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AN UPDATE ON COMMUNICATIONS LAW & ISSUES

Scheduling Plan Proposed for Television Repack

The FCC's Media Bureau has proposed a scheduling plan to establish construction deadlines for television stations that will need to modify their facilities during the 39-month post-auction transition period when television broadcasting will be removed from the 600-MHz band and repacked in lower spectrum bands. The proposal is the product of the Bureau's consultations with the Incentive Auction Task Force, the Wireless Telecommunications Bureau, the Office of Engineering and Technology and stakeholders in the broadcasting and wireless industries.

The plan creates a phased transition schedule for all stations that are reassigned to a new channel in the repacking process. Stations are assigned to one of 10 "transition phases" with sequential testing periods and deadlines, or "phase completion dates." The phase completion date will be the expiration date for the station's modification construction permit and the last date on which it could operate on the pre-auction channel. The Bureau believes that this approach will enable stations, vendors and other industry participants to plan for and respect the obligations and resource requirements of stations that are assigned to earlier phases.

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UHF Discount Abolished

The FCC has amended its national television multiple ownership rules to eliminate the UHF discount found in Section 73.3555(e)(2)(i). Under the rule, a single entity is prohibited from owning or having an attributable interest in stations that, in the aggregate, reach more than 39% of all television households in the United States. The UHF discount allowed the owner of a station operating on a UHF channel (channel 14 and above) to count only 50% of the households in that station's Designated Market Area ("DMA") in calculating the total reach of its commonly held stations for compliance with the 39% cap. This action was taken by way of a *Report and Order* in Docket 13-236.

The discount originally grew out of the widespread perception that analog UHF stations were technically inferior to analog VHF stations (on channels 2-13). UHF stations produced spotty signals and inconsistent reception. In many cases, they were thought to be capable of providing a quality signal to only about half of the number of homes that could be adequately served by a VHF station. Hence, it appeared unfair to charge their owners with coverage of the full market in computing compliance with the multiple ownership rules.

Technical conditions changed with the transition to digital television broadcasting in 2009. VHF stations experience more

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Court Reverses DOJ on Fractional Music Licensing

The United States District Court in New York City has issued an *Opinion & Declaratory Judgment* to the effect that the Consent Decree governing the music licensing activities of Broadcast Music, Inc. ("BMI") "neither bars fractional licensing nor requires full-work licensing." This ruling serves to nullify an interpretative statement issued in August by the Antitrust Division of the United States Department of Justice ("DOJ") that the Consent Decree does not permit fractional licensing. BMI had asked the DOJ to review the Consent Decree, urging it to find that fractional licensing was permitted, or if not, to initiate a process to revise the Consent Decree so as to allow the practice. On a parallel track, the American Society of Composers, Authors and Publishers ("ASCAP") also asked the DOJ for a similar review of its Consent Decree. DOJ issued one statement disposing of both requests with the same response. BMI then asked the District Court for a declaratory judgment that its Consent Decree does not require full-work licensing and this ruling resulted.

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The initial steps of the scheduling process can begin before the incentive auction has been completed. The final stage rule will be satisfied when bidding in the forward auction produces enough committed revenue to meet the required minimum. At that point, no additional stages will be needed, but bidding may continue as long as there are forward auction applicants willing to bid higher. Also at that point, the Bureau will know precisely which television stations must be modified and the final television channel assignment plan can be determined.

It is likely therefore that the Bureau will be able to determine the final channel assignment plan and the phase assignments prior to the conclusion of the forward auction. Realizing that broadcasters would benefit from as much advance notice as possible, the Bureau intends to send each eligible station that will remain on the air after the auction a confidential letter identifying the station's post-auction channel assignment, technical parameters and transition phase while the forward auction is still in progress.

When the auction has concluded, the Commission will release a public notice that will announce the channel assignment, technical parameters, transition phase and phase completion date for every station remaining on the air. Stations reassigned to new channels will be required to file their construction permit applications within three months of the release of that public notice. The 10 transition phases will all begin at the same time, but will have sequential phase completion dates. Each phase will have a defined "testing period" that ends on the phase completion date. Testing equipment for post-auction facilities must be confined to the specified testing period within each phase in order to minimize interference and facilitate coordination. Except for the first phase, the testing period for each phase will begin on the day after the phase completion date for the prior phase.

