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MEMORANDUM

TO: Radio Tech Summit Attendees
FROM: John F. Garziglia
DATE: June 2, 2010

It is a pleasure to be here with you for Radio Ink's Radio Tech Summit at the Microsoft Silicon Valley Campus.

Here are some recent FCC developments which are relevant to radio broadcasters:

New Review of Broadcast Ownership Rules

Although its focus has been on other areas lately, the FCC last week issued a *Notice of Inquiry* to explore revisions to its broadcast ownership rules. Similar exercises that have been undertaken every four years since enactment of the Telecommunications Act of 1996 resulted only in fine-tuning (and court rejection of a single bolder initiative). This time, citing "dramatic" and "profound" changes in the marketplace, a broader-based "fresh look" is promised, with "no preconceived notions" about the framework that may result or specific rules that may be adopted. Further impetus may arise from the Senate Commerce Committee's recent interest in a possible rewrite of the Communications Act, numerous independent studies that the FCC is commissioning, and the impact of the FCC's own broadband plan.

The *Notice of Inquiry* is quite extensive and poses hundreds of questions. Consequently, this description attempts only an overview.

The Commission retains its fundamental concern of advancing its traditional policy goals of competition, localism and diversity. In a background introduction, it cites such disparate modern trends as the increased consolidation of the broadcast industry, penetration of alternative media, declining newspaper circulation, shifts in advertising placement, control of websites by owners of traditional outlets, the rise of social media as information sources and an attenuation of local reporting and content. The Commission's discussion of the impact of these developments upon its policy goals centers on four affected groups: consumers, advertisers, content creators and distributors.

Competition – The Commission’s focus here is upon how to measure competition in today’s media marketplace. Its prior analyses have attempted to quantify the impact of regulation upon fostering lower pricing, higher output, increased consumer choices and technological progress. Aside from this economic focus, the Commission seeks a metric to assess consumer welfare in terms of utilization and satisfaction, taking into account evolving opportunities and choices.

Localism – Traditionally, the Commission has evaluated localism in terms of available programming, and especially the quantities of news and public affairs offered by over-the-air broadcasters. Here, too, the Commission questions how to measure localism as it applies to consumers, and particularly in light of the impact of the changing media marketplace upon consumer satisfaction. For the first time, the Commission seems willing to consider the notion that consumers may not want as much local broadcast programming as it has assumed. Thus, the Commission seems prepared to consider a shift away from attempting to assess local programming input (that is, how much news is broadcast, its local content, the staff devoted to producing it, etc.) and regarding each medium as a separate market with its own responsibilities. Rather, it now may look at the entire mix of available information, including the increasing availability of Internet blogs, websites and similar resources, and the extent to which local creators and production meaningfully contribute to the quantity and responsiveness of useful local content. The Commission is particularly concerned over defining and measuring localism as it applies to historically-underserved minority communities.

Diversity – In part owing to First Amendment sensitivities, the Commission’s traditional approach to diversity has been structural, so as to foster program and viewpoint diversity through oversight and regulation of sources, outlets and minority/female ownership. A threshold issue is to define the geographic region in which diversity is to be assessed, and the Commission tentatively suggests using an area in which citizens have roughly the same range of media choices. Although the Commission still hopes to promote diversity generally through competition among media outlets, it notes its historical (and presumably continuing) concern with the specific needs of children for educational programming and protection from excessive and inappropriate commercial messages. As with localism, the Commission will consider a “demand” (rather than “supply”) approach that will try to measure media consumption and audience satisfaction as proxies for viewpoint diversity, although the Commission seeks guidance as to how that might be assessed. Even so, it raises a number of concerns with source diversity, including the continuing need in each market for independent media outlets owned by diverse individuals, and the impact of such established structural controls upon content diversity.

Specific Rules to be Considered – Although the findings of this initial inquiry will be implemented only after one or more notices of proposed rulemaking, the Commission has already raised the prospect of changes in specific rules. For each medium, it seeks comment on how the current rules impact its three core policy goals.

- **Local Television Ownership** – The current approach requires eight independently-owned and -operated full power stations in a DMA, and effectively bars any mergers among the top four-rated stations. In addition to possibly adjusting this

standard, the Commission asks how to define markets now that the former Grade B contour no longer exists following the digital transition, the extent to which other media should be factored in, whether the “failing/failed” station exception remains relevant, and – perhaps most notably – whether consolidation might provide more and better programming.

