pillsbury Antenna™ NOVEMBER 2017
AN UPDATE ON COMMUNICATIONS LAW & ISSUES

Main Studio Rule Repealed

By a 3 to 2 vote along party lines, the FCC has abolished the main studio rule in a *Report and Order* adopted in Docket 17-106. The Commission found that technological innovations have rendered local studios unnecessary for members of the public to communicate with stations and for stations to provide locally relevant programming. The Commission concluded that eliminating the rule would reduce broadcasters' costs, enabling them to redirect their resources to programming, equipment upgrades and newsgathering. Stations will enjoy maximum flexibility to operate efficiently. The Commission suggested that these economies could prevent some stations from going silent and foster the development of new stations in smaller communities.

Until now, Section 73.1125(a) of the Commission's rules has required each AM, FM, full service television and Class A television station to maintain a facility identified as its "main studio." The main studio must be located (1) within the station's community of license, (2) within the principal community contour of any AM, FM or TV broadcast station licensed to the station's community of license, or (3) within 25 miles of the reference coordinates of the station's community of license. The station must maintain meaningful management and staff presence at the main studio, which has been defined as at least two staff members working at the studio on a full-time basis, at least one of whom must be management-level. The main studio must also be equipped with program production and transmission capabilities. All of these requirements are being deleted from the Commission's rules.

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FCC to Take up Ownership Review

The FCC's agenda for its November 16 meeting includes a proposed order which it intends will conclude the long-running 2010/2014 Quadrennial Review of the broadcast ownership rules. The Commission has released the tentative text for an Order on Reconsideration and a Notice of Proposed Rulemaking in this proceeding that will be considered at that meeting.

The Commission's broadcast ownership rules limit the number of attributable broadcast and newspaper interests that a single entity can hold. The Commission is required by statute to review these rules every four years to determine whether they remain "necessary in the public interest as the result of competition," and to "repeal or modify any regulation [that the Commission] determines to be no longer in the public interest." Appellate litigation has resulted in combining the reviews that were commenced in 2010 and 2014.

In August 2016, the Commission adopted a *Second Report and Order* which left the regulations under review largely

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TV Filing Freeze to Be Lifted November 28 – December 7

The FCC's Media Bureau has announced that the freeze on filing certain television minor modification applications that was imposed on April 5, 2013, will be lifted for a brief filing window from November 28 through 11:59 p.m. Eastern Time on December 7.

Full service and Class A television stations that were reassigned to new facilities as a result of the incentive auction were to file construction permit applications for those facilities by July 12. Since July 12, the Commission has conducted two priority filing windows for certain eligible reassigned stations to file applications for alternate facilities. The Media Bureau has also announced that it will open a filing window in early 2018 for low power and translator television (collectively "LPTV") stations that have been displaced by the conversion of the spectrum in channels 38 to 51 to wireless services or by the resulting reassignment of stations to their channels below Channel 37. This Special Displacement Window was intended to be scheduled at a time of relative stability in the table of assignments so that LPTV stations, with their secondary status, could select

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Transitory Transmitters Earn $1.5 Million Civil Penalty

The FCC's Media Bureau has entered into a Consent Decree with DTV America and several affiliated business entities (collectively "DTVA") in connection with investigations concerning approximately 180 of DTVA's licensed low power television ("LPTV") stations alleged to have no permanent transmission facilities. DTVA agreed to pay a civil penalty of $1.5 million and to surrender to the FCC its licenses for 31 stations, including stations in large markets such as St. Louis, Minneapolis, Charlotte, Indianapolis, Memphis and Montgomery.

Prior to this Consent Decree, DTVA held 252 LPTV licenses and 182 LPTV construction permits. More than 350 of these authorizations had resulted from applications that DTVA filed during the Rural LPTV Filing Window in 2009. DTVA subsequently acquired numerous other stations, some of which had also resulted from applications filed during the Rural LPTV Filing Window. To encourage the development of LPTV services in rural areas, the Commission restricted applications in that filing window to proposals for transmitter sites at least 75 miles from the reference coordinates for the top 100 markets in the country.

In September 2016, a third party alleged to the Commission staff that some of DTVA's stations had no transmission equipment or antenna structures. Enforcement Bureau research bore out the accuracy of these allegations, and the Bureau broadened its investigations to include the operational status of all of DTVA's stations and its licensing practices.

