

[Gazing Into the Crystal Ball - What Washington Has In Store For Broadcasters in 2011](#)

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Every year, about this time, I dust off the crystal ball to offer a look at the year ahead to see what Washington has in store for broadcasters. This year, like many in the recent past, Washington will consider issues that could fundamentally affect the broadcast industry - for both radio and TV, and affecting the growing on-line presence of broadcasters. The FCC, Congress, and other government agencies are never afraid to provide their views on what the industry should be doing but, unlike other members of the audience, they can force broadcasters to pay attention to their views by way of new laws and regulations. And there is never a shortage of ideas from Washington as to how broadcasters should act. Some of the issues discussed below are perennials, coming back over and over again on my yearly list (often without resolution), while others are unique to this coming year. Issues unique to radio and TV, and those that could affect the broadcast industry generally, are addressed below.

Television Issues

Spectrum issues have been the dominant TV concerns in past years, first with the digital transition, and more recently with the "white spaces" rulemaking and the proposals advanced as part of the [FCC's Broadband Plan to reclaim part of the TV spectrum for wireless broadband uses](#). These issues remain on the FCC's agenda, as do new issues dealing with the carriage of television stations by cable and satellite television providers. Specific issues for TV include:

Spectrum reclamation: The initial proposals for the reclamation of part of the TV spectrum for wireless broadband were laid by the [FCC's Notice of Proposed Rulemaking](#) released in November, looking at how the TV spectrum could be used more efficiently, and how incentive auctions encouraging some TV stations to vacate their channels could be conducted. Congress still has to pass legislation to allow such auctions, and it will probably also mandate a spectrum inventory to determine if the reclamation of the TV spectrum is really necessary to provide for wireless broadband needs. At the same time, some TV operators have begun to talk about television stations themselves providing broadband service with their excess spectrum. While Congress will probably act on the auction bills this year, and there will be much debate about the details of the reallocation issue, so don't expect final resolution of this matter in 2011.

White Spaces: The FCC [has authorized the operation of wireless devices in the television spectrum](#), resolving many of the concerns about interference to television operators by requiring all wireless users to protect operating TV channels in specific areas based on databases of

existing users, not on spectrum sensing techniques. But implementation issues still need to be worked out - including finding parties to compile and administer the databases to make sure that all existing spectrum users who are to be protected are registered. Expect action on these matters this year, but no actual white spaces use until after these implementation efforts are completed.

LPTV Digital Transition: While many members of the general public may consider the digital television transition to be complete, many Low Power TV stations and TV translators are still operating in analog. The FCC has [commenced a proceeding to require the transition of these stations to digital](#), suggesting that the transition be complete as early as the end of 2012. Expect controversy on this issue. Many LPTV stations feel that being forced incur the costs to covert to digital is premature and could imperil broadcast service, especially to rural areas and minority populations who rely on translators and LPTV stations, if spectrum repacking caused by any future repurposing of TV spectrum for broadband forces further technical changes. These issues will be considered by the Commission this year.

Retransmission Consent Reform: At the end of 2010, there was much controversy over retransmission consent issues, as there were instances where broadcasters and cable operators and other multichannel video programming distributors had difficult negotiations over the carriage fees to be paid to the TV stations. FCC sources stated at the end of the year that a proceeding will be initiated to determine if the rules governing the negotiation process should be changed. The multichannel video programming distributors and some public interest groups argue that the FCC should protect viewers who may have their TV service disappear if a TV station does not reach a deal with a MVPD, while the broadcasters argue that the ability to remove the station is the heart of the negotiation, and removing the risk of the MVPD losing the right to carry the station would negate the negotiation. Look for this proceeding to commence early in the year but, as it will no doubt be very controversial, it may take some time to resolve.

DMA Boundary Issues: The FCC has also [begun a proceeding](#) to look at **DMA boundaries** that cross state lines to see if every television viewer should be guaranteed to receive service from cable or satellite providers of a station in his or her state. Television stations fear that this guarantee could upset traditional television markets, and could have an impact on retransmission consent negotiations in border counties. Comments in this proceeding are due on January 24th, 2011.

Radio Issues

Radio has fewer unique issues on the front burner in Washington, but at least one is of incredible significance - the performance royalty. Here are some of the issues facing radio broadcasters:

Performance Royalty: Even though the performance royalty will have to start from scratch in the new Congress after dying in the Congressional session that just ended (despite having cleared both the House and Senate Judiciary committees for the first time), advocates of the royalty have made clear that they will be pushing on this bill again in the new session of Congress which began this week. Look for the settlement talks with the NAB to restart now that everyone has returned from their holidays. As with most issues, this is not an easy one, as the NAB put what many broadcasters thought was [its best deal on the table](#) in the Fall, only to have that deal rejected out of hand by the pro-royalty forces. So don't look for any quick resolution of the issues this year.

LPFM/FM Translator Issues: At the very end of 2010, Congress passed the long-delayed [legislation clearing LPFM stations to operate on channels that are third-adjacent to full power FM operations](#). Look to the FCC to adopt rules to implement this legislation, and to finally resolve the issues of what to do with the FM translators left from the 2003 translator window.