- Local Radio Ownership – The present limitations on common control depend upon the number of stations in Arbitron-rated markets or overlapping stations in other areas. The Commission questions the continued need for separate caps for AM and FM stations or whether they should be considered part of a consolidated service, whether to count low power stations, and whether to consider market share and/or the degree of consolidation of other media.
- Cross-Ownership – Noting newspapers’ need for relief, the Commission suggests that the time may be ripe to favor certain consolidations previously banned. Thus, it questions the disparate treatment of newspaper/radio and radio/television combinations, even as it asks whether structural relief would suffice to bolster local news and information in light of the fragmentation of news sources. Consideration also will be given to the impact of technological changes upon defining the relevant market.

More generally, the Commission asks whether its overall approach to structural regulation should remain in terms of “bright line” rules, which define the precise criteria under which ownership combinations are permitted and thus are efficient and predictable. Alternatively, the Commission may consider case-by-case analyses, which can be custom-tailored to the needs of a particular market, but which are time-consuming and can generate uncertainty as standards evolve through variable precedents. A “hybrid” approach would define parameters that would predict a likely outcome while incorporating additional factors to be weighed. However, the factors that are mentioned in the *Notice of Inquiry* seem so vague and complex as to mitigate against the benefits of the current, largely objective, approach; these might include local economic and financial conditions, an applicant’s financial status and ability to access capital, the holdings of the applicant’s competitors in the market, the applicant’s history of promoting innovation and the effect of the digital transition. Even more indistinct is a final “broad cross-media” alternative approach to regulation that would “look at all conditions in a geographic market in determining the degree of permissible combined ownership in that market.”

In separate statements, the two most senior Commissioners illustrated the range of opinion that is likely to emerge in response to the *Notice of Inquiry*. Commissioner Copps views the current underrepresentation of women and minorities in broadcast ownership as “appalling” and urges a review that, for the first time asks “the questions that really need to be asked. ... Anyone who actually thinks that who owns the media doesn’t significantly affect how our country is being informed is not paying attention. Shortchanging media ownership diversity is shortchanging our civic dialogue.” Commissioner McDowell, though, while supporting the inquiry, finds “some of its premises and questions disquieting. ... The possibility of the

government monitoring core protected speech should send shivers down the spine of anyone who cherishes liberty. ... I am confident that the answers will come from those actively engaged in media enterprises and not from Washington bureaucrats.”

Reading the complete *Notice of Inquiry* is essential to describe the full scope of the Commission’s consideration of the matters we have only briefly summarized. It can be accessed on the FCC website at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-92A1.pdf.

Comments will be due 30 days after publication in the Federal Register.

FCC Sets Deadline Date of July 8, 2010 for Twice Postponed 2009 Biennial Ownership Report Filing

The FCC, after withdrawing late last December its revised electronic form for submitting biennial ownership reports, has now made technical changes to the electronic form and announced the re-release of the form. The ownership report form is now due to be filed on or prior to July 8, 2010.

I was one of the counsel referenced in the FCC’s Public Notice announcing the further revised form who asked for changes to the form. The use of a machine-readable spreadsheet for completing Question 3(c) entries (the data fields for other media interests held by each principal) was my suggestion in an ad hoc meeting a number of us had with the FCC’s staff. I am happy that suggestion was adopted as Question 3(c) for more complicated ownership structures where principals held interests in tens, or hundreds, of radio stations, resulted in the need to enter data fields numbering in the tens of thousands which imposed an incredible burden.

It should be noted that the FCC’s staff was highly responsive to reports of problems with the form. In the days immediately prior to Christmas, the FCC’s staff responsible for this form got agency approval to put the form on hold and postpone the previous early January filing deadline. The FCC’s staff could have waited until after the Christmas holidays, causing hundreds of broadcasters and their counsel to waste many hours battling the form during the Christmas holiday, only to have the form withdrawn several days prior to the deadline. It is to the credit of the FCC’s staff that they took immediate cognizance of the burden they were placing on broadcasters with the previous form, and in the days immediately prior to Christmas were able to coordinate things within the FCC to put things on hold.

The new ownership report form eliminates many of the former reporting exceptions and now requires the identification of the gender and race of each owner. Also, the form will require that each individual owner be listed on the form itself, rather than in an exhibit, so that the FCC may make accurate compilations of the extent to which there is female and minority ownership of broadcast stations. Finally, the new form requires each individual owner of the licensee, parent, affiliate or subsidiary, to obtain and list an FCC FRN by providing the FCC with his or her Social Security Number.

