



TV Channel Sharing Allowed Beyond Auction

The FCC has adopted rules to allow some television stations to share channels outside of the context of the incentive auction. To accommodate anticipated congestion in the shrunk television band after the incentive auction, the Commission has previously adopted regulations to permit stations to economize on spectrum use by sharing channels. One of the bidding options in the reverse auction was to relinquish one's own channel and move to share a channel with another licensee. Those previously adopted rules were to guide stations in the context of the reverse auction. The additional new rules adopted in this *Report and Order* in Docket 15-137 will govern future channel sharing agreements ("CSAs") that (1) may be necessary to replace the original agreements if and when those expire or terminate (i.e. "second-generation" CSAs) or (2) involve secondary stations that become displaced in the post-auction repacking process. The Commission's stated intention is to create a channel-sharing regime that is flexible and voluntary.

Full power stations that relinquish their channels and become sharees will live by these rules if in the future they

continued on page 6

Translator Siting Rule Effective April 10; Prometheus Seeks a Stay

April 10 is the effective date for the new rule recently adopted by the FCC to allow for more flexible siting of AM fill-in translators. That is the first date on which applications taking advantage of this rule can be filed. Under the old rule, the translator's 60 dbu contour could not extend beyond the smaller of the AM station's 2 mV/m daytime contour or a radius of 25 miles from the AM antenna site. The rule was amended to require that the translator's 60 dbu be completely contained within the greater of the AM station's 2 mV/m daytime contour or the 25 mile radius around the AM antenna site. For AM stations with 2 mV/m contours that extend for more than 25 miles from the antenna site, this rule change opened potentially large new areas for locating the translator. The Commission had originally proposed a restriction requiring the translator's 60 dbu contour to remain within 40 miles of the AM antenna site regardless of the location of the 2 mV/m contour. However, that limitation was not included in the rule as adopted.

On April 3, one week before the effective date of the new

continued on page 7

Ninth Circuit Denies Compulsory License for FilmOn X

The U.S. Court of Appeals for the Ninth Circuit, sitting in San Francisco, has ruled that FilmOn X is not entitled to take advantage of the Copyright Act's compulsory license to retransmit television programming received from over-the-air broadcasting to its subscribers via the Internet. This reverses a 2015 decision of a lower court to the effect that FilmOn was indeed able to rely on the statutory license. Broadcasters and programmers had launched this suit against a company now known as FilmOn X with the claim that its retransmission of their signals without their consent constituted copyright infringement. FilmOn asserted that it did not need broadcasters' consent because it was operating under cover of the compulsory license. Although deciding in favor of FilmOn, the District Court had recognized the highly controversial nature and widespread potential impact of the case, and stayed its own ruling pending an expedited appeal.

This case requires an interpretation of Section 111 of the Copyright Act. The law provides that a "cable

continued on page 3

IN THIS ISSUE

Post-Auction Disbursements.....	2
Flo & Eddie Lose Again.....	3
Deadlines To Watch.....	4-5
April Agenda.....	8

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

Donald E. Martin, P.C.

P.O. Box 8433
Falls Church, Virginia 22041
Tel: (703) 642-2344
Fax: (703) 642-2357
E-mail: dempc@prodigy.net

Procedures Set for Post-Incentive Auction Disbursements

The forward auction portion of the FCC's incentive auction has concluded, raising over \$19.75 billion from the proceeds of the sale of spectrum in the 600-MHz band. Now the winning bidders who agreed to relinquish some or all of their spectrum rights in the reverse auction can look forward to their payouts. The FCC has released a Public Notice to announce the procedures for claiming and disbursing funds that television station owners are to receive for their winning bids in the reverse auction or for reimbursement of the expenses that reassigned stations will incur in the repacking process.