The channel assignment public notice will identify groups of linked stations in each phase. These are stations with interference relationships in a "daisy chain." Stations in a linked group or daisy chain must coordinate their testing with each other and must transition to their post-auction channels simultaneously. Daisy chains may become very complex and involve dozens or even hundreds of stations. The process may be simplified if large daisy chains can be disconnected. The Bureau suggests for consideration several potential solutions that could mitigate the preclusive effect of daisy chains: (1) assign linked stations to different phases; (2) allow limited increases in station-to-station interference above the 0.5 percent allowed by the rules for post-transition interference; and/or (3) assign stations to temporary channels that would require special temporary authorizations.

The Bureau proposes to use two computer-based tools to help assign stations to the phases (the "Phase Assignment Tool") and to schedule the length of each phase (the "Phase Scheduling Tool"). The Phase Assignment Tool uses mathematical optimization techniques to assign stations to transition phases based on a defined set of constraints and objectives. Solutions produced by the process – i.e., assignment of stations to phases – must satisfy all defined constraints. From among the solutions that satisfy all of the constraints, the Assignment Tool will select the solution that best meets the defined objectives. The Bureau proposes to set the Assignment Tool with the following constraints:

(1) A station cannot cause more than two percent new interference to another station during the transition.

(2) No Canadian station will be assigned to transition before the third phase, and no Canadian station will be assigned a temporary channel.

(3) There will be no more than 10 transition phases.

(4) No U.S. stations will be assigned to temporary channels.

(5) All stations in a Designated Market Area ("DMA") will be assigned to no more than two phases.

(6) The difference in the number of stations in the largest phase and in the smallest phase will be no more than 30 stations.

(7) Every transitioning station will be assigned to a transition phase.

(8) No phase can have more than 125 linked stations.

(9) No station classified by the Phase Scheduling Tool as "complicated" will be assigned to the first phase.

Solutions that meet all of these constraints will then be prioritized by meeting the following objectives, ranked in the order of priority:

(1) All U.S. stations whose pre-auction channels are in the 600-MHz band will be assigned to earlier phases in order to the clear the 600-MHz band as quickly as possible, while simultaneously assigning all other U.S. stations and all Canadian stations to later phases.

(2) Over all DMAs, the number of times the public in a DMA must rescan will be minimized.

(3) The total number of linked stations will be minimized.

(4) Differences in the number of stations in each phase will be minimized.

The Phase Scheduling Tool is used to determine the ideal length of time for each phase. It models the various processes involved in a station transition and divides them into two sequential stages: the "pre-construction stage" and the "construction stage." In each stage, the Scheduling Tool uses two inputs: (1) the time it would take for a station to complete the tasks of that stage (such as obtaining appropriate zoning for a tower site) if all resources are available when needed; and (2) the estimated availability of constrained resources (such as custom antennas). The Scheduling Tool uses these inputs to calculate how long it will take each station within a transition phase to complete all of the tasks necessary to be ready to operate with the post-auction facilities.

It is not possible to know the exact order in which stations will begin each process. To model this uncertainty, the

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FCC Proposes to Restrict MFN and ADM Clauses in MVPD Carriage Agreements

In a *Notice of Proposed Rulemaking* in Docket 16-41, the FCC has proposed new rules to prohibit multichannel video programming distributors ("MVPDs") from including (1) unconditional most favored nation ("MFN") provisions, and (2) unreasonable alternative distribution method ("ADM") provisions in their program carriage agreements with independent video programming vendors. An MFN provision requires the programming vendor to make its programming available to the MVPD on terms at least as favorable as it makes programming available to any other distributor. An ADM provision generally prohibits or restricts a vendor from offering its programming to other distributors or directly to consumers.

