

Supreme Court Will Review Media Ownership Case

The U.S. Supreme Court has agreed to hear the appeals brought by the FCC and the National Association of Broadcasters from a 2019 decision of the U.S. Court of Appeals for the Third Circuit in *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3rd Cir., 2019). The two appeals will be consolidated into a single case.

In the *Prometheus* decision, the Third Circuit vacated the FCC's rulings in a 2017 order on reconsideration in the Commission's Quadrennial Regulatory Review for the combined 2010/2014 review cycles (the "Reconsideration Order"). In that Reconsideration Order, the Commission repealed the prohibitions on in-market broadcast-newspaper cross-ownership and radio-television cross-ownership. The "eight-voices" test was also repealed, under which the common ownership of two television stations in the same market was allowed only if at least eight independently owned stations would remain in the market post-merger. The court also vacated the FCC's order establishing an incubator program (the "Incubator Order"), designed to foster aid for struggling small radio station operators and

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Waiver Policy Adopted for FM Translator Permits

The FCC is taking steps to mitigate the negative effects of the COVID-19 pandemic on the timely construction of certain FM translator stations. In a *Public Notice* (DA 20-1059), the Media Bureau has announced a policy for waivers of the construction deadline for construction permits for new cross-service FM translators. These are the translator permits that resulted from applications filed in the Auction 99 and Auction 100 filing windows in 2017 and 2018 for stations to serve as cross-service fill-in translators for AM primary stations.

The Media Bureau acknowledged that the pandemic has forced stations to halt construction, has disrupted equipment availability and delivery, and has interfered with travel for tower crews and equipment installers. The problems have been compounded by the financial difficulties suffered by

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Deadlines Set for Final Repack Reimbursement Claims

In a *Public Notice* (DA 20-1171) released by the FCC's Incentive Auction Task Force and the Media Bureau, the deadlines have been announced for the final submission of invoices to claim reimbursement for expenses incurred in the post-incentive auction television repack. Congress allocated \$2.75 billion to the TV Broadcaster Relocation Fund to be disbursed in response to reimbursement claims. The Fund will be closed down on July 3, 2023, and all remaining money will then be returned to the U.S. Treasury.

Full power television and Class A stations assigned to Phases 1 through 5, and stations that were permitted to transition prior to the Phase 1 testing period, will be required to complete their reimbursement claims by October 8, 2021. Final claims by full power and Class A stations assigned to Phases 6 through 10, and stations that were permitted to transition after the end of Phase 10 due to circumstances beyond their control, must be submitted by March 22, 2022.

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Court-Ordered Retrans Extension Includes Copyright License

A judge for the United States District Court in Chicago has ruled that the license to retransmit copyrighted television programming pursuant to a retransmission consent agreement remains in effect during a court-ordered extension of the agreement.

Terrier Media Buyer, Inc., through subsidiaries, owns and operates a number of television stations, including 13 stations formerly owned by Cox Media, Inc. (the “Cox stations”). These stations were carried on the DISH satellite service under a retransmission consent agreement that was set to expire on December 31, 2019. The agreement was temporarily extended voluntarily while Terrier and DISH attempted to negotiate a new agreement. Those attempts were unsuccessful and the agreement ultimately expired on January 18, 2020. Thereupon, Terrier withheld its consent for DISH to retransmit the former Cox stations.

However, on January 15, 2020, DISH obtained a temporary restraining order (“TRO”) in Illinois state court that enjoined Terrier from prohibiting DISH from retransmitting the Cox stations. After hearing argument from the parties several days later, the state court extended the TRO on January 24. On that same day, Terrier filed a copyright infringement lawsuit against DISH in federal court. Terrier also sent DISH a letter stating that any retransmission of the Cox stations after the January 18 expiration of the retransmission consent agreement constituted knowing and willful copyright infringement. Nonetheless, DISH filed a motion to dismiss Terrier’s suit and continued to carry the Cox stations.