Winning Bidders' Incentive Payments

The Commission is expected to release a Public Notice sometime in April to formally announce the conclusion of the auction and the new digital television table of assignments. Winning reverse auction bidders are to submit a completed Form 1875 within 20 days of the release of that Public Notice. The Form 1875 requests information to identify the bidder, certain certifications, and the bank account information where the disbursement is to be deposited, including a bank account verification letter or a redacted bank statement confirming ownership of the account. The Form 1875 must be signed, notarized and a hard copy of it filed with the Commission's Travel & Operations Group in Capitol Heights, Maryland. A separate Form 1875 must be filed for each station for which the bidder claims funds.

Upon receipt of the Form 1875, the Commission will give the applicant access to the CORES Incentive Auction Financial Module. The applicant will use that online facility to reconfirm its bank account information and to monitor the actual disbursement process. Auction proceeds are subject to offsets for debts owed to the Commission.

The timing of payments will be tied to the process for granting the forward auction license applications and cannot be precisely determined in advance. Forward auction licenses will be granted on a rolling basis as the processing of them progresses. The Commission intends to make just one payment for each station's winning bid. Consequently, sufficient funds will need to be collected to cover an entire payment before it can be disbursed. The Commission says that it may be possible to disburse funds to cover the full amount of all of the winning bids at one time. However, if that is not possible, stations will be paid in sequence. The order in which stations receive their funds will be determined by the post-auction transition plan, allowing stations to vacate their spectrum in a manner that will maintain the schedule for stations remaining on the air.

Reimbursement of Repacking Expenses

Full power and Class A television stations that are reassigned to new channels in the post-auction repacking process will be eligible to receive reimbursement for their reasonable expenses incurred in implementing those changes. Congress created a Reimbursement Fund with \$1.75 billion from the proceeds of the forward auction to cover these expenses. Each eligible station must file an estimate of its eligible costs on Form 2100, Schedule 399 within 90 days of the release by the FCC of its Public Notice announcing the end of the incentive auction and the new DTV table of assignments. That Public Notice is expected in April. Upon the conclusion of the 90-day period for filing estimates, the three-year Reimbursement Period will begin, during which all reimbursement claims must be submitted to the Commission.

After reviewing the cost estimates submitted to it, the Media Bureau will make initial allocations from the Fund to each eligible station. The initial allocations will be 80% of the estimated cost for commercial stations, and 90% of the estimated cost for noncommercial stations. A station will draw down against its allocation as it incurs reimbursable expenses. The Media Bureau will announce one or more additional allocations later. Throughout the Reimbursement Period, stations are required to update their cost estimates, which may become the basis for updated allocations. The Form 2100, Schedule 399 must be submitted each time a station requests reimbursement. Prior to the end of the Reimbursement Period, each station must submit information regarding actual and remaining estimated costs. If needed, a final additional allocation will be made to cover the last eligible expenses. Stations will be required to return any overpayments.

To facilitate the disbursement of reimbursement payments, each licensee must file a separate Form 1876 for each station for which it seeks reimbursement. The Form 1876 requires the filer to provide identifying information, certain certifications, and information about the bank account where the reimbursement is to be deposited. The Form 1876 must be executed and notarized, with a hard copy filed with the Commission's Travel & Operations Group in Capitol Heights, Maryland. The licensee then has to confirm its bank account information in the CORES Incentive Auction Financial Module online, where the reimbursement process can be tracked. The Commission says that it will soon publish a User Manual for the Financial Module. The Commission advises stations that it will take four weeks from receipt of the properly completed Form 1876 until the agency can begin to deliver reimbursement payments. Stations should plan accordingly.

Common Law Copyright Clarified in New York to Flo & Eddie's Disadvantage

The New York State Court of Appeals, the highest state court in New York, has ruled that there is no state common law copyright in the performance of sound recordings in New York. This is the outcome that broadcasters hoped for. Music industry interests were hoping for the opposite decision. The issue concerned whether the present performance of sound recordings made before federal copyright law began to cover them in 1972 gives rise to enforceable rights under state copyright law. This is the latest episode

in a complex series of related cases litigated in several states by Flo & Eddie, Inc., the reconstituted remnants of the 1960s rock band known as The Turtles.

