Continuing Travel, Contracting Limits

FCC Seen Being Hit Hard in Any Government Shutdown

The FCC likely would again be hit hard in any government shutdown, though it's escaped some of the continuing impact of the budget sequester, said agency and industry officials in interviews this week and last. They said that as a fee-funded agency with a large amount of its $300 million-plus annual budget spent on labor, the commission continues to avoid furloughs. That's unlike some other parts of the government, where employees have been forced to take days off during the ongoing sequester.

The commission likely would see a return to December 1995 and January 1996, the last time it was shut down because there was no budget, if a continuing resolution doesn't pass by Monday, said current and former agency employees and industry officials and a budget expert. The building was unheated then, and commissioners at first were the only eighth-floor employees exempt from a requirement they not work, recalled then-FCC member Susan Ness. Eventually during the several-week government shutdown, each commissioner office could have one additional staffer, and some auction personnel also worked (CD Sept 25 p1), said the Democrat, who now is a communications policy consultant and senior fellow at Johns Hopkins University's School of Advanced International Studies.

"It was freezing cold because the heat hadn't been turned on in the building," said Ness. "So we were literally sitting there with blankets to keep warm. On the other hand, you didn't get a lot of phone calls. You could read a lot." Agency personnel have largely been in the dark in recent weeks about contingency planning, though they expect to soon hear more, said several staffers. Acting FCC Chairwoman Mignon Clyburn, "hopeful" the agency...
won't "be faced with" a shutdown, said the Office of Managing Director is "working closely with the Office of Management and the Budget to make sure proper procedures are followed." The agency will continue to keep employees "informed," she told reporters after the agency's monthly meeting Thursday. "We're engaged — we have a plan. Unfortunately, this is not the first time we've been faced with this so we do have a plan that we are familiar with."

Behind-the-scenes planning appears to have begun, though no plan has been shared with career employees, said several agency officials including the chapter president of the commission's main union. The National Treasury Employees Union, representing about 1,200 of the agency's approximately 1,700 staff, hasn't been told by commission brass what to expect in a shutdown, but expects to hear soon, said Ana Curtis, a Wireline Bureau lawyer and president of the NTEU's FCC chapter. "I think pretty much they'll follow what they did last time. I don't think they'll make too many changes in terms of who is an essential employee," she said of now versus 2011. "The agency doesn't have too much leeway about that." That means only employees doing what's considered essential to safety and life can stay, said Curtis.

Delays getting licensing renewals, deals approved and what Wilkinson Barker radio lawyer David Oxenford called a "long-awaited" filing window to seek low-power FM stations all could occur if no budget deal is reached, said Oxenford and other attorneys. Licensees with expiration in the next few months should "get their renewal applications in BEFORE October 1 to avoid the possibility of losing their operating authority for the duration," wrote communications lawyer Donald Evans on the blog of his law firm, Fletcher Heald (http://bit.ly/18sijCy). "FCC filings would also probably be put on hold (and one wonders if the electronic filing system would even be available for preparing drafts of applications that would be filed once the government reopened)," wrote Oxenford on his blog Thursday (http://bit.ly/16MxKlr).

Other agencies in the communications field would be affected differently, according to experts and planning documents those agencies issued in 2011 when there were fears another continuing resolution would have expired without new funding. The U.S. Patent Office and Trademark Office, like the FCC also funded by fees and not hit by furloughs, would have been able to keep all of its then 10,363 staff in 2011 because their compensation was funded by money that didn't come from an annual appropriation, said a Commerce Department plan (http://1.usa.gov/17571nr). A PTO spokesman had no comment. Four NTIA employees, about 1 percent of the total, would be considered exempt from having to stay home during a shutdown, according to Commerce's 2011 figures. An NTIA spokeswoman had no comment.

"The Administration strongly believes that a lapse in appropriations should not occur," