	March 21	April 4
Sydney, NE	None	7	March 21	April 4



DEADLINES TO WATCH



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 with 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
Broadcast service authorization application, Form 2100, Schedule D	March 9
Commercial broadcast station ownership report, Form 323	March 11
Class A television service certification	April 4
Commercial earth stations and space stations, Forms 312, 312-EZ, 312-R	April 4
Open video systems, Form 1275	April 8
Cable carriage of digital television signals	April 11
LPTV channel sharing agreements, Section 74.800	April 18
Applications for consent to assignment or transfer of control of LPTV, TV and FM translator stations, Form 345	April 18
Digital TV demonstration of interference, Section 73.623	April 26

Lowest Unit Charge Schedule for 2016 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 ("LUC") for advertising that promotes the candidate's campaign for office. Lowest-unit-charge periods are imminent in the following states. Some of these dates are tentative and may be subject to change.

State	Election Event	Date	LUC Period
Hawaii	Republican Pres. Caucus	Mar. 8	Jan. 23 - Mar. 8
Idaho	Republican Pres. Primary	Mar. 8	Jan. 23 - Mar. 8
Michigan	Presidential Primary	Mar. 8	Jan. 23 - Mar. 8
Mississippi	Pres. & State Primary	Mar. 8	Jan. 23 - Mar. 8
Guam	Republican Pres. Primary	Mar. 12	Jan. 27 - Mar. 12
Florida	Presidential Primary	Mar. 15	Jan. 30 - Mar. 15
Illinois	Pres. & State Primary	Mar. 15	Jan. 30 - Mar. 15
Missouri	Presidential Primary	Mar. 15	Jan. 30 - Mar. 15
N. Carolina	Pres. & State Primary	Mar. 15	Jan. 30 - Mar. 15
Ohio	Pres. & State Primary	Mar. 15	Jan. 30 - Mar. 15
Virgin Islands	Republican Pres. Caucus	Mar. 19	Feb. 3 - Mar. 19
Arizona	Presidential Primary	Mar. 22	Feb. 5 - Mar. 22
Idaho	Democratic Pres. Caucus	Mar. 22	Feb. 5 - Mar. 22
Utah	Presidential Caucuses	Mar. 22	Feb. 5 - Mar. 22
Alaska	Democratic Pres. Caucus	Mar. 26	Feb. 10 - Mar. 26
Hawaii	Democratic Pres. Caucus	Mar. 26	Feb. 10 - Mar. 26
Washington	Democratic Pres. Caucus	Mar. 26	Feb. 10 - Mar. 26
North Dakota	Republican Pres. Caucus	April 1-3	Feb. 16 - April 3
Wisconsin	Presidential Primary	April 5	Feb. 20 - April 5
Wyoming	Democratic Pres. Caucus	April 9	Feb. 24 - April 9
New York	Presidential Primary	April 19	Mar. 5 - April 19
Connecticut	Presidential Primary	April 26	Mar. 12 - April 26
Delaware	Presidential Primary	April 26	Mar. 12 - April 26
Maryland	Pres. & State Primary	April 26	Mar. 12 - April 26
Pennsylvania	Pres. & State Primary	April 26	Mar. 12 - April 26
Rhode Island	Presidential Primary	April 26	Mar. 12 - April 26
Indiana	Pres. & State Primary	May 3	Mar. 19 - May 3
Guam	Democratic Pres. Primary	May 7	Mar. 23 - May 7
Nebraska	Pres. & State Primary	May 10	Mar. 26 - May 10
West Virginia	Pres. & State Primary	May 10	Mar. 26 - May 10
Idaho	State Primary	May 17	Apr. 2 - May 17
Kentucky	Dem. Pres. & State Primary	May 17	Apr. 2 - May 17
Oregon	Pres. & State Primary	May 17	Apr. 2 - May 17
Georgia	State Primary	May 24	Apr. 9 - May 24
Virgin Islands	Dem. Presidential Caucus	June 4	Apr. 20 - June 4
Puerto Rico	Dem. Pres. & State Primary	June 5	Apr. 21 - June 5
California	Pres. & State Primary	June 7	Apr. 23 - June 7
Iowa	State Primary	June 7	Apr. 23 - June 7
Montana	Pres. & State Primary	June 7	Apr. 23 - June 7
New Jersey	Pres. & State Primary	June 7	Apr. 23 - June 7
New Mexico	Pres. & State Primary	June 7	Apr. 23 - June 7
North Dakota	Democratic Pres. Caucus	June 7	Apr. 23 - June 7
South Dakota	Pres. & State Primary	June 7	Apr. 23 - June 7
District of Columbia	Pres. & State Primary	June 14	Apr. 30 - June 14
Maine	State Primary	June 14	Apr. 30 - June 14
Nevada	State Primary	June 14	Apr. 30 - June 14
North Dakota	State Primary	June 14	Apr. 30 - June 14
S. Carolina	State Primary	June 14	Apr. 30 - June 14
Virginia	State Primary	June 14	Apr. 30 - June 14
Colorado	State Primary	June 28	May 14 - June 28
New York	State Primary	June 28	May 14 - June 28
Oklahoma	State Primary	June 28	May 14 - June 28
Utah	State Primary	June 28	May 14 - June 28