The Turtles acquired the copyright to the master recordings of their albums from their record label in 1971. Thereafter, two of the band members bought out the others' rights to the albums and assigned their copyrights to their corporation, Flo & Eddie, Inc. Since then, Flo & Eddie has

continued on page 5

Ninth Circuit Denies FilmOn X *continued from page 1*

system" is eligible for a compulsory license that allows it to retransmit a performance or display of a copyrighted work without having to obtain the copyright owner's consent. While the cable system must pay a statutory royalty fee to the Copyright Office for this license, this process is less complicated and less costly than having to deal directly with all of the owners of the copyrighted material that a cable system might want to retransmit. The statute defines a "cable system" as a facility that "makes secondary transmissions of . . . [broadcast television] signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service."

The District Court had determined that FilmOn qualified for the compulsory license because it seemed to meet the statutory definition of "cable system." It also relied on the Supreme Court's 2014 decision in *Aereo Broadcasting Cos. v. Aereo, Inc.* Aereo's business model was similar to that of FilmOn. It captured over-the-air television signals and retransmitted them to its paying subscribers via the Internet. The Supreme Court observed that this service seemed to be no different than that performed by cable systems. However, the issue in the *Aereo* case concerned the Transmit Clause of the Act – that is, whether Aereo's retransmission of the programs constituted a public performance triggering obligations to the copyright owner. Whether the company's operation met the statutory definition of a "cable system" was not a factor in the *Aereo* decision.

The plaintiff-appellant broadcasters in this case argued that the meaning of "facility" in Section 111 comprises the entire retransmission service – both the service's means of receiving broadcast signals and its means of making secondary transmissions to the paying subscribers. They claimed that FilmOn could not qualify under this definition because it does not own the means for making the secondary transmissions, i.e., the Internet. The court said that this theory was "not implausible." On the other hand, the court could not find that the language of the statute compels this conclusion.

For its part, FilmOn urged that Section 111 should be interpreted in "a technology agnostic manner." It said that the compulsory license should be available to any facility that retransmits broadcast signals without regard to its technology. The court did not agree that such an interpretation was consistent with the Act. If Congress had meant the Section 111 license to

be available for all types of technology, it would not have listed specific elements of the cable system operation such as wires and cables. Furthermore, if Congress had intended Section 111 to be completely comprehensive as to all technologies, there would have been no need for separate licensing provisions for satellite carriers in Sections 119 and 122.

Nevertheless, the court found the plain language of Section 111 to be ambiguous and it could not fully accept the arguments of either party. This led the court to rely on and defer to the government's expert agency in this field – the Copyright Office. Judicial precedent favors such deference if the court could find the Copyright Office's interpretation to be persuasive and reasonable based on a review of the agency's thoroughness, valid reasoning and consistency.

The court found that the Copyright Office had consistently characterized cable systems as localized services, not national in scope. The Office's pronouncements consistently reference the statute's text, structure and legislative history. On at least four occasions since 1997, the Office has explicitly held that Internet-based retransmission services are not "cable systems" under Section 111. Indeed, the Office had refused to accept FilmOn's payment of the compulsory license fee because it did not consider FilmOn to qualify as a "cable system."

The court observed that the Copyright Office's long-standing position on this question is apparently consistent with Congressional intent. While Congress is aware of the Copyright Office's interpretation, it has not moved to correct the Office, to amend Section 111 or to enact a separate compulsory license for Internet-based services.

The court concluded that the Copyright Office's views on Section 111 are persuasive and reasonable, and therefore it deferred to them. It ruled that FilmOn does not meet the definition of "cable system" and is not qualified for the Section 111 compulsory license. FilmOn cannot retransmit broadcast signals without the consent of the owners of the content of those signals.

This decision is entitled *Fox Television Stations, Inc., et al. v. Aereokiller, LLC, et al.*, 2017 U.S.App. LEXIS 4999. This ruling is consistent with at least seven other federal court decisions across the country that have rejected the notion that Internet-based retransmission services qualify as "cable systems" under Section 111 of the Copyright Act.