General Broadcast Issues

There are numerous issues before the FCC that affect both radio and television broadcasters, some of which have been pending for many years, ripe for resolution, while others are raised in proceedings that are just beginning. These include:

Multiple Ownership Rules Review: Last year, the FCC issued its [Notice of Inquiry to start its Quadrennial Review of the FCC's ownership rules](#). Broadcasters hope that the FCC looks at the relaxation of small market duopoly rules for television and the sub-caps (limiting the number of AM and FM stations that one party can own) for radio, while some public interest groups are seeking tighter rules on ownership, including potentially cracking down on shared service agreements in television. While the FCC had hoped to have this proceeding close to resolution by this point, the Commission has yet to even issue a Notice of Proposed Rulemaking setting out specific proposals, as certain academic studies on which the FCC planned to rely in making conclusions about the media marketplace, have been delayed. Delay in resolving ownership issues should really not be a surprise, as the appeals of the 2003 FCC decision revising the ownership rules, and of the FCC's decision in 2007 slightly relaxing the broadcast-newspaper cross-ownership rules, are still pending. Look for more action in this proceeding, though probably no decision, this year.

Localism Rules and the Future of Media: FCC's proposals to impose specific rules on how broadcasters serve the public interest, advanced in its "localism proceeding," are over 5 years old. [The rules that it adopted for television stations](#) mandating on-line public files and detailed reporting on the quantity of news, public affairs, local programming, civic programming, election programming, independently produced programming and many other categories of

programming, were adopted over 3 years ago, but have never become effective. Some had thought that the FCC might be spurred to final action on some of these proposals after its [special task force on the Future of Media](#) issued its report as to how media should best serve the needs and interests of residents of their communities. That report was supposed to have been issued by the end of 2010. Obviously, that target was not met, so the consideration of all the localism issues seem to be stalled. But don't be surprised to see that report in the first part of this year, spurring more FCC discussion about these issues - though probably in the form of further comments on the meaning of the report and the impact of its findings on these pending proceedings.

EEO Rules: The FCC recently [issued some fines for EEO violations by broadcasters](#), but there are fundamental issues about the FCC's policies that have not been addressed in the 7 years since these rules were first adopted. Proposals to extend the rules to part time employees, and to require the filing of FCC Form 395 (the form that classifies all employees by race and gender), are still pending. Also pending are proposals sought in requests for reconsideration of the adoption of the EEO rules that would make the EEO rules comport with today's reality - such as the proposals to allow Internet-based EEO recruiting. More recently, minority organizations [suggested that the enforcement of the rules be suspended](#) until they could be made tougher, as these organizations did not believe that the rules were sufficiently stringent to encourage diversity in the broadcast workforce. Maybe this will be the year that some of these outstanding issues are finally resolved.

Political Rules: As more and more money makes its way into the broadcast marketplace for political advertising following the Supreme Court's [Citizens United](#) decision, some have suggested that a comprehensive review of the FCC's political rules is in order. These rules were last reviewed almost 20 years ago, and since then, there have been major campaign reform acts (e.g. the McCain-Feingold campaign reform act or BCRA), and significant Supreme Court decisions repealing portions of that Act. Sales practices at broadcast stations have also changed, and the FCC has a [long-outstanding proceeding](#) on how Internet-based ad sales of remnant broadcast advertising inventory affect lowest unit rates. With this being an off year before what will no doubt be a huge political year in 2012, if the FCC is going to review the political rules, this would be the time that it should be done.

Many other issues may be decided through Court actions. We just saw [a ruling on indecency issues](#) this week, and the appeals on that subject may well bring the issue back to the Supreme Court. So expect more thrashing about on indecency this year, as a final court decision will likely be some ways down the road.

While not really DC issues, copyright proceedings to determine ASCAP and BMI rates for both radio and TV could also be important. Renewing old agreements or, particularly for radio, the [potential reduction of obligations for music royalties](#) to these organizations, are likely to be the subject of litigation that will take place this year. Noncommercial broadcasters may also have to assess these issues, as the Copyright Royalty Board has just issued a notice commencing a proceeding to decide the royalties paid ASCAP, BMI and SESAC by noncommercial broadcasters for the next 5 years.

With their online activities becoming more and more important to broadcasters, actions that could affect advertising and on-line programming become ever more important. One of the major areas likely to be considered this year that could affect online businesses is in the area of privacy regulation. Both the FTC and the Commerce Department recently issued proposals for privacy regulation (see summaries of these reports from our firm's *Broadband Law Advisor Blog*, [here](#) and [here](#)), and Congress has been considering this area as well. Look for more action here, and assess its potential impact on Internet advertising, recommendation software and other business practices.

These are but some of the legal and regulatory issues that will be facing broadcasters in the upcoming year. Each year, we make these predictions, and there are always numerous other issues arise that we did not anticipate. So watch the trade press and the pages of this blog to see what trouble Washington can make for broadcasters as this year progresses.

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