This proceeding is an outgrowth of a *Notice of Inquiry* ("NOI") released earlier this year. Comments filed in response to that NOI and public input at a workshop hosted by the Commission created a record indicating that certain participants in the video marketplace – particularly independent content producers and online video distributors ("OVDs") – face significant challenges. Problems for OVDs reportedly arise from contractual provisions frequently found in carriage agreements between independent programmers and MVPDs that severely limit the programmer's ability to license its content to other distributors, including OVDs. The Commission found that MVPDs use their market power and bargaining leverage over independent programming vendors to impose unconditional MFN and/or unreasonable ADM clauses that inhibit the vendors' ability to experiment with online video. The Commission suggests that such contracts are detrimental to the development of competition, diversity and innovation. Programmers are thwarted from developing broader audiences and diverse sources of economic support.

For authority to regulate these matters, the Commission relies on Section 616 of the 1992 Cable Act (which became Section 536 of Title 47 of the United States Code). The statute states that "the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors." The agency is confident that this passage authorizes it to develop the proposed rules. Nonetheless, it requests public comment on the question of whether indeed it does have such authority.

The Commission is proposing rules to govern the use of MFN and ADM terms in carriage contracts between MVPDs and independent video programming vendors. At the outset, the term, "independent video programming vendors," must be defined. In the NOI, the Commission defined such programmers as those that are not vertically integrated with an MVPD. However, now the agency recognizes that large established programmers that are not vertically integrated with an MVPD may well have enough leverage of their own to enable them to negotiate favorable carriage terms. The Commission suggests that vendors affiliated with a broadcast network, movie studio or MVPD could be excluded from the definition. It also asks whether the definition should include an economic factor. Should there be a revenue threshold? If so, how much, and from what sources? The Commission seeks comment on this point.

The FCC proposes to ban "unconditional" MFN terms in carriage agreements between MVPDs and independent programming vendors. For the purposes of the proposed rule, an unconditional MFN provision is one that entitles the MVPD to the rights or benefits that the vendor has offered to another distributor without obligating the MVPD

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Scheduling Plan Proposed for Television Repack *continued from page 2*

Scheduling Tool uses "discrete event simulation." The Scheduling Tool assumes that a station assigned to an early phase will begin its pre-construction stage process requiring a constrained resource (such as ordering an antenna) before a station assigned to a later phase. The Scheduling Tool simulates the transition process by randomly assigning the station order within a phase. This results in a single estimate for the time needed to complete each transition phase. The Tool repeats this simulation multiple times for stations in the same phase with a new random station order each time. This produces a range of possible completion times for each phase. The Bureau expects to use this range in determining appropriate phase deadlines, taking into account the composition of stations in each phase.

The Commission invites public input on this proposed scheduling regime and all of its details. Comments must be filed in Docket 16-306 by October 31; reply comments, by November 15.

The agency reminds television licensees that the Commission's rules prohibit broadcasters and forward auction applicants from communicating any incentive auction applicant's bids or bidding strategies to other parties covered by the Commission's anticollusion rules for the Incentive Auction. Although not communicated directly to covered parties, disclosures in comments filed with the Commission in an open proceeding such as this one could have the same effect and result in rule violations. Communication that merely allows a reader to infer an applicant's bids or bidding strategy may also violate the rule regardless of intent. Commenters are also cautioned not to disclose information about third parties, such as channel-sharing partners.

The Incentive Auction Task Force will host a webinar about this proposed scheduling plan on October 17 from 1:00 to 4:00 p.m. Eastern Time. This event will be streamed live from the FCC's website at www.fcc.gov/live.

DEADLINES TO WATCH

License Renewal, FCC Reports & Public Inspection Files

October 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 **Alaska, American Samoa, Florida, Guam, Hawaii, Iowa, Mariana Islands, Missouri, Oregon, Puerto Rico, Virgin Islands** and **Washington.**

October 3, 2016 Deadline to file Biennial Ownership Report for all noncommercial radio stations in Iowa and Missouri, and noncommercial television stations in **Alaska, American Samoa, Florida, Guam, Hawaii, Mariana Islands, Oregon, Puerto Rico, Virgin Islands** and **Washington.** (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.)

October 3, 2016 Deadline for all broadcast licensees and permittees of stations in **Alaska, American Samoa, Florida, Guam, Hawaii, Iowa, Mariana Islands, Missouri, Oregon, Puerto Rico, Virgin Islands** and **Washington** 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).