In the course of this investigation, DTVA admitted that all but approximately 50 of its licensed stations were lacking permanent transmission facilities. For most of those stations, only temporary facilities were in place at the time of filing a license application. DTVA admitted that it had constructed many of the stations temporarily and with no intention for their facilities to be permanent or to provide service to the public permanently from them.

The Commission discovered a recurring pattern in DTVA's licensing practices:

(1) filing of a construction permit application to relocate the station up to 30 miles from its current licensed site, often to a site located in an empty field, a parking lot or at the base of an existing tower;

(2) upon grant of the construction permit, the station would be constructed with temporary facilities;

(3) filing of a license application;

(4) after grant of the license application, requesting special temporary authority for the station to be silent with the justification that it could not continue to transmit "due to reasons beyond the applicant's control;"

(5) removal of the equipment, filing of a new construction permit application for a new transmitter site up to 30 miles distant from the most recently authorized site.

The Commission found that many of these stations were eventually moved substantial distances from their originally authorized locations, frequently ending up at sites within the originally restricted areas within 75 miles of the top 100 markets. From this repetitious cycle implemented for numerous stations, the Commission concluded that it was DTVA's deliberate business plan to relocate stations into the large markets, in contravention of the purpose underlying the Rural LPTV Filing Window. The Commission observed that these practices also appeared to be designed to circumvent Section 74.787 of the Commission's rules which limits a minor change application for an LPTV station to a move of not more than 30 miles. The net result of DTVA's system of daisy-chained minor change applications is a de facto major change. Major change applications can be filed only during a filing window.

The Media Bureau cited a prior Commission ruling where it held that permittees "may not rely on temporarily constructed facilities to satisfy construction requirements..." The Commission said that a certification in the license application that a station was constructed pursuant to the construction permit when, in fact, the facilities were not intended to be permanent is a violation of Section 1.17(a) of the agency's rules. That rule provides that an applicant shall not "intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading."

In June and July 2017, DTVA entered into agreements to assign and/or transfer control of the stations to HC2 Broadcasting and filed assignment and transfer-of-control applications with the FCC. HC2 was not involved in and was not aware of DTVA's misdeeds. However, as the proposed new owner of the stations, HC2 became a party to the Consent Decree.

In exchange for termination of the investigation so that it could proceed with the assignment and transfer transactions, DTVA agreed to the following:

(1) to admit to the noncompliant licensing practices described above and to misleading the Commission in its license applications;

(2) to pay a civil penalty of $1,500,000;

(3) to surrender the licenses for 31 stations;

(4) to consent to the dismissal of pending license applications for 26 stations.

The Media Bureau agreed to grant the assignment and transfer-of-control applications for the remaining stations provided that the civil penalty is paid within one business day of the closing of the transactions. The Bureau also agreed to grant pending license applications for 24 stations and pending authorization applications for 21 stations.

HC2 agreed that within 60 days of consummation of the purchase of the stations, it will file applications for the involuntary modification of 31 stations so as to take them outside of the areas surrounding the largest markets. The Bureau will cancel the authorization for any of these stations for which the modification application is not filed within that 60-day period.

HC2 also agreed to implement a three-year compliance plan during which it will train and monitor its personnel to comply with the Commission's rules concerning the modification and licensing of LPTV stations.

FCC Will Not Resolve Call Sign Dispute

The Video Division of the FCC's Media Bureau has rejected a radio licensee's plea to resolve its dispute with another station concerning their simultaneous use of the same call sign in the same community. In a *Memorandum Opinion and Order* responding to Texas Public Radio's ("TPR") Petition for Reconsideration, the Division cited Section 73.3550(g) of the Commission's rules which states that a party objecting to the assignment of a call sign may assert its rights "under private law in some other forum." That is to say, TPR would need to litigate the matter in a local court.

TPR is the licensee of KCTI(AM), Gonzales, Texas. TPR's complaint concerned the Commission's assignment of the call sign KCTI-FM to Sun Radio Foundation's FM station, also in Gonzales. The FCC will not assign the same call sign to two stations in the same service (i.e., AM, FM or TV). However, it will allow the duplication of an existing call sign by a station in a different service (such as AM compared to FM) with a differentiating suffix, such as "-FM" and with the applicant's certification that it has obtained the consent of the other station.