DEADLINES TO WATCH



License Renewal, FCC Reports & Public Inspection Files

April 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 **Delaware, Indiana, Kentucky, Pennsylvania, Tennessee** and **Texas**.

April 3, 2017 Deadline for all broadcast licensees and permittees of stations in **Delaware, Indiana, Kentucky, Pennsylvania, Tennessee** and **Texas** to file annual report on all adverse findings and final actions taken by any court or governmental administrative agency involving misconduct of the licensee, permittee, or any person or entity having an attributable interest in the station(s).

April 3, 2017 Deadline to file EEO Broadcast Mid-term Report for all radio stations in employment units with more than 10 full-time employees in **Texas**; and all television stations in employment units with five or more full-time employees in **Indiana, Kentucky** and **Tennessee**.

April 10, 2017 Deadline to place Issues/Programs List for previous quarter in public inspection file for all full service radio and television stations and Class A TV stations.

April 10, 2017 Deadline to file quarterly Children's Television Programming Reports for all commercial full power and Class A television stations.

June 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 **Arizona, District of Columbia, Idaho, Maryland, Michigan, Nevada, New Mexico, Ohio, Utah, Virginia, West Virginia** and **Wyoming**.

June 1, 2017 Deadline for all broadcast licensees and permittees of stations in **Arizona, District of Columbia, Idaho, Maryland, Michigan, Nevada, New Mexico, Ohio, Utah, Virginia, West Virginia** and **Wyoming** 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).

June 1, 2017 Deadline to file EEO Broadcast Mid-term Report for all radio stations in employment units with more than 10 full-time employees in **Arizona, Idaho, Nevada, New Mexico, Utah** and **Wyoming**; and all television stations in employment units with five or more full-time employees in **Michigan** and **Ohio**.

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 **April 28, 2017**. Informal objections may be filed anytime prior to grant of the application.

Present Community	Proposed Community	Station	Channel	Frequency
Chandler, AZ	Maricopa, AZ	KPNG	204	88.7
Fountain Hills, AZ	Maricopa, AZ	KLVK	206	89.1
Maricopa, AZ	Avondale, AZ	KLVA	288	105.5
Newbury, MA	Seabrook, NH	WVCA	201	88.1
North Dartmouth, MA	Newport, RI	WUMD	207	89.3
Clayton, NM	Hartley, TX	KUHC	213	90.5
Weatherford, TX	Mineral Wells, TX	KYQX	207	89.3
Canaan, VT	Milan, NH	WWOX	231	94.1

Deadlines for Comments In FCC and Other Proceedings

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

Docket 07-260; Public Notice Fox Television Stations' request for waiver of newspaper/broadcast cross-ownership rule	Apr. 10	Apr. 25
---	---------	---------

Docket 17-85; Public Notice Entercom/CBS merger	Petition to Deny May 1	Opposition May 11
--	---------------------------	----------------------

Docket 16-251; Public Notice Revision or elimination of certain regulations	May 4	N/A
---	-------	-----

Docket 16-142; NPRM Next Generation TV	May 9	June 8
---	-------	--------

Flo & Eddie's Disadvantage

continued from page 3

licensed the use of The Turtles' music in a variety of media.

Broadcasters pay copyright royalties for the broadcast and Internet performances of copyrighted music to performing rights organizations such as ASCAP, BMI, SESAC, GMR and SoundExchange. As presently established, these entities only collect royalties for their members for copyrights existing under federal law.

Although copyright developed in the English common law and came to America as part of the common law system, it is now governed primarily by federal statutes, the first of which was enacted in 1790. An update in 1831 covered musical works – i.e., sheet music. A major revision to the law in 1909 was too early to give serious consideration to covering sound recordings – which had only just been invented. Congress did not address the copyright prospects for sound recordings until an amendment to the Copyright Act that was adopted in 1971 and became effective in 1972. However, that only covered the reproduction aspect and not the performance of them. The performance of sound recordings was finally given federal statutory copyright protection in the 1995 Digital Performance Right in Sound Recordings Act (“DPRA”) – but only performances by means of digital audio transmission.