FCC Proposes Revisions to Tower Lighting and Marking Rules

The FCC has issued a *Notice of Proposed Rulemaking* to update its antenna structure lighting and marking rules. Its goal is to fulfill its statutory responsibility to ensure the safety of air navigation through streamlined requirements and effective enforcement.

Currently, structures must obtain a “no hazard” determination from the Federal Aviation Administration and then register with the FCC’s Antenna Survey Branch (a) if they support (or serve as) antennas and, with appurtenances, exceed 200 feet above ground level or (b) if they are sufficiently close to an airport runway so as to exceed a “slope test.” The registration often contains FAA marking and/or lighting specifications.

In addition to editorial improvements and exploring how best to conform and coordinate FCC and FAA marking and lighting requirements, the FCC has made a number of specific proposals:

- **Accuracy of Location and Height Data** – The FCC proposes to require a new FAA study whenever a change or correction of location results in a difference of at least one second of latitude or longitude or one foot of height. To ensure accuracy, the Commission asks whether a specific survey method, such as GPS technology, should be mandated for all tower measurements.
- **Notification Requirements** – A pending FAA rulemaking proposes to expand the events that trigger the requirement of a new FAA study beyond physical tower attributes to include operation in specified frequency bands or changes in frequency, power or antenna configuration. The Commission will consider how to coordinate its own approaches to the outcome of the FAA rulemaking.
- **Maintenance** – The Commission proposes to scale back on its existing inspection requirements. Currently, the Commission requires quarterly physical inspection, daily observation, and reports to the nearest FAA office within 30 minutes of any lighting extinguishment or malfunction. The Commission proposes to replace the inspection and observation requirements with a simple rule mandating prompt reporting of outages, such that tower owners would be held responsible for lapses regardless of the measures they may have taken to ensure compliance. As an alternative, the Commission will consider exempting from its inspection requirements towers using certain automatic or mechanical monitoring systems of proven reliability.
- **Time-Frames** – The Commission notes that current notifications of outages automatically expire after 15 days, and proposes to require that notifications be renewed at 15-day intervals until proper operation is restored. (In that regard, the Commission specifically notes that loss of power does not exempt tower owners from the notification requirement.) The Commission further suggests mandating time limitations for lighting

system repairs and, if so, whether factors such as geographic location or weather conditions should be taken into account.

- **Preservation of Records** – The Commission questions whether records of extinguishment or improper structure lighting should be required at all, or, alternatively, whether they should continue to be retained for two years and be made available for inspection.
- **Painting Standards** – The Commission concedes that its current standard that structures be painted to maintain good visibility is vague and could be subject to inconsistent enforcement. It proposes use of the FAA’s objective “In Service Aviation Orange Tolerance Chart.” Whichever visibility requirement it adopts, it asks whether observation should be made at the tower base, as is now done, or at a distance of a quarter-mile, which, while subjective, would more closely approximate tower visibility from a pilot’s perspective.
- **Clarification of Responsibility** – The Commission will clarify that its structure obligations extend only to owners, and not to mere tenants (who in the past have been fined for problems on towers they merely occupy). It will also clarify that obligations remain until a tower is dismantled, even if it no longer supports licensed facilities.
- **Posting of Registration Numbers** – In lieu of the current requirement that FCC structure registration numbers be posted near the tower base, the Commission proposes that the number should be displayed so as to be visible at the closest publically-accessible location near the base. Where separate locations exist for a single structure, such as two roads from different directions, posting would be required at both locations.

A copy of the complete *Notice of Proposed Rulemaking* (WT Docket No. 10-88) can be accessed through the FCC’s website at:

http://www.fcc.gov/Daily_Releases/Daily_Digest/2010/dd100421.html. The Commission invites comments on these proposals, to be filed within 60 days after publication in the Federal Register.

Proposed 2010 Regulatory Fees

This year may bring an historic moment – the first time since the advent of FCC regulatory fees in which the fees will not have risen. Despite all the harsh things being said about Congress recently, its annual FCC appropriations act specifies that the 2010 fees to be collected are to be 1.8% less than last year.

All fees are to apply to authorizations held as of October 1, 2009. As in the past, the methodology used to calculate individual fees allocates the overall amount among various categories of facilities and then divides the result by the number of authorizations within each

category. (A few fees held steady or even rose slightly due to the fewer number of stations of a given type among which a fee category is to be divided.)

The only major change this year is to remove the former exemption for digital TV broadcasting. As a reward for early conversion, last year the FCC imposed a regulatory fee only upon analog TV licenses. With the conversion over, this year all TV licensees are to be assessed a fee. In addition, a uniform fee is to be imposed upon each TV Low Power, Class A, translator or booster facility for which conversion is voluntary so far. Only a single fee will be charged to licensees simulcasting in both analog and digital modes on companion channels. TV fees again will be based upon band (VHF or UHF) and market size.

Radio fees are to be determined by service (AM or FM), class of station and estimated population served (still using the 2000 Census). No additional fee is to be imposed upon radio stations' HD channels.

The Commission again will send each individual broadcast station a pre-billing notice to advise of the assessed fee and the attributes that determine that amount. In the past, the notices omitted auxiliary facilities for which additional fees will be required and that is likely to be the case again this year. The Commission proposes to eliminate this mailed notification in all future years, so that broadcasters will have to rely on the FCC website for the appropriate information.

FCC Revises Radio Allotment Preferences and Procedures

The FCC has adjusted certain of its preferences and procedures that govern the allotment of radio stations. It created a new dispositive priority for many Native American applicants, and took steps toward remedying several loopholes in its auction procedures.

- **New Priorities for Native Americans** – In an effort to redress its concern over a dearth of radio stations serving Tribal lands and Alaska Native villages, the Commission has created a new Tribal Priority. It will be available for applicants that (a) are a Tribe acknowledged by the federal government or are at least 51% owned or controlled by such Tribes; (b) propose a community of license located on Tribal lands; and (c) propose that at least 50% of their daytime principal community contour will cover reservations or certain adjacent communities. The Commission found that such a preference is not barred as a racial classification due to the unique legal status of Tribes under Federal law.
 - For noncommercial educational FM, any applicant that qualifies for this Tribal Priority and that proposes a first noncommercial service for its proposed community would automatically be awarded its construction permit. Ties between such applicants would be decided by any degree of difference in their proposed population coverage within Tribal lands; further ties among identical service proposals would be resolved through the existing point system for selecting among mutually-exclusive noncommercial educational FM applicants.

- For FM channel allotments and AM applications, the traditional priorities will be modified to add a Tribal Priority that will favor the holder over any applicant not claiming a higher priority. Thus, for example, the holder of a Tribal Preference that proposes a first station to its community of license or service to significant “gray” (having only one reception service) area (thus triggering co-equal priorities (2) or (3)) would be preferred over any other proponent – except for a proponent that would eliminate significant amounts of “white” (completely unserved) area (traditional priority (1)).
- The Commission is also launching a *Further Notice of Proposed Rule Making* to consider a special tribal bidding credit of up to 35% in auctions for new commercial facilities, which possibly could be used in addition to the 35% new entrant credit.
- **Threshold Technical Eligibility to Participate in an AM Auction.** Despite the protests of many frustrated auction participants, until now the FCC has refused to disqualify patently impossible proposals from participation in AM auctions. Rather, the FCC has allowed such defective applications to cure their fatal defects when filing their “long form” should they be awarded a Section 307(b) preference or win an auction. In addition to unfairly skewing the competitive allocation or auction proceeding, defective applications remained in the database and blocked legitimate minor change applications that otherwise complied with the rules. Now, the Commission will require that the “short form” filing establish eligibility by meeting four basic technical criteria: daytime and nighttime community of license coverage; and daytime and nighttime protection of co- and adjacent-channel existing AM facilities, issued construction permits and prior-filed applications. AM applicants will have to include the following information on their short forms: (1) community of license, (2) frequency, (3) class, (4) hours of operation, (5) day, night and critical hours power, (6) day, night and critical hours antenna location, and (7) all other antenna data. FCC staff will review the data and provide one opportunity to cure defects (other than failure to provide the required information, which will result in automatic dismissal). Other technical challenges will still await the outcome of the auction and can be filed only against the tentative winner’s long form. The Commission cautions that this will not be a settlement opportunity, as the staff review will occur only prior to disclosure of other applications submitted during a filing window.
- **Limits upon Downgrading AM Facilities Awarded through Dispositive 307(b) Preferences** – The Commission has struck a new balance between the challenges of building new AM stations and the need to protect the integrity of the process for awarding dispositive preferences to mutually-exclusive AM applicants on the basis of their proposed service. For a period of four years following the commencement of on-air operation, the Commission will (a) bar changes in the proposed city of license and (b) permit only those technical changes that will continue to provide the same priority of service to at least 80% of the population originally proposed to be served. Note that the 80% coverage requirement does not require the same area but rather refers to the total population figure. Thus, any permitted change in a proposal to eliminate gray area to

1,000 people would have to result in elimination of gray area to a population of at least 800, even if located on the opposite side of the original service contour.

- **Other Matters.** The Commission also adopted several other adjustments to its procedures for selecting among new allotment proposals and applicants. These include:
 - Permitting partial settlements in future noncommercial FM windows, so long as at least one applicant can be granted as a result.
 - Authorizing its bureaus to limit the number of AM “short form” applications that any applicant or group of commonly-controlled applicants can submit in future filing windows.
 - Authorizing the bureaus to extend the usual 30-day deadline for the filing of long-form applications by winning auction bidders.

A complete copy of the *First Report and Order and Further Notice of Proposed Rule Making* in this matter is available on the FCC’s website at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-24A1.pdf.

FCC Authorizes HD Radio Digital FM Power Increase

The FCC has amended its HD Radio rules to permit FM stations to increase their digital effective radiated power (ERP). The amended rules seek to enable digital stations to come closer to replicating their analog coverage and to overcome reception problems in mobile and indoor locations where most radio listening occurs, which the existing limitation of 1% of analog power often failed to achieve. They are also intended to minimize interference to the protected contours of analog FM stations.

The power increase rules reflect the results of experimental operation and are modeled upon the terms of an agreement between iBiquity (the licensor of HD technology) and National Public Radio, which had performed extensive field testing to evaluate its concerns over potential interference. Here is a summary of the new provisions:

- All but super-powered FM stations are able to increase their digital ERP by 6 dB as of May 10, 2010, the effective date of the rule changes. HD power may now be increased, but within ten days of commencement the FCC must be notified through its electronic filing system.
- The approximately 2% of FM stations that are super-powered will have their maximum digital ERPs calculated through a program that is to be available on the Media Bureau’s web page.

- The NPR/Ibiquity agreement contains a formula to determine if power may be increased beyond 6 dB up to a maximum of 10 dB, based upon protection to first adjacent channel 60 dBu analog signals. Other methodologies may be used and evaluated on a case-by-case basis in situations where the simplified formula method is claimed to be inapplicable due to terrain, environmental or technical factors.
- AM stations and Low Power FM Stations are not eligible for the power increase.
- In the event that any power increase causes interference to the protected service contour of a full-service analog FM station, remediation will be required after the analog station contacts the digital licensee. If an agreement cannot be reached for power reduction or other remediation measures, then a complaint may be filed with the Media Bureau. A complaint must present at least six reports of on-going objectionable interference within the analog station's protected contour. The complaint also must include maps and detailed descriptions of tests to identify the interference and unsuccessful efforts to resolve it. If the Bureau has not acted within 90 days, then digital ERP must be reduced in 3 dB increments down to 1% of analog power.
- The Commission reserves the right to revisit the new standards should implementation of these power increases result in wide-spread instances of non-resolvable cases of objectionable interference.

The National Association of Broadcasters supported the power increase as a key to improving digital coverage, insuring reliable reception of new multicast signals and increasing consumer enthusiasm for HD radio. However, other broadcasters have expressed reservations. In a filing shortly before release of the FCC decision, the New Jersey Broadcasters Association predicted "devastating effects" including the disruption of established listening patterns that often fall outside protected contours and a resultant diminution in local public service, especially for Class A and short-spaced stations.

A copy of the *Order* is available on the FCC website at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296079A1.pdf.

New Rules Allowing FM Translators to Re-Broadcast AM Stations Now in Effect

The Federal Communications Commission has codified the standard under which it previously granted special temporary authority for FM translators to rebroadcast certain AM stations. FM translators can now carry AM stations as a primary station provided that the predicted 60 dBu coverage contour of the FM translator is contained within the 2 mV/m daytime contour of the AM primary station and a 25-mile radius centered around the AM transmitter site.

The rule change will apply only to currently-authorized FM translators with licenses or permits in effect as of May 1, 2009. This is in deference to LPFM advocates who feared substantial preclusion to future LPFM authorizations from the rule change. Thus, no subsequently-granted FM translator facility from the applications remaining from the 2003 filing window will be able to specify an AM station as a primary station. The Commission further notes that the next filing window for secondary spectrum use will be for LPFM stations. After that filing window, it may revisit the bar on newly granted FM translators carrying AM stations.

Daytime-only Class D AM stations may originate programming on FM translators during hours when the AM station is not operating, provided the AM station operated within the last 24 hours. In addition, although not part of the rule change nor addressed in the FCC's order adopting the rule change, the Commission's Audio Division continues to informally allow FM translators to carry, in analog, the HD-2 or HD-3 programming of an in-contour FM stations as a primary station.

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