Cut-Off Date for Low Power Television Applications

The FCC has accepted for filing the following digital low power television applications. The deadline for filing petitions to deny any of these applications is **March 21, 2016**. Informal objections may be filed anytime prior to grant.

Community	Station	Channel	Applicant
Eureka, CA	K10FS	14	Redwood Television Partners LLC
Poway, CA	KUAN-LD	36	NRJ TV LA License Co, LLC
Miami, FL	WLMF-LD	39	Paging Systems, Inc.
Sun Valley, NV	KEVO-LD	19	Joseph Fiori
Pittsburgh, PA	WBPA-LP	6	Venture Technologies Group, LLC
Providence, RI	WCRN-LD	25	Tyche Media LLC
Lebanon, TN	W11BD-D	18	Dove Broadcasting, Inc.
Huntsville, TX	KHXL-LD	31	Grace Worship Center, Inc.

FILING WINDOW FOR "250-MILE" FM TRANSLATOR MODIFICATIONSTO BECOME AM FILL-IN TRANSLATORS

Class C and Class D AM Stations	Now - July 28, 2016
All AM Stations	July 29 - Oct. 31, 2016

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levels available for each station will be those that the applicant specified on the Form 177 application. Possible choices included going off the air (for all stations); moving to a low VHF channel (for stations presently on UHF and high VHF channels); or moving to a high VHF channel (for stations presently on UHF channels). Although any commitment made in this window will be binding on the station licensee, the FCC's acceptance of the commitment will depend on the configuration of spectrum it will need to develop the spectrum clearing target and initial band plan to be announced several weeks after the commitment window.

The Wireless Bureau and the Media Bureau have announced that they will conduct a workshop online about the initial commitment window on March 11, from 10:00 a.m. to 1:00 p.m. Eastern Time. Applicants will have an opportunity to familiarize themselves with the system and the process. The initial commitment module of the Auction System will be available during a preview period that will begin at 10:00 a.m. Eastern Time on March 24 and end with the opening of the commitment window at 10:00 a.m. Eastern Time on March 28. The Wireless Bureau has announced that bidders in the reverse auction will have access to detailed information related to the results of their bidding in CSV files. Sample data files illustrating the format for these files are available for applicants to review in the data section on the Auction 1001 website (www.fcc.gov/auctions/1001).

Several low power television stations have attempted – so

far unsuccessfully – to have the auction postponed until the Court of Appeals has ruled on their appeals of the FCC's decision to reject their claims that they have been unfairly excluded from participating in the auction. Their arguments concern the issue of whether they are entitled to Class A TV status, and therefore entitled to participate in the auction and to protection in the post-auction repacking process. The Spectrum Act requires the Commission to protect during the post-auction repacking all full power and Class A stations that were licensed or had a license application pending as of February 22, 2012. However, the FCC did not interpret this provision as precluding it from protecting other stations as well. It has, in fact, approved some applicants for auction eligibility and protection whose license applications post-date February 12, 2012. Others were denied.

The case at the Court of Appeals is on a schedule that cannot possibly result in a ruling before the Commission begins the auction process with the March 28-29 window for initial commitments. The Commission has denied separate motions for a stay of the auction proceeding by the licensees of WDYB-CD, Daytona Beach, and WOSC-CD, Pittsburgh. Both of them are pursuing petitions at the Court of Appeals for a judicial stay of the auction pending the outcome of their appeals. They argue that they would be irreparably harmed if the auction were to go forward without them and the court were to rule later that they should be eligible to participate in the auction and to be protected in the repacking.

FCC Studies Video Programming Diversity continued from page 3

periods of time after the first transmission of the content.

(c) Program Bundling. Large media companies with extensive program offerings, sometimes including programmers vertically integrated into MVPDs, may require their own and other MVPDs to carry a wide range of their channels, including channels that may have little or no audience demand, as a condition for obtaining popular or premium channels. The MVPDs may then not be able to carry independent channels due to budgetary constraints or a lack of channel capacity.