While federal copyright law evolved over time as the statute was amended and enlarged, states continued to have their own variety of statutory and/or common law copyrights. DPRA expressly provided that while the federal copyright statute preempts other laws, it does not limit or annul the common law or statutes of any state with respect to a violation of rights unless rights provided under state law are equivalent to the federal rights. As to sound recordings made before February 15, 1972, DPRA said that any rights or remedies under state statutes or common law that do not conflict with the federal statutes may be applied until February 15, 2067. The Supreme Court has confirmed that states may regulate areas of copyright not covered by federal law, including sound recordings produced before February 15, 1972.

Enter Flo & Eddie, Inc. with its pre-1972 catalog of recordings, many of which are still widely played. Flo & Eddie has sought to explore the extent to which state copyrights may exist and be enforced in the vacuum of federal copyright coverage for pre-1972 sound recordings. Flo & Eddie sued perhaps the largest radio broadcast user of music it could find – SiriusXM Radio, which is said to have some 42,000 pre-1972 songs in its music library. On behalf of itself and a class of owners of pre-1972 recordings, Flo & Eddie sued SiriusXM in federal courts in California, Florida and New York. State copyright law in each state would be decisive.

The New York federal district court decided that the pre-1972 recordings were covered by state common law – a temporary win for Flo & Eddie. SiriusXM appealed this decision to the Second Circuit Court of Appeals. The Second Circuit determined that this case raised an unresolved issue of New York law, requiring the expertise of a state court. It

DEADLINES TO WATCH



Paperwork Reduction Act Proceedings

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

Topic	Comment Deadline
Remittance advice form, Form 159	Apr. 17
Children's television programming, Sections 73.671, 73.673	May 1
Accessibility of emergency information, Sections 79.2, 79.105, 79.106	May 1
Must carry rules, Sections 76.56, 76.1708, 76.1709, 76.1614, 76.1620	May 1
Broadcast station log, Section 73.1820	May 8
Broadcast Station Annual Employment Report, Form 395-B	May 15
Noncommercial broadcast construction permit application, Form 340	May 19
First Amendment to Nationwide Programmatic Agreement for the Collocation of Wireless Antennas	May 22

therefore certified the question of whether New York has a common law copyright for sound recording to the New York State Court of Appeals. After offering an exhaustive history of the issue in the state, the court declared that “New York’s common-law copyright has never recognized a right of public performance for pre-1972 sound recordings.” The court declined to create such a new right for the first time now. It said it was not equipped to address the extensive and far-reaching consequences that might ensue, and it opined that such a task would more appropriately be undertaken by the legislature.

Upon receiving the state court’s decision, the federal Second Circuit Court of Appeals reversed the District Court’s decision, remanded the case back to it and ordered the District Court to issue summary judgment in favor of SiriusXM.

In the California and Florida lawsuits, the federal courts have asked the Supreme Courts of those states to advise them on the status of these issues under each respective state’s law.

TV Channel Sharing Allowed Beyond Auction *continued from page 1*

move and develop a second-generation CSA with a different host sharer. Full power stations that did not win a bid for a channel-sharing opportunity in the reverse auction will not be permitted to become sharees in the future. The Commission reasoned that there was little likelihood that a full power station would want to voluntarily vacate its channel, without compensation, to share spectrum with another station. All Class A stations will be permitted to operate as either a sharee or sharer regardless of their auction status. Not all of Class A stations are protected in the repack, and thus some of them may need to develop new facilities or arrangements. All low power TV stations may participate in CSAs on either side of the contract. The permittee of an unbuilt LPTV station will also be allowed to become a sharee immediately without having to first construct a traditional station of its own.