The KCTI-FM call sign was obtained for the FM station by a prior owner, Maranatha Church of Laredo. In certifying that it had received consent from the AM licensee, Maranatha had relied upon permission given it in an email from the general manager of the AM station, who served in that capacity under the station's previous licensee, Gonzales Communications.

The Commission announced the grant of the call sign to the FM station in a Public Notice released in mid-2016. Ordinarily, a request for reconsideration of a Commission action would be due within 30 days of such a public notice. Some 227 days after that deadline, TPR filed a Rescission Request, asking the Division to rescind the KCTI-FM assignment. Addressing this procedural obstacle, TPR argued that the FCC's role in assigning call signs was merely a ministerial formality, and was not to be considered an "action" within the meaning of the rules for reconsideration. TPR's substantive argument was an attack on the legitimacy of the former AM station general manager's act in giving consent on behalf of the licensee for the concurrent use of the call sign. TPR asserted that neither it nor Gonzales Communications had authorized the general manager to express any such consent.

The Division treated the Rescission Request as a very late-filed petition for reconsideration, and dismissed it for lack of a good explanation to justify its tardiness. TPR timely filed a Petition for Reconsideration of that dismissal action, and this *Memorandum Opinion and Order* resulted. The Division explained that assignment of a call sign is in fact an "action" by the Commission, and is subject to the normal rules for reconsideration. The Public Notice announcing call signs is entitled, "Media Call Sign Actions." Therefore, dismissal of the Rescission Request on procedural grounds alone was justified.

However, despite the procedural dismissal of TPR's pleading, the Division addressed its substantive arguments as well for the sake of "administrative finality." The Division said that the issue of whether the FM station actually had consent to use the call sign rested on determining whether the AM station's general manager had the authority to give that consent. Such a determination would require the Commission to resolve a factual dispute akin to that raised in agency and contract law, both of which are outside the Commission's jurisdiction. The Division concluded that TPR should have sought relief in a court of competent jurisdiction over the matter.

Next Generation TV on November Agenda

The next phase of the process for adopting the standards and rules for ATSC 3.0 television, or "Next Gen TV," is set to unfold at the FCC's November open meeting. The Commission has released a draft text of a Report and Order and Further Notice of Proposed Rulemaking in Docket 16-142 that it will consider at that meeting.

In the Report and Order, the Commission would allow stations to adopt Next Gen TV on a voluntary basis. The agency has concluded that simulcasting program streams on both ATSC 1.0 and 3.0 will be necessary because most audience members will continue to have only ATSC 1.0 receivers – at least during a transition period. Stations will be required to simulcast their primary video stream in both formats. To do this, a station will need to partner with another station in the market. One of them will air the ATSC 1.0 stream for both stations while the other one converts its facilities to ATSC 3.0. While a station is operating in ATSC 3.0, its ATSC 1.0 stream being simulcast on another station must cover its entire community of license and should generally reach at least 95 percent of its originally covered population. The content of the two program streams must be the same, except for advertisements, program promotions and content that features the enhanced capabilities of ATSC 3.0.

The draft order would create a system for separate licensing of the guest channel while it is being hosted on the partner station. The channel would be licensed to the station originating the programming rather than the station on whose facilities it is being transmitted.

The ATSC 3.0 signal would not have mandatory carriage rights on cable or satellite systems. Must-carry rights would continue to attach to the ATSC 1.0 signal.

The ATSC 3.0 program stream would be subject to broadcasters' public interest obligations just as is the ATSC 1.0 stream.

There would be no ATSC 3.0 mandate for tuners. Stations

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DEADLINES TO WATCH

License Renewal, FCC Reports & Public Inspection Files

Dec. 1, 2017 — 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**.

Dec. 1, 2017 — 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).

Dec. 1, 2017 — Deadline to file EEO Broadcast Midterm Report for all radio stations in employment units with more than 10 full-time employees in **Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island** and **Vermont**; and all television stations in employment units with five or more full-time employees in **Colorado, Minnesota, Montana, North Dakota** and **South Dakota**.