A retransmission consent agreement provides a license to the distributor, in this case, DISH, to retransmit a television station’s copyrighted programming. Terrier argued in the federal court case that the expiration of the retransmission agreement for the Cox stations on January 18 terminated that license. Terrier claimed that the TRO was not intended to prevent it from seeking copyright damages for DISH’s continued carriage of the Cox stations. Terrier relied on language in the TRO that stated: “[T]his Order does not

prevent any Defendant from asserting a right to monetary relief for copyright infringement.” Dialogue between Terrier’s counsel and the state court judge during the hearing for the TRO encouraged this viewpoint:

COUNSEL: I don’t think, Judge, that you intended in your TRO to say to the defendants [Terrier], “You don’t have a right to go to federal court and say, copyright damages.” I don’t think you intended that –

JUDGE: You can be assured I didn’t say that, and I would never—I don’t think it would be enforceable to begin with, and I would never suggest that. You can do what you want.”

Nonetheless, the TRO also contained language explicitly stating that it was not intended to prevent DISH from asserting any defenses to a copyright claim.

Terrier contended that it would be “nonsensical” for the TRO to permit it to file a lawsuit but prevent it from arguing that DISH lacked consent to retransmit. However, the federal judge observed that the TRO did not guarantee that Terrier would be successful in pursuing such a claim, and pointed to language in the TRO stating that “[t]he court takes no position as to the effect of this Temporary Restraining Order in any such copyright infringement lawsuit”

The federal court judge found that the existence of a copyright license would turn on the sole issue of whether DISH had consent to retransmit the Cox stations. The expired retransmission consent agreement had given DISH that consent. The TRO expressly extended the existence of the retransmission consent agreement, albeit over Terrier’s objection. Thus, as a matter of law, while the TRO remains in effect, the agreement remains in effect, and therefore DISH’s copyright license embodied in that agreement also remains in effect. DISH’s motion to dismiss was granted with respect to any retransmission occurring while the TRO was in effect.

The decision is entitled *Terrier Media Buyer, Inc., d/b/a Cox Media Group v. DISH Network, LLC*, 2020 U.S. Dist. LEXIS 167540.

Waiver Policy Adopted for FM Translator Permits continued from page 1

AM stations due to the loss of advertising in the economic downturn. The objective of enhancing the service of AM stations with the development of fill-in translators will be thwarted if significant numbers of the translator permits fall victim to the pandemic and expire before construction is completed. The Media Bureau has made a public interest finding that these conditions are sufficient grounds for waiving the construction deadlines for affected translators. This waiver policy is adopted to support the FCC’s efforts to revitalize AM radio.

This waiver policy is specifically directed to Auction 99 and Auction 100 construction permits that expire on or

before June 30, 2021. The permittee must submit a waiver request no later than 15 days before the permit expires, and may request an extension of up to six months. The request must explain how the failure to construct the station during the normal life of the construction permit was caused by the pandemic.

A waiver request should take the form of a letter and must be sent via email to either Robert Gates (Robert.Gates@fcc.gov) or Larry Hannif-Ali (Larry.Hannif-Ali@fcc.gov) in the Media Bureau’s Audio Division. Requests should not be submitted through the Licensing and Management System. No filing fee is needed.

Cable Service Notice Rule Modified

The FCC has amended its rules concerning the notice that cable television systems must give their subscribers about services changes in a *Report and Order* (FCC 20-135) in Docket 19-347.

Section 76.1603(b) of the FCC's Rules provides that cable subscribers are to be given 30 days advance written notice of any service changes that are within the cable operator's control. In this proceeding, the FCC amended this rule to clarify that a service change due to retransmission consent or program carriage negotiations that fail within the last 30 days of a contract is a change not under the cable system's control. For changes not under the cable system's control, the notice to subscribers is to be given "as soon as possible." This amendment avoids the possibility of requiring notice when there is merely the potential that a channel will go dark. Such notices will only sow confusion if the negotiations succeed and render the notice inaccurate.

The phrase, "as soon as possible," is interpreted to require cable operators to give notice without delay after negotiations

have failed such that the cable operator is reasonably certain it will no longer be carrying the programming at issue, and, if possible, before the channel goes dark. The Commission declined to define this phrase with a specific timeframe. Determining what does or does not satisfy the rule is necessarily a fact-specific question that will depend on the situation.

The FCC also revised its rules to give cable operators some flexibility as to the means they employ to provide written notice of service changes to their subscribers. In cases where a channel has gone dark because of the last-minute failure of carriage negotiations, the Commission concluded that a channel slate would be adequate. A slate would provide immediate notice to subscribers most interested in knowing about the change—i.e., subscribers intending to tune into the channel recently occupied by the departed station. However, if the carriage negotiations fail well in advance of the contract expiration, and the cable operator does not intend to continue negotiating, the notice should be delivered by other written means, before the channel goes dark.

Unauthorized Transfer of Control Costs \$8K

Big Horn Media, Inc. ("BHM") has entered into a *Consent Decree* (DA 20-1058) with the FCC's Media Bureau, and has agreed to pay an \$8,000 civil penalty, in order to resolve an investigation into an unauthorized transfer of control of the company. BHM is the licensee of KUEZ(FM), Fallon, Nevada, and KUEZ-FM1, Reno, Nevada. Section 310 of the Communications Act and Section 73.3540 of the FCC's Rules require advance consent by the Commission prior to the transfer of control of a company that is a radio licensee.

When BHM acquired the radio stations in October 2017 pursuant to an authorized assignment of the licenses, it was owned and controlled by John and Mercedes Burkavage, who jointly owned all of the outstanding stock (27 shares) in the corporation. In November 2017, 73 shares of the corporation's stock were issued to Harry and Bonnie Dixon to hold jointly as community property. This resulted in the Dixons having a 73% controlling interest in the company. According to the *Consent Decree*, due to an oversight, no request was submitted to the FCC for its consent to this transaction until 2020. On February 21, 2020, an application for a transfer of control of the licensee was filed with the FCC, when BHM "became

aware of the filing obligation." This application gave rise to the Media Bureau's investigation.

In exchange for termination of the investigation, BHM and its principals admit to violating the rule, agree to pay a civil penalty of \$8,000, and agree to adopt a three-year compliance plan pertaining to issues related to assignments and/or transfers of control. The Commission will grant the transfer-of-control application upon payment of the penalty, provided that no other issues arise that would preclude its approval. Elements of the compliance plan include appointment of a compliance officer, development of a compliance manual, and implementing a staff training program. Compliance reports must be submitted to the FCC within 120 days of the effective date of the *Consent Decree*, and on the first, second, and third anniversaries of the effective date.

BHM asked that the application be granted *nunc pro tunc*, that is, effective as of the date of the purported transfer of control, rather than upon the eventual actual grant of the application. The Media Bureau declined this request.

New KidVid Report Forms Now Available

The FCC's Media Bureau has released a *Public Notice* (DA 20-1130) announcing that the new form for Children's Television Programming Reports, Form 2100, Schedule H, is now available for uploading data in the Commission's Licensing and Management System.

Until the FCC amended its rules last year, this Report had to be filed on a quarterly basis. At the end of 2019, the FCC began requiring stations to file a Report annually. However,

the 2020 Report will be the first to include a station's data for children's television programming for the entire year, and is due to be filed annually by the following January 30. The actual filing deadline for the 2020 Report will be February 1, 2021, because January 30, 2021, falls on a Saturday.

Stations may begin to upload their 2020 children's programming information into the form now. However, the form cannot actually be filed until January 1, 2021.



DEADLINES TO WATCH



License Renewal, FCC Reports & Public Inspection Files

October 1	Deadline to file license renewal applications for radio stations in Iowa and Missouri , and television stations in Florida, Puerto Rico and the Virgin Islands .	November 1 & 16	Requirement to broadcast pre-filing announcements regarding license renewal applications has been WAIVED for radio stations in Colorado, Minnesota, Montana, North Dakota and South Dakota and television stations in Alabama and Georgia .
October 1	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, the Mariana Islands, Missouri, Oregon, Puerto Rico, the Virgin Islands , and Washington .	December 1	Deadline for television stations that provided ancillary or supplementary services during the 12-month period ending September 30, 2020, to file annual Ancillary/Supplementary Services Report.
October 1	Deadline for all broadcast licensees and permittees of stations in Alaska, American Samoa, Florida, Guam, Hawaii, Iowa, the Mariana Islands, Missouri, Oregon, Puerto Rico, the 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).	December 1	Deadline to file license renewal applications for radio stations in Colorado, Minnesota, Montana, North Dakota and South Dakota , and television stations in Alabama and Georgia .
October 1 & 16	Radio stations in Illinois, Iowa, Missouri and Wisconsin and television stations in Florida, North Carolina, Puerto Rico, South Carolina , and the Virgin Islands broadcast post-filing announcements regarding license renewal applications.	December 1	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 .
October 1 & 16	Requirement to broadcast pre-filing announcements regarding license renewal applications has been WAIVED for radio stations in Colorado, Minnesota, Montana, North Dakota and South Dakota and television stations in Alabama and Georgia .	December 1	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).
October 10	Deadline to place quarterly Issues/Programs List in Public Inspection File for all full service radio and television stations and Class A TV stations.	December 1 & 16	Radio stations in Colorado, Iowa, Minnesota, Missouri, Montana, North Dakota , and South Dakota and television stations in Alabama, Florida, Georgia, Puerto Rico , and the Virgin Islands broadcast post-filing announcements regarding license renewal applications.
October 10	Deadline for noncommercial stations to place quarterly report re third-party fundraising in Public Inspection File.	December 1 & 16	Requirement to broadcast pre-filing announcements regarding license renewal applications has been WAIVED for radio stations in Kansas, Nebraska , and Oklahoma and television stations in Arkansas, Louisiana and Mississippi .
November 1 & 16	Radio stations in Iowa and Missouri and television stations in Florida, Puerto Rico , and the Virgin Islands broadcast post-filing announcements regarding license renewal applications.		

**LOWEST UNIT CHARGE
PERIOD FOR GENERAL ELECTION
SEPTEMBER 4 – NOVEMBER 3, 2020**



DEADLINES TO WATCH



Deadlines for Comments in FCC and Other Proceedings

DOCKET

COMMENTS REPLY COMMENTS

(All proceedings are before the FCC unless otherwise noted.)

Docket 20-221; NPRM (FCC 20-92)		
Updating ex parte rules		October 19
Docket 20-270; NPRM (FCC 20-116)		
Application filing fees	FR+30	FR+45

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

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

The FCC has accepted for filing the applications identified below proposing to change the community of license for each station. 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 20, 2020**. Informal objections may be filed anytime prior to grant of the application.

PRESENT COMMUNITY	PROPOSED COMMUNITY	STATION	CHANNEL	FREQUENCY
Elberton, GA	Colbert, GA	WHTD(AM)	n/a	1400
Faribault, MN	Elko New Market, MN	KBGY	298	107.5
Mayville, ND	Northwood, ND	KMSR(AM)	n/a	1520
Belton, SC	Due West, SC	WAHP	203	88.5
Due West, SC	Bowman, GA	WYPJ	237	95.3

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
Application to modify license, Section 73.3544	Oct. 9
Posting or filing of station license, Sections 73.1230, 74.165, 74.432, 74.564, 74.664, 74.765, 74.832, 74.1265	Oct. 9
Maintaining station records, Sections 74.781, 74.1281	Oct. 9
Pleadings in TV-MVPD proceedings, Section 76.7	Oct. 9
Television carriage complaints, Section 76.61	Oct. 9
AM directional antenna field strength measurements, Section 73.61	Oct. 14
Satellite earth station lump sum elections	Oct. 14
C-Band accelerated relocation elections	Oct. 14
Broadcast station chief operators, Section 73.1870	Oct. 16
Permit-but-disclose proceedings, Section 1.1206	Oct. 21
Showing required for AM application, Section 73.37	Oct. 26
Broadcast transmission systems, Section 73.1350	Oct. 26
Visual modulation monitoring, Section 73.691	Oct. 26
Radio authorization application, Form 601	Nov. 4
Low power auxiliary stations, Section 74.802	Nov. 17
3.7 GHz service licensee and earth station operator agreements	Dec. 4

Supreme Court Will Review Media Ownership Case *continued from page 1*

the development of new entrants in the radio broadcasting industry.

The FCC's actions in the Reconsideration Order were derived from its statutory responsibility to review its broadcast ownership rules on a regular basis to determine whether any of them have become obsolete. The FCC is mandated to repeal or modify any regulation that it finds to be no longer serving the public interest. An ongoing issue in these reviews concerns what impact, if any, deregulation has on diversity in the ownership of broadcast stations.

In a ruling on an appeal from earlier FCC actions in the 2010 and 2014 review cycles, the Third Circuit had ordered the Commission to "include a determination about the effect of the rules on minority and female ownership" in its ultimate conclusion to those proceedings. The principal issue in the present appeal concerned claims that the Commission had failed to make a rational determination about that in connection with the deregulation of cross-ownership and the implementation of the incubator program. Although the FCC had found that media deregulation had little impact on diversity of ownership, the Third Circuit said that the record was inadequate to make such a determination, and that the resulting decision was arbitrary and capricious.

The FCC's Incubator Order was the culmination of a decade-long effort to define the term "eligible entity." Eligible entities are entitled to certain preferences in broadcast proceedings, the purpose for which is to encourage broadcast ownership by minorities and women.

The incubator program was designed to encourage established broadcasters (in exchange for a waiver of the radio multiple ownership limits) to assist small struggling station operators or new entrants in radio. The Third Circuit was unable to find how this program would foster minority or female ownership in light of the qualification criteria to be eligible for incubation. The eligibility criteria concerned the size of the entity, in terms of revenue and the number of stations owned, with no reference to minority or female status.

The Third Circuit remanded both the Reconsideration Order and Incubator Order back to the FCC, requesting reasoned rationales for its decisions, instead of relying on what the court called faulty and insubstantial data. The Commission had concluded that media consolidation would not harm ownership diversity. The Third Circuit said that it could not determine whether or not that was true because the Commission's decisions lacked a sufficient reasonable explanation.

Rather than accepting the remand, the FCC petitioned the Supreme Court to reverse the Third Circuit's decision. The Supreme Court agrees to hear only the cases it deems to be the most important—only a small fraction of the total number of cases for which it receives petitions. The parties will now submit briefs and prepare for oral argument before the Supreme Court. A decision is not likely before the spring or summer of 2021.

Deadlines Set for Final Repack Reimbursement Claims *continued from page 1*

A station that was granted permission to change phases is assigned to the deadline associated with its revised phase completion date. All other claimants are to submit all of their invoices and supporting documentation by September 5, 2022. This last group includes low power television and television translator stations, FM stations, and multichannel video programming distributors.

In view of the fact that the earliest deadline falls more than a year after the statutory end of the transition period on July 13, 2020, the FCC does not anticipate the need for extensions of these deadlines. However, in what the Commission calls the "unlikely event" that an entity faces circumstances beyond its control, the FCC will consider a limited extension by means of shifting an entity assigned to

the first or second deadline to the second or third deadline. A claimant requesting such a shift will have to justify its request with evidence of the circumstances beyond its control, such as a local zoning problem or a force majeure event occurring near the filing deadline.

The Commission reminds claimants that they may be selected for audits, data validations, and/or site visits before or after the station has completed constructing its modifications, or during the interim close-out period, or thereafter. All reimbursement recipients must retain documentation as evidence of valid disbursements for a period of 10 years after receiving the final payment from the Relocation Fund.

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