October 3, 2016 Deadline to file EEO Broadcast Mid-term Report for all radio stations in employment units with more than 10 full-time employees in **Iowa** and **Missouri**; and all television stations in employment units with five or more full-time employees in **Florida, Puerto Rico** and **Virgin Islands.**

October 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.

October 11, 2016 Deadline to file quarterly Children's Television Programming Reports for all commercial full power and Class A television stations.

December 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 **Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota** and **Vermont.**

December 1, 2016 Deadline to file Biennial Ownership Report for all noncommercial radio stations in **Colorado, Minnesota, Montana, North Dakota** and **South Dakota,** and noncommercial television stations in **Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island** and **Vermont.** (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.)

December 1, 2016 Deadline for all broadcast licensees and permittees of stations in **Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota** and **Vermont** 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).

December 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 **Colorado, Minnesota, Montana, North Dakota** and **South Dakota**; and all television stations in employment units with five or more full-time employees in **Alabama** and **Georgia.**

December 1, 2016 Deadline for all digital television stations to file annual Ancillary/Supplementary Services Report for 12-month period ending September 30.

Deadlines for Comments In FCC and Other Proceedings

Docket	Comments	Reply Comments
(All proceedings are before the FCC unless otherwise noted.)		
Docket 12-107; Public Notice Petition for extension of waiver re accessible emergency information	Oct. 17	Oct. 27
Docket 16-247; Public Notice Status of competition in video programming market		Oct. 24
Docket 16-306; Public Notice Post-incentive auction transition schedule	Oct. 31	Nov. 15
Docket 16-41; NPRM Fostering diversity of video programming	FR+60	FR+90

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

DEADLINES TO WATCH

Cut-Off Date 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 **October 18, 2016**. Informal objections may be filed anytime prior to grant of the application.

Present Community	Proposed Community	Station	Channel	Frequency
Ashland, AL	Stewartville, AL	WFXO	252	98.3
El Dorado, AR	Junction City, AR	KMLK	268	101.5
Roaring Springs, TX	Girard, TX	New	248	97.5
Sandy, UT	Kearns, UT	KTKK(AM)	N/A	630

Rulemakings to Amend FM Table of Allotments

The FCC is considering an amendment proposed to the FM Table of Allotments to add or delete (indicated with a "D") the following channels. The deadlines for filing comments and reply comments are shown. The asterisk indicates that these channels are reserved for noncommercial use.

Community	Channel	MHz	Comments	Reply Comments
Pima, AZ	278A*	103.5	Oct. 17	Nov. 1
Pima, AZ	296A*(D)	107.1	Oct. 17	Nov. 1
Gaylord, MI	246C2	97.1	Nov. 28	Dec. 13

Lowest Unit Charge Schedule for 2016 Political Campaign Season

During 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. The LUC rule is in effect from now until the General Election on November 8, 2016.

RADIO STATIONS IN TOP-50 MARKETS WITH 5 OR MORE FULL TIME EMPLOYEES SHOULD HAVE BEGUN USING ONLINE PUBLIC FILE AS OF JUNE 24, 2016 FOR NEW DOCUMENTS. DEADLINE TO UPLOAD PRIOR EXISTING DOCUMENTS IS DECEMBER 24, 2016

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
Broadcasting emergency information, Section 73.1250	Oct. 14
International broadcast station applications, Forms 309, 310, 311	Oct. 25
Broadcast Ownership Reports, Form 2100, Schedules 323 and 323-E	Oct. 26
Modifications to FM translator and booster stations, Section 74.1251	Nov. 14
Dismissal of petitions to deny and informal objections, Section 73.2588	Nov. 14
Requests for waivers of regulatory fees and application fees	Nov. 21
Non-duplication and syndicated exclusivity, Sections 76.122, 76.123, 76.124	Nov. 21
Petitions to amend FM and TV tables of allotment, Section 1.420	Nov. 21
DTV Program System and Information Protocol (PSIP), Section 73.682(d)	Nov. 28

Cut-Off Dates for FM Booster Applications

The FCC has accepted for filing the applications for new FM booster stations as described below. The deadline for filing petitions to deny these applications is indicated. Informal objections may be filed any time prior to grant of the application.