Dec. 1, 2017 — Deadline for digital television stations that received revenues from the provision of ancillary or supplementary services to file annual Ancillary/ Supplementary Services Report for 12-month period ending September 30, 2017. (Stations that did not receive revenue from the provision of such services are exempt from the filing requirement this year pending FCC action on a proposal to modify the reporting obligation.)

Dec. 1, 2017 to Mar 2, 2018 — Filing window for 2017 Biennial Ownership Reports for all AM, full service FM, full service TV, Class A TV and Low Power TV stations.

Jan. 10, 2018 — Deadline for noncommercial stations to file quarterly report re third-party fundraising.

Jan. 10, 2018 — Deadline to place 2017 EEO Public File Report in public inspection file and on station's Internet website for all nonexempt radio and television stations in **Puerto Rico** and **Virgin Islands**.

Jan. 10, 2018 — Deadline to place Issues/Programs List for 3rd quarter of 2017 in public inspection file for all full service radio and television stations and Class A TV stations in **Puerto Rico** and **Virgin Islands**.

Jan. 10, 2018 — 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.

Jan. 10, 2018 — Deadline to file quarterly Children's Television Programming Reports for all commercial full power and Class A television stations.

Jan. 10, 2018 — Deadline to file quarterly Transition Progress Report for all television stations subject to modifications in the repack.

U.S. COPYRIGHT OFFICE DEADLINE TO REGISTER AGENT FOR TAKE DOWN NOTICES REGARDING INFRINGING WEBSITE CONTENT UNDER NEW ELECTRONIC REGISTRATION SYSTEM DECEMBER 31, 2017

NATIONWIDE EAS TEST

FORM ONE AND FORM TWO FILING DEADLINE EXTENDED TO NOVEMBER 13, 2017 FOR PARTICIPANTS AFFECTED BY HURRICANES HARVEY, IRMA AND MARIA

FORM THREE FILING DEADLINE: NOVEMBER 13, 2017

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 are indicated. Informal objections may be filed any time prior to grant of the application.

Community	Parent Station	Channel	MHz	Filing Deadline
Santa Paula, CA	KCAQ	240	95.9	Nov. 15
Boston, MA	WXLO	283	104.5	Nov. 15
Lexington, MA	WXLO	283	104.5	Nov. 15
Waltham, MA	WXLO	283	104.5	Nov. 15
Ocean View Estates, HI	KANO	206	89.1	Dec. 4
Ocean View Estates, HI	KAHU	217	91.3	Dec. 4
Leadwood, MO	KYLS	240	95.9	Dec. 4
Medford, OR	KORJ	249	97.7	Dec. 4

DEADLINES TO WATCH

Deadlines for Comments in FCC and Other Proceedings

Docket	Comments	Reply Comments
(All proceedings are before the FCC unless otherwise noted.)		
Dockets 17-231, 17-105; NPRM Maintenance of copies of FCC rules	Nov. 13	Nov. 27
Docket 02-278; Public Notice Petition for Declaratory Ruling re liability for technical errors in text messaging under Telephone Consumer Protection Act	Nov. 27	Dec. 12
Docket 17-264; NPRM Publishing notices of applications; digital TV ancillary and supplementary reports	FR+30	FR+45
Dockets 14-50, 17-289; NPRM Broadcast multiple- and cross-ownership rules	TBD	TBD
Docket 16-142; FNPRM Next generation broadcast television standard	TBD	TBD

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

FILING WINDOW FOR LONG-FORM FM TRANSLATOR APPLICATIONS IN AUCTION 99 DECEMBER 1 – 21, 2017

DEADLINE FOR ALL RADIO STATIONS THAT HAVE NOT YET DONE SO TO UPLOAD PUBLIC FILE TO FCC PUBLIC FILE WEBSITE MARCH 1, 2018

SETTLEMENT WINDOW FOR MUTUALLY EXCLUSIVE APPLICATIONS FOR FM TRANSLATOR STATIONS IN AUCTION 99 CLOSES NOVEMBER 29, 2017

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
AM measurement data, Sections 73.54, 73.61, 73.62, 73.68, 73.69, 73.151, 73.154, 73.155, 73.158, 73.3538, 73.3549	Nov. 13
Station records for LPTV and TV and FM translators, Sections 74.781, 74.1281	Nov. 13
Regulatory fee exemption	Nov. 17
Chief operators, Section 73.1870	Nov. 24
AM measurement data	Jan. 2
Application form for International Broadcast Station, Form 420-IB	Jan. 2
Application for license for International Broadcast Station, Form 421-ID	Jan. 2
Application for radio service authorization, Form 601	Jan. 2
Application for consent to assignment or transfer of control of radio service authorization, Form 603	Jan. 2

Next Generation TV on November Agenda *continued from page 3*

would be required to provide advance on-air notice to inform the public about Next Gen TV deployment and simulcasting.

In the Further Notice of Proposed Rulemaking, the Commission would seek public input on three topics:

(1) exceptions and waivers to the simulcasting rule when the partners' coverage areas are not congruent;

(2) using vacant channels to facilitate the transition to ATSC 3.0 in lieu of partnering with an existing station;

(3) whether local simulcasting should change the significantly-viewed status of a Next Gen TV station.

This draft order and further notice has not yet been adopted. It was made public in the interest of promoting the transparency of the agency's processes. The draft is subject to further deliberation, revision and/or withdrawal until the Commissioners vote on it. Even after adoption, the item may be subject to minor edits before the official version is released. If and when the Commission acts on this item, that action will be reported in this publication.

TV Freeze to Be Lifted *continued from page 1*

channels with confidence that they would not be displaced again in the foreseeable future.

The Bureau has now determined that it should offer another brief filing opportunity to certain full service and Class A stations in order to reduce the risk that LPTV stations will face displacement soon again after the Special Displacement Window when the freeze is lifted permanently.

On April 5, 2013, the Commission imposed a freeze on the filing of certain construction permit applications by full service and Class A stations. As of that date, no applications were accepted for filing that proposed to increase in any direction a full service station's noise-limited contour or a Class A station's protected contour. Stations whose facilities were not disturbed by the incentive auction repack and were therefore ineligible to file applications in the priority filing windows have not be able to file applications proposing to extend their contours for over four and a half years. The Commission anticipates that many such stations will want to file applications as soon as the freeze is lifted. If that opportunity comes after the LPTV Special Displacement Window, unprotected LPTV stations may become displaced again if full service or Class A stations disrupt their selected channels. To mitigate LPTV stations' risk of such double exposure to displacement, the Commission will temporarily lift the freeze prior to the Special Displacement Window.

Applications filed during this filing window will be processed on a first come/first served basis. Minor modification applications that were filed before the freeze was imposed on April 5, 2013 that could not be processed because of the freeze will also now be processed. Acceptable applications will be protected as of the filing date from subsequently filed conflicting applications. The freeze will be reimposed on December 8.

Main Studio Rule Repealed *continjed from page 1*

The Commission recounted that the rule was first adopted in 1939 to ensure that community members could provide their local stations with input and that stations could participate in community activities. The agency said that the record in this proceeding clearly documented that the local main studio is no longer needed to fulfill these purposes because members of the public are now highly unlikely to visit the studio.

Not every requirement related to presence in the local community was eliminated. Each station will continue to be obligated under the current Section 73.1125(e) of the Commission's rules to maintain a local or toll-free telephone number so that community members can communicate easily with station staff. That number is to be published in the station's online public file. Earlier in this proceeding, the Commission had asked for comment on the question of whether stations should be held responsible for responding to time-sensitive and emergency calls received on that number on a timely basis. The agency decided not to adopt such a rule.

The elimination of the main studio rule does not affect the obligation to maintain a public inspection file – including among other things, the quarterly compilation of the issues and programs list – which stations will continue to be required to produce. To the extent that a station still maintains some part or all of its public inspection file at the studio, that requirement will continue until these revisions to the rules become effective. After that, elements of the public file that are not deposited with the FCC's online public file repository must be maintained at a location within the station's community of license that is accessible to the public during regular business hours. If the public file is presently maintained at a main studio that is not within the community of license, that location will be grandfathered to continue to host the file. Stations must respond to inquiries from the public about the location of the public file within one business day.

The two Democrats on the Commission, Mignon Clyburn and Jessica Rosenworcel, voted against repealing the rule and both of them offered stern dissents. Commissioner Clyburn wrote, "Today is a solemn one in the history of television and radio broadcasting. By eliminating the main studio rule in its entirety, for all broadcast stations – regardless of size or location – the FCC signals that it no longer believes those awarded a license to use the public airwaves should have a local presence in their community."

Commissioners Clyburn and Rosenworcel both acknowledged that compliance with the main studio rule has been an economic burden for some smaller stations and stations in rural communities. However, rather than scrapping the entire rule, they would have adopted a policy for waivers to excuse stations with limited resources from some of the more costly obligations. The Commission majority was enthusiastic about the cost savings that stations will experience and the prospects for stations to invest those savings in growing and upgrading their services to their communities. Commissioner Clyburn would have conditioned relief from the main studio rule on a requirement by the station to devote its savings specifically to improving its services to benefit the community.

These changes in the Commission's rules will not become effective until 30 days after publication in the Federal Register. Until then, stations remain obligated to comply with the old rules.

Filing Window for Translator Singleton Long Forms Is December 1-21

The FCC's Media Bureau has announced a filing window for long form applications for all proposals for new FM translator stations filed in Auction 99 that are not mutually exclusive with one or more other proposals. These applications propose to rebroadcast Class C and Class D AM stations. The complete Form 349 must be filed electronically during the period from December 1 through December 21. The Bureau states that the filing deadline will be strictly enforced and that short form applications for which no corresponding long form is filed will be summarily dismissed. Applications for new commercial FM translator construction permits incur a filing fee of $805.

Applicants may use the long form to request minor changes to the technical proposals that they submitted in the short form.

Bureau staff will review the long form applications for acceptability. Those found to be acceptable will be placed on public notice for a 15-day period for petitions to deny.

Paperwork Reduction Proposed

The FCC has adopted a *Notice of Proposed Rulemaking* in Dockets 17-264, 17-105 and 05-6 in which it proposes to eliminate or at least reduce two paperwork obligations for broadcast applicants and licensees that appear to be no longer necessary.

Digital television stations are permitted to offer certain non-broadcast services using the excess capacity of their channels. Stations can charge users for these ancillary and supplementary services. The FCC imposes a fee of 5 percent of the gross receipts that a station receives from these activities. Section 73.624(g) of the Commission's rules requires every station to submit an annual report about the types of services rendered and the revenues received regardless of whether it had anything to report. The Commission now proposes to eliminate this filing requirement for stations that have nothing to report.

Section 73.3580 of the agency's rules requires certain broadcast applicants to publish written notices about their applications in local newspapers. The FCC proposes to permit applicants to publish these notices on the Internet instead of in a print publication, or in the alternative, to eliminate the requirement entirely.

The Commission invites public comment about these proposals. The deadline for filing comments will be 30 days after publication in the Federal Register of a notice about this proceeding. Reply comments will be due 45 days after that publication.

FCC to Take up Ownership Review *continued from page 1*

intact. That order reinstated the television Joint Sales Agreement attribution rule and the revenue-based eligible entity standard for purposes of ownership diversity. It also developed a requirement for the disclosure of television shared services agreements. Several parties petitioned the Commission to reconsider that decision. This new action will be the Commission's response to those reconsideration requests.

According to the draft text, this Order on Reconsideration would do the following:

- Eliminate the Newspaper/Broadcast Cross-Ownership Rule, which prohibits the common ownership of a broadcast station and a daily newspaper in the same market
- Eliminate the Radio/Television Cross-Ownership Rule, which generally prohibits the common ownership in a market of more than two television stations and a radio station
- Modify the Local Television Ownership Rule, which prohibits a combination of television stations in the same market if fewer than eight voices would remain, and adopt a waiver policy for the Top-Four Prohibition, which prohibits the common ownership of two stations both ranked among the top four stations in a market
- Eliminate attribution of television station ownership arising from participation in joint sales agreements

The tentative text does not include changes in the Local Radio Ownership Rule, and it would retain the disclosure requirement for commercial television shared service agreements.

The Proposed Rulemaking portion of the item would consider the establishment of an incubator program to facilitate entry into the broadcast industry of new and diverse voices. The Commission would solicit public input on how to define the elements of such a program, such as eligible entities, incentives to parties that foster incubation, and incubation activities.

Note that this item is only a tentative draft text of the proposed order. The Commissioners will deliberate and vote on this proposed text at their November meeting. Until adopted by the Commission and released in its final form, the text remains subject to revision and/or rejection.