Many of the requirements for this round of channel sharing are the same as those that govern first-generation CSAs. The sharee must file a minor-change construction permit application proposing to share spectrum with the host, attaching the new CSA as an exhibit. The Commission will limit its review of the CSA to what is necessary to ensure that the agreement is rule-compliant. The parties will be free to negotiate most terms such as compensation and contract length under market conditions. Each station must continue to provide at least one standard definition program stream. Beyond that, the stations are free to divide the channel capacity however they wish.

In moving to co-locate with a sharer station in a second-generation CSA, the full power sharee will have to maintain the minimum coverage required for its community of license. In evaluating the minor-change application, the Commission will consider factors such as service losses and gains, and the consequences for the continuation of service if the application were denied. When the application is granted, the Media Bureau will automatically update the digital TV table of assignments to associate the new channel with the station's community of license. A station will not be permitted to initially propose to change its community of license without pursuing the more complicated process of amending the DTV table.

An LPTV station proposing to be a sharee in conjunction with a minor-change digital displacement application is limited to an antenna site not more than 30 miles from the reference coordinates of its community of license. In all other cases involving a CSA, in order to be considered a minor change, the sharee LPTV station (1) must maintain overlap between the protected contour of its existing and proposed facilities, and (2) may not relocate more than 30 miles from its existing antenna site. The Commission says that it will consider a request for a waiver of this limitation upon a showing that no channels are available within the prescribed area and that the proposed sharer is the nearest station available to the sharee's community of license.

Full power and low power stations will be permitted to enter into CSAs with each other. Both stations will operate with the technical parameters of the host station. A secondary LPTV operating as a sharee with a full power station will get the benefit of the larger coverage area and will have "quasi" primary interference protection during the life of the CSA. On the other hand, a full power sharee operating with a secondary LPTV sharer will have the smaller coverage area of the low power station and will be subject to the same risk of displacement as the LPTV station. In all cases, each station will be required to comply with the programming and other operational obligations pertaining to its specific class of license (i.e., full power, noncommercial full power, Class A or secondary LPTV) regardless of the legal status of the host station's facilities over which both stations transmit their programming.

Where a noncommercial station is a sharee, its operations on the sharer's channel must continue to be noncommercial and comply with the noncommercial rules. Conversely, if a commercial station is the sharee on a noncommercial sharer's facilities, it will be permitted to continue operating as a commercial station notwithstanding its use of a reserved channel.

The Commission will begin accepting non-auction-related channel sharing applications on a date after the incentive auction to be announced by the Media Bureau. A secondary station that is displaced because of the auction or the repacking process can file its channel-sharing application immediately upon that announcement, and need not wait for the post-auction displacement filing window if it proposes to share with a full power or Class A station.

Parties to non-auction-related CSAs will have three years after grant of the construction permit to implement their shared facilities. When shared operations have been initiated, the sharee will notify the Commission that it has ceased operations on the vacated channel and both the sharee and the sharer must file license applications.

Both the full power sharee and the full power sharer will continue to have whatever carriage rights on multi-channel video programming distributors ("MVPDs") they enjoyed as of November 30, 2010. That was the date on which the Commission released its proposed rules for first-generation channel sharing in the auction context. Secondary stations will continue to retain whatever carriage rights they enjoyed, if any, as of the date of the release of the FCC's Public Notice announcing the conclusion of the incentive auction and the new DTV table of assignments (which is expected sometime in April). This is subject to the caveat, however, that the very limited carriage rights of LPTV stations depend on their placement in a given county with no local service and their location relative to other stations and the cable headend. The carriage rights of a sharee LPTV station will be subject to those conditions as they may

continued on page 7

Translator Siting Rule Effective April 10 *continued from page 1*

rule, the Prometheus Radio Project filed a Petition for Emergency Partial Stay and Processing Freeze. The stay and the freeze would be intended to hold the status quo pending resolution of a Petition for Reconsideration that Prometheus plans to file. Prometheus is a nonprofit organization active in fostering the development of low power FM radio, providing advice and technical assistance to LPFM applicants and licensees, and advocating for LPFM interests.

Prometheus asserts that the premature grant of the hundreds of translator modification applications expected to be filed under the new rules would “cause immediate and irreparable harm to many of the Low Power FM . . . licensees Prometheus has advised and assisted and to their listeners, whose rights are ‘paramount’ under the First Amendment.” Prometheus argues that the greater flexibility for siting translators will result in frequent situations where translators block incumbent LPFM stations from moving to improve their facilities or just to relocate upon the loss of a transmitter site. Such constraints on LPFM stations can, at least, reduce the number of listeners they can serve, and at worst, cause them to go silent. It is a matter of congestion in the spectrum that LPFM stations and translators share.

Prometheus acknowledges that to prevail in its request for a stay, it must demonstrate that: (1) it appears likely to succeed on the merits of its Petition for Reconsideration; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be substantially harmed if the stay is granted; and (4) the public interest favors granting a stay. The petitioner presented the following arguments to support each of these elements:

(1) Prometheus says its reconsideration petition will prevail on the merits because the new rule was not adopt-

ed in accord with the notice and comment process required for administrative agency rulemaking procedures. To satisfy this requirement, the elements of a final rule must have been proposed in the rulemaking proceeding or must have at least been logical outgrowths of deliberations in the proceeding. The final rule abolished the 25-mile fixed distance maximum between the AM station and the translator. Prometheus argues that elimination of the distance limit was not proposed in the rulemaking and could not have been foreseen. Prometheus also asserts that the order adopting the rule is arbitrary and capricious because it does not address the question of the adverse impact that the rule will have on LPFM, and it is inconsistent with the goals of the Local Community Radio Act.

(2) As stated above, Prometheus claims that irreparable harm will come to LPFM stations if the Commission accepts translator applications under the new rule because the LPFM stations will be too constrained in their ability to relocate. Prometheus also alleges that, despite FCC assurances to the contrary, the increase in translator activity has led to increases in the number of translator-LPFM short-spacings and encroachments.

(3) According to Prometheus, the stay would maintain the status quo and would not cause harm to would-be applicants because they have not yet filed their applications. There is no reason to believe that AM stations would suffer any loss in current audience or advertising merely because they would be prevented from modifying their translators.

(4) Prometheus argues that the public interest is served by fostering noncommercial, community-based LPFM interests.

As of this writing, the Commission has not responded to the Petition.

TV Channel Sharing Allowed Beyond Auction *continued from page 6*

exist at its new location with the sharer station.

Rights under a CSA will be assignable and transferrable, generally subject to the same procedures and rules governing the assignment or transfer of control of broadcast stations. Whenever a sharing station’s license is terminated due to revocation, failure to renew, voluntary relinquishment, or any other circumstance, its spectrum usage rights (but not its license) may revert to the remaining sharing partner if the partner agrees and the CSA includes a provision to this effect. The remaining station may apply to change its license to non-shared status, eligi-

ble to use the entire 6 MHz channel. The surviving station will continue to have the status and operate under the rules of its original service, i.e., full power, noncommercial full power, Class A or secondary LPTV. In the event that a non-commercial station goes off the air, leaving a commercial station apparently in control of the entire channel and creating the risk of dereservation of the channel, the Commission says, without further elaboration, that it “will exercise its broad discretion to ensure that the public interest is served.”

Agenda Items Set for April Commission Meeting

Among the process reforms that FCC Chairman Ajit Pai has instituted at the beginning of his term as Chairman is the practice of publishing advance draft texts of items on the agenda for consideration at Commission meetings. The Commission's previous practice was merely to release the required Sunshine Agenda, published at least seven days prior to an open Commission meeting, listing the items to be considered with only a very brief description.