Community	Parent Station	Channel	MHz	Filing Deadline
Lahaina, HI	KMNO	219	91.7	Oct. 21
Heber City, UT	KNIV	284	104.7	Oct. 21

DEADLINE TO FILE FORM 3 IN EAS TEST REPORTING SYSTEM NOVEMBER 14, 2016

FILING WINDOW FOR "250-MILE" FM TRANSLATOR MODIFICATIONS TO BECOME AM FILL-IN TRANSLATORS NOW THROUGH OCTOBER 31, 2016

Renewal Applicant Fined for Long-Term Unauthorized Silence

The FCC's Media Bureau has sanctioned the applicant for renewal of the license for KLIM(AM), Limon, Colorado, for prolonged periods of silence, including one that was unauthorized. The renewal application was granted for a short term of only two years (instead of the normal eight), and the Bureau proposed a forfeiture of $5,000.

In his 2012 license renewal application as amended, licensee Roger Hoppe disclosed that KLIM had been off the air for five distinct periods, each just less than one year, between 2009 and 2014.

The Commission's rules require that a station must request special temporary authority ("STA") to remain silent for more than 30 days. Hoppe requested STAs for four of his silent stints, justifying the silence due to storm damage, health issues, financial difficulties and equipment problems. Hoppe acknowledged that "some required notifications have been overlooked." The Bureau confirmed that it could not locate an STA request for the fifth silent period that lasted from December 11, 2011, until December 6, 2012.

The Bureau cited the Commission's *Forfeiture Policy Statement*, finding that the forfeiture for unauthorized discontinuance of service is $5,000. The Bureau has the discretion to adjust this amount. However, it found no reason to do so, noting that the applicant could give no good justification for failing to request an STA other than it was "overlooked."

The amount of the forfeiture was eventually reduced to $1,500 in a subsequent Consent Decree settlement due to the licensee's financial hardship.

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FCC Proposes to Restrict MFN and ADM Clauses *continued from page 3*

to accept terms or conditions that are integrally related, logically linked or directly tied to the grant of such rights or benefits in the other distributor's agreement, and with which the MVPD can reasonably comply. The Commission recognizes that some MFN provisions may have public interest value by enabling well-informed negotiating positions and encouraging investment in programming. However, the Commission suggests that justifiable MFN provisions should be conditional, that is, the MVPD should trade appropriate consideration for the benefit received. The Commission observed that unconditional MFN clauses that entitle an MVPD to the most favorable terms granted to other distributors without requiring the MVPD to provide the same or equivalent consideration in exchange for those terms appear to be designed to discourage or foreclose the wider distribution of video content, without countervailing public interest advantages.

The Commission also proposes to prohibit "unreasonable" ADM provisions in carriage agreements between MVPDs and independent programming vendors. The agency has tentatively concluded that in determining whether a specific ADM provision is "unreasonable," it will consider, among other factors, the degree to which an ADM clause prohibits an independent programmer from licensing content to other distributors, including OVDs.

While the issue of the unreasonableness of any ADM term would be fact-specific, the Commission said that certain ADM provisions seem unlikely to produce any pro-competitive benefits that would outweigh the accompanying harm to the public interest. A list of such provisions would include the following: (1) a bar preventing a programmer from licensing content, for an extended time period or indefinitely, to an OVD that distributes content to consumers without cost; (2) a bar preventing a programmer from licensing content, for any period of time, to an OVD that distributes content to paying customers; (3) a bar preventing a programmer from licensing content to an OVD unless or until the OVD meets conditions that are difficult to satisfy in a timely manner or are designed to undermine the OVD's ability to compete; or (4) a penalty or adverse impact on a programmer for the provision of its content to an OVD. The Commission has tentatively concluded that ADM provisions that include any of these factors should be presumed to be unreasonable. The Commission asks for public comment on whether this proposal would enhance or degrade independent programmers' incentives and abilities to develop new content and to compete in the marketplace.