Court Affirms FCC's Multilingual EAS Decision

The U.S. Circuit Court of Appeals for the D.C. Circuit has affirmed the FCC's 2016 decision to reject a proposal to require broadcasters and other participants in the Emergency Alert System ("EAS") to disseminate emergency alerts in languages other than English. The Multicultural Media, Telecom and Internet Council (the "MMTC") and the League of United Latin American Citizens had asked the court to review the Commission's order. The court found that the FCC's decision was consistent with the Communications Act and was reasonable and reasonably explained.

The FCC adopted the ruling at issue in this case in response to a Petition for Immediate Interim Relief filed in 2005 jointly by MMTC, the Independent Spanish Broadcasters Association, and the Office of Communication of the United Church of Christ, Inc. The petitioners sought amendments to the Commission's EAS rules that they said would facilitate access to emergency information by non-English-speaking audiences. The Petition was filed in the wake of the catastrophe wreaked at New Orleans by Hurricane Katrina. The Commission requested public comment on the Petition three times, and the petitioners updated and supplemented their proposals a number of times.

While sympathetic to the petitioners' objective, the Commission said that it rejected their proposals because the proposals were generally not supported by EAS participants who filed comments in the proceeding, and because the proposals lacked sufficient specificity as to how to implement them. In lieu of the proposed amendments, the Commission has ordered EAS participants, including broadcast stations, to submit reports to their respective State Emergency Communication Committees ("SECCs") detailing their existing capabilities for multilingual EAS operations and their plans, if any, to implement such operations in the future. The SECCs will then relay the data thus collected to the Commission. The FCC said that it intends to use this information to evaluate whether existing multilingual EAS practices are consistent with its rules and to assess whether there are regulatory approaches that it could or should take with respect to this topic. The reports to be submitted by EAS participants to the SECCs were due November 6.

At the Court of Appeals, the appellants argued that the FCC's failure to ensure that non-English speakers could access emergency information contravened the agency's obligations under Section 1 of the Communications Act. The statute directs the FCC to operate "so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." The court said that this "general policy provision" does not require the Commission to compel broadcasters to broadcast emergency alerts in any language other than English. The court reasoned that policy statements, by themselves, do not create statutorily mandated responsibilities. Furthermore, Section 1 by its terms does not impose an affirmative obligation on the agency to take any specific action. The court concluded that if Congress had intended to require broadcasters to air multilingual communications in general, and multilingual emergency alerts in particular, it would have said so in the statute.

On the other hand, while not required, the court agreed that Congress apparently had given the FCC discretion to implement a multilingual EAS mandate for broadcasters if the agency chose to do so. The appellants' second line of attack was to assert that the Commission had exercised this discretion in an arbitrary and capricious manner.

The court observed that in cases concerning claims that an agency's action is arbitrary and capricious, the agency's exercise of discretion must be both reasonable and reasonably explained. The court found that on the record in this proceeding, it was not unreasonable for the FCC to gather more information before deciding whether to compel broadcasters to translate emergency alerts and broadcast them in other languages as well as English. The court accepted the Commission's explanation that broadcasters generally play a passive role in the EAS, automatically retransmitting the alerts that they receive from originating agencies at various levels of government. There would be practical and technological obstacles to requiring broadcasters to translate alerts into other languages. Each broadcaster would need to have personnel with language skills (in an untold number of languages) on duty at all times. The Commission's rules require state and local alerts to be retransmitted within 15 minutes of receipt, and presidential alerts must be relayed immediately. Even if translating and repackaging alerts on such short notice were feasible, the haste of the process would make messages very susceptible to human error, and possibly expose broadcasters to liability for incorrect emergency information. A less cumbersome approach might be to require the alert originators to provide alerts in multiple languages – but the Commission lacks authority to regulate them.

The court concluded that it was reasonable for the FCC to seek more comprehensive information before deciding whether to transform the role of broadcasters in the EAS. Further, the court said that the Commission's explanation itself fell "comfortably within the zone of reasonableness."

The decision is *Multicultural Media, Telecom and Internet Council, et al., v. Federal Communications Commission*, No. 16-1222 (D.C.Cir. Oct. 17, 2017).

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