More generally, the Commission also asks about the atmosphere for negotiating carriage agreements between independent programmers and MVPDs. Do MVPDs negotiate with programmers fairly and in good faith? Are there situations where the programmer may have bargaining leverage over an MVPD?

The FCC requests suggestions as to what role it could and/or should play in addressing obstacles that prevent

greater access by consumers to sources of independent and diverse programming. Does the agency have the legal authority to act on such matters? Is there an appropriate role for other federal government agencies? Could the marketplace on its own be expected to resolve such problems as may exist?

The public is asked to submit comments in this proceeding by March 30. Reply comments will be due by April 19.

The Media Bureau plans to host two workshops to examine competition, diversity and innovation in the video marketplace. The first of these will be held on March 21 from 10:00 a.m. to 4:00 p.m. Eastern Time in the Commission Meeting Room at the FCC's offices in Washington. The meeting will be webcast live at www.fcc.gov/live and a recording of it will be available for viewing later at www.fcc.gov/events/past. This session will feature panels that will explore marketplace trends and challenges encountered by distributors of video programming.

Mandatory Geo-Locators Proposed for Stationary White Space Devices

The FCC has proposed to upgrade the quality of location data for unlicensed fixed white space devices in a *Notice of Proposed Rulemaking and Order* in Docket 16-56. The purpose for such improvements would be to minimize the risk that television broadcasters would receive interference from these unlicensed devices operating on television channels.

Low power unlicensed white space devices are deployed to provide a variety of wireless services in spectrum currently allocated to broadcast television. These devices operate on channels that are not assigned to broadcast stations in the immediate geographic area. To avoid causing interference to television operations, a white space device transmits the geographic coordinates of its location to an FCC-approved database that transmits back to the device a list of the vacant channels available at its location for its use. While mobile devices are required to determine their locations automatically by the use of geo-location technology, stationary, or fixed, devices may either use an internal geo-location system or rely on a professional human installer to determine the device's precise location.

The FCC has authorized the development of 10 databases for white space devices. Five of them are up and running. Upon reviewing the databases in operation, the National Association of Broadcasters ("NAB") discovered numerous errors, omissions and inconsistencies that could lead to harmful interference to television station transmissions. NAB petitioned the Commission for an emergency suspension of white space operations and to amend its rules to address these issues. Many of these problems could be credited to variations in interpretations of the rules by different database administrators; variations in practice and schedules for the deletion of obsolete data; and simple clerical errors. The Commission says that it has taken steps to cure most of these kinds of problems and declined to suspend white space operations.

Nonetheless, the agency did propose a rule change in response to the NAB's petition. The most significant factor in database errors that the NAB uncovered concerned the mistakes made by the human installers of fixed devices.

Under the current rules in Part 15 of the Commission's regulations, the geographic coordinates and antenna height above ground of a fixed white space device may be determined and then stored in the device by either a geo-locator embedded in the device, or by a human installer. The Commission observed that most such devices now on the market require the human installer. The rules are silent as to how the location data is to be transmitted to the database administrator when the device is registered. This transmission could be done directly electronically from the device to the database, or manually entered into the database by human operators. The Commission acknowledged that it has observed numerous instances where questionable location data have been provided to the databases for fixed white space devices, undermining the integrity of its interference protection plan.

To bypass most of the opportunities for human installation error, the Commission proposes to amend Section 15.711(c) of its rules to eliminate the option for human installers to calculate the location of fixed white space devices. All such devices would be required to include internal geo-location capability that can determine the device's location automatically without manual intervention. This location data would then be automatically stored in the device and transmitted to the database electronically. The Commission proposes that when a device is moved 50 meters or more to a new location or its coordinates become altered, the device's coordinates and antenna height must be reestablished and registered again automatically. When a device is located in a place where its internal geo-locator cannot function, such as deep inside a building, the device could be fitted with an extended antenna or the coordinates could be determined from an external electronic source to which the white space device would be connected.

The Commission believes that implementation of this rule change will substantially reduce the risk of interference to television signals resulting from inaccurate data. Public input is invited. Comments will be due 45 days after notice of this proceeding is published in the Federal Register. Replies must be filed within 75 days of that publication.

LMA Crosses the Line continued from page 1

responsibilities in allowing the operator to make direct payments of the stations' operational expenses, including payment of the salaries for two of the licensee's employees. The LMA also provided for the operator to take possession and use of all of the stations' equipment, vehicles, furniture, personal property, fixtures, towers and transmitters.