On the other hand, the Commission has tentatively concluded that certain ADM provisions should be presumed to be reasonable. These include a provision that would prohibit the programmer from distributing content, for which the MVPD has agreed to pay, to consumers for free on the Internet for only a limited period of time after the programming's initial airing on a linear MVPD service. Commenters are asked to discuss how long that "limited period of time" should be. The FCC has also tentatively concluded that an ADM provision that grants an MVPD the universally exclusive right to distribute an independent vendor's content should be presumed reasonable. The agency recognizes that blanket exclusivity has been historically common in the industry, and does not appear to raise the same concerns about competition as do ADM clauses aimed at OVDs.

The Commission solicits public comments on this topic. The deadline to submit comments will be 60 days after notice of this proceeding is published in the Federal Register. The due date for reply comments will be 90 days after that publication.

Court Reverses DOJ on Fractional Music Licensing *continued from page 1*

BMI is one of several performing rights organizations ("PROs") that represent the holders of copyrights in musical works with respect to licensing the public performance of those works by various users, including broadcasters. For a blanket license fee, a broadcast station can obtain a license to air any or all of the works in BMI's repertoire. Concerns about the anti-competitive nature of BMI's activities led to the adoption in 1941 of the Consent Decree (and a similar Decree covering ASCAP) that has governed its operations since then. The Consent Decree represents an effort to strike a balance between the monopolistic practices of a single entity that represents competitors and the benefits for users of one-stop shopping for a blanket performance license. The U.S. District Court in New York presides over the implementation of the Consent Decree and is the forum for modifying it if the need arises.

Under copyright law, joint authors of a single work are treated as "tenants-in-common," each with the right to grant nonexclusive licenses to use the entire work without the consent of the co-owner(s), provided that the licensor shares the proceeds of the license with the co-owner(s) on a pro-rata basis. This is the default position that governs in the absence of any other agreement between or among the co-owners, which they are free to negotiate and adopt at any time.

Situations in which a musical work has multiple authors give rise to the possibility of fractional licensing. A fractional license conveys rights only from the partial owner of the work. To be able to use the work, the music user would need to acquire a license as well from the other co-owner(s). Where the co-owners do not belong to the same PRO, the music user must obtain a license from multiple PROs and/or the co-owner(s) directly.

Under present practice, when there are multiple authors of a work who do not all belong to the same PRO, one PRO offers a full license for the work. If the other authors belong to other PROs, and the default position on sharing license fees is in effect, they are compensated by way of the broadcasters' licenses with the other major PROs.

BMI, ASCAP and other music stakeholders proposed that the DOJ adopt the position that if co-owners of a work agree to handle their fractional interests in separate transactions with music users, then each PRO would license only that fraction of the work belonging to its member. The music user would then have to make a separate licensing transaction with the other co-owner(s), either through one or more other PROs, or independently.

The DOJ refused to adopt this position, relying on decades of usage under the Consent Decrees and its understanding of Supreme Court guidance. It said that ASCAP and BMI are required to offer the complete repertoire of the works of their members. Licensing a fractional copyright interest is inconsistent with that principle. The DOJ said that would place undue burdens on music users to locate and negotiate with all other copyright owners, and it would give hold-out owners of fractional interests undue leverage.

The District Court appeared to acknowledge that fractional licensing could pose legal and logistical problems, but concluded that the Consent Decree is silent on this issue. The court said that while the Consent Decree requires BMI to license performances of the works for which it has the right to do so in its repertoire, "[the Decree] contains no provision regarding the source, extent or nature of that right. It does not address the possibilities that BMI might license performances of composition without sufficient legal right to do so, . . . or users might perform a music composition licensed by fewer than all of its creators." Questions about the validity, scope and limits of performance rights are left to the marketplace and legal forums to resolve. The court found that "Infringements (and fractional infringements) and remedies are not part of the Consent Decree's subject-matter." Consequently, if BMI represents fewer than all of the copyright owners in a work, it may offer a fractional license of that work and leave to the music user the responsibility for securing rights for the missing fraction.

This ruling does not directly address the similar provisions of the ASCAP Consent Decree. That Decree will no doubt be the subject of a future ruling or interpretation.