In accord with this new practice, the Commission has released tentative orders to be considered at its next scheduled meeting on April 20. The agenda announced for that meeting includes these three broadcast items: (1) reconsideration of repeal of the UHF discount; (2) reconsideration of the order requiring noncommercial broadcast interest holders to provide personal information in order to obtain FCC Registration Numbers; and (3) a rule amendment to permit noncommercial stations to conduct third-party on-air fundraising. The following are brief synopses of the draft texts that the FCC has released for these proposed actions. It is important to remember that these drafts are subject to further deliberation, revision and/or withdrawal until the Commission votes on them. Even after adoption, they may be subject to minor edits before the official version is released. Full reports on these actions if and when they are officially adopted will appear in future issues of this newsletter.

Reconsideration of Repeal of the UHF Discount, Docket No. 13-236

The national television multiple ownership rule prohibits a single owner from having attributable interests in commercial television stations that collectively reach more than 39 percent of the television households in the United States. Previously, only 50 percent of the households in the markets of UHF stations would be counted in calculating compliance with this cap (the "UHF discount"). This discount was eliminated by the Commission in August 2016. In November 2016, a Petition for Reconsideration was filed arguing that elimination of the discount without also analyzing whether the national audience reach cap should be adjusted was unlawful and resulted in an unwarranted tightening of the reach cap.

In a tentative Order on Reconsideration, the Commission would find that the UHF discount and the national reach cap are inextricably linked, and that the elimination of the discount without considering whether the cap should be modified was error. The UHF discount would be reinstated. The Commission plans to open a rulemaking proceeding later this year to consider the future of the UHF discount and the national television ownership rule.

Reconsideration of FRN Requirement for Interest Holders in Noncommercial Stations, Docket No. 07-294

In January 2016, the Commission revised its broadcast ownership report forms. Among other things, the agency required that every reportable interest holder (for noncommercial stations – typically officers and members of the governing boards of their licensees) be identified by a unique identifier – either an FCC Registration Number ("FRN") or a Restricted Use FRN ("RUFRN"). To obtain an FRN or RUFRN, individuals are compelled to disclose personal information, such as Social Security Numbers and/or date of birth. The Commission said it would take enforcement action against individuals who refused to provide such information. In May 2016, a number of noncommercial broadcasters petitioned for reconsideration of this measure, contending that it would hinder their efforts to recruit and maintain qualified members to serve on their governing boards.

In a tentative Order on Reconsideration, the Commission would eliminate the requirement that compels interest holders to furnish personal information to be listed on the ownership report of a noncommercial station. Noncommercial licensees would have the option to identify their interest holders with a Special Use FRN ("SUFRN") – which can be obtained without divulging so much personal information. Noncommercial licensees would be able to use any combination of FRNs, RUFRNs or SUFRNs, in their ownership reports.

Permit On-Air Third-Party Fundraising by Noncommercial Stations, Docket 12-106

Under current rules, noncommercial broadcast stations are not permitted to conduct on-air fundraising that alters or suspends the station's regular programming, unless the fundraising is for the station itself. In April 2012, the Commission initiated a proceeding to consider relaxation of this rule.

In a tentative Report and Order, the Commission would amend its rules to allow noncommercial stations to conduct on-air fundraising for nonprofit third-parties that alters or suspends regular programming. Such activities would be limited to a maximum of one percent of the station's annual airtime. The third-party beneficiary of such fundraising must be recognized by the IRS as a tax-exempt entity under Section 501(c)(3) of the Internal Revenue Code. The third party would be allowed to reimburse the station for the station's expenses, but any additional consideration would be prohibited. This relaxation of the rule would NOT apply to stations that receive funds from the Corporation for Public Broadcasting.

ANTENNA is an information service about current events in communications law edited and published by Donald E. Martin. This publication is produced only to report on current events and factual matters in the field of communications law. Publication and dissemination of this material is not intended to constitute the practice of law or the rendering of legal advice. No attorney-client relationship shall be deemed to exist between the publisher or provider and any other party as a result of the publication, dissemination, distribution or other use of this material. The publisher attempts to ensure that the information reported is correct, but no warranty, express or implied, is given as to the accuracy or completeness of any information or statement published herein. All material published herein is protected by copyright and all rights are reserved. © 2017 Donald E. Martin, P.C.