Under the Consent Decree, the licensee and operator admit that they violated the provisions of the Communications Act and the Commission's rules that prohibit unauthorized transfers of control, and they collectively

agree to pay a civil penalty of \$8,000. The Bureau agrees to terminate the investigation and that it will not use the subject violations as the basis for any further action against either party.

Notwithstanding this violation, the Bureau concluded that the investigation raised no substantial and material question of fact as to the basic qualifications of the parties, and it granted the assignment application, subject to payment of the civil penalty.

Copyright Preempts Right of Publicity

Former National Football League (“NFL”) players have lost an appeal in their lawsuit against the NFL in which they claimed that the League’s “NFL Films” violated their right of publicity under various state laws. The U.S. Court of Appeals for the Eighth Circuit, sitting in St. Louis, affirmed summary judgment by the U.S. District Court in Minnesota in favor of the defendant NFL on grounds that the players’ right of publicity was subordinate to the NFL’s copyright in the game films and to the NFL’s First Amendment right to freedom of speech.

NFL Films creates theme-based audiovisual productions describing significant games, seasons and players in NFL history. The programs consist of compilations of game footage and interviews with players, coaches and other individuals involved in the game. Hundreds of these programs have been produced and aired since 1965. The programs are licensed for release on various broadcast television, cable and Internet outlets, and copies are sold directly to the public.

This litigation originated as a class action on behalf of a number of former NFL players who had appeared in games that were featured in the programs, and in some cases, had given interviews that were included in the programs. Only three of the players remained in the case to pursue the appeal. The players claimed that exhibition of the films violated their right of publicity under the various state laws in states where the programs were shown.

According to the Copyright Act, copyright arises in “works of authorship that are fixed in a tangible medium of expression...” The players did not claim that the NFL lacked permission to record them in games. Nor did they question the NFL’s enforceable copyright in the footage gathered at those games. Rather, the players asserted that their performances in football games during their careers constituted part of their identities rather than “fixed” works eligible for copyright protection. They cited a 1997 decision of the Second Circuit Court of Appeals concerning National Basketball Association games that recognized the initial performance of a game as an “athletic event” outside the subject matter of copyright. However, the court pointed out that the Copyright Act was amended in 1976 specifically to ensure that simultaneously recorded transmissions of live events

would meet the Act’s requirement that the work be “fixed in any tangible medium of expression.” Concluding that the content in question was indeed subject to copyright, the court found that as a federal statute, the Copyright Act preempts the state laws concerning the right of publicity.

The players argued that their claims lie outside the scope of copyright law because the films represent commercial speech (i.e., advertisement) that states have a legitimate interest in regulating for the benefit of the public. They said that the purpose of the programs was to promote NFL games as a product. However, the court countered that the programs did not qualify as advertising because they did not propose a commercial transaction; the programs feature historical accounts of football games rather than promoting a specific product or service; and the NFL has no economic motivation for the speech. The films represent speech of independent value and publish interest rather than advertisements for a specific product. Thus, as expressive speech, rather than commercial speech, the NFL’s programs are also protected from state interference by the First Amendment.

Finally, the players also argued that the programs included false claims of their endorsements of the NFL, in violation of the federal trademark statute, the Lanham Act. This law “prohibits false representations concerning the origin, association or endorsement of goods or services through the wrongful use of another’s distinctive mark, name, trade dress or other device.” The players asserted that the films gave the false impression that they endorse the NFL. The court rejected this argument too with the observation that the programs contained no “misleading false statements” concerning the players’ current relationship with the NFL. Further, the players provided no evidence that the films implicitly conveyed a false impression, were misleading in context, or were likely to deceive. The films merely portrayed accurately the players’ participation in games and their comments in interviews. There was no content that might mislead viewers as to the players’ relationship with or feelings toward the NFL.

On all counts, the players failed to overcome the lower court’s summary judgment and that judgment was affirmed. The decision is *Dryer v. NFL*, 2016 U.S. App. LEXIS 3435.

Kidvid Reports Move to LMS

In keeping with its plan to upgrade the online filing facilities for broadcast stations, the FCC has announced that the quarterly Children’s Television Programming Report, FCC Form 398, is moving from the Children’s Television Online Filing System to the new Licensing and Management System (“LMS”). All full power

and Class A television stations are required to file these reports on a quarterly basis within 10 days of the end of each calendar quarter. Beginning with reports to be submitted by April 10 for the first quarter of 2016, all stations must use LMS. LMS can be accessed at <https://enterpriseefiling.fcc.gov/dataentry/login.html>.

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