Renewal Applicant Fined for Long-Term Unauthorized Silence *continued from page 6*

After levying and explaining the fine, the Bureau continued in its *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* to express dissatisfaction with the prolonged periods of silence that KLIM had experienced, STAs notwithstanding. During the last four years of the station's eight-year license term, it was off the air about three and one-third years. It was off the air for approximately 17 months while its license renewal application was pending. The interim periods when the station was on the air were brief, ranging from 80 days down to just one day.

The Bureau observed that the policy against extended silent periods aims to ensure that scarce broadcast spectrum does not lie fallow and unavailable to others capable of instituting and maintaining service to the public. In this case, the Bureau said that Hoppe's conduct fell far short of that which would warrant routine license renewal and that his stewardship of the station failed to meet the public service commitments that licensees are expected to provide their communities with daily service. The Bureau decided upon a two-year term for KLIM's next license, to be granted upon payment of the forfeiture.

Broadcasters, Blind Groups Seek Extension of Emergency Information Accessibility Deadline

The American Council for the Blind, the American Foundation for the Blind and the National Association of Broadcasters ("NAB") have jointly petitioned the FCC for an 18-month extension of the deadline for compliance with the agency's rule that requires video programming to include an aural representation of visual, non-textual emergency information on a secondary audio stream.

Section 79.2(b)(2)(ii) of the FCC's rules requires video program providers to make visually-presented emergency information (such as radar maps) in non-newscast programming accessible to the visually impaired by way of aural explanations on a secondary audio channel. In adopting this rule in 2013, the Commission mandated that such aural descriptions of visual content must accurately and effectively convey the critical details regarding the emergency and how to respond to the emergency.

The compliance deadline was originally set for May 26, 2015. However, the Commission granted a blanket waiver of the rule for 18 months until November 26, 2016, at the request of the NAB on the grounds that the television industry needed more time to develop technology that would enable reasonable compliance. NAB explained then that an automated text-to-speech solution could not be used to aurally describe maps and other graphics because they do not contain text files that can be converted to speech. The petitioners indicate that an automated graphics-to-speech solution still has not been developed. They requested another extension of the compliance deadline – until May 26, 2018 – to allow the Commission, broadcasters and other stakeholders to work with third-party vendors to develop a solution.

The Commission has requested public comment on the Petition, which must be filed in Docket 12-107 by October 17. Reply comments will be due October 27.

UHF Discount Abolished

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challenges with digital signal transmissions. UHF spectrum has superior propagation qualities for digital television. Consequently, UHF stations are no longer seen as technically inferior. Furthermore, when the UHF discount was first introduced, delivery of signals to the audience was almost entirely via over-the-air reception. With much greater reliance on multichannel video programming distributors to deliver signals today, the comparative over-the-air signal quality is a factor of diminishing importance. The Commission found that in today's digital environment, there is no longer any technical justification for the UHF discount.

In the rulemaking proceeding, broadcast group owners argued that, aside from the technical issues, the UHF discount was still needed to promote competition, localism and diversity. They claimed that it helps non-network groups compete with stations owned and operated by the major television networks, which usually have higher ratings and benefit from historical viewing patterns. The FCC concluded otherwise. It found that the continued existence of the discount actually thwarts competition and localism because it allows ownership consolidation. Station groups can amass larger audiences than they would otherwise be able to cover, potentially doubling the maximum possible reach of an all-UHF group to 78% of the households in the country.

The Commission acknowledged that abolishing the discount may result in pushing some groups that own UHF stations into violation. Such combinations will be grandfathered and allowed to continue to exist despite the demise of the discount. Station groups that exceed the 39% national household reach cap are grandfathered with respect to the stations owned as of September 26, 2013, the date of the *Notice of Proposed Rulemaking* in which the elimination of the UHF discount was proposed in this proceeding. Groups will also be grandfathered for which an assignment or transfer application was pending with the FCC on that date, or that were part of a transaction that had received Commission approval as of that date, if such groups would exceed the cap without the use of the discount. Any combination subsequently assigned or transferred will be required to comply with the national audience reach cap in effect at that time. The Commission observed that no divestitures will be necessary because no station group presently exceeds the national cap that will not be grandfathered under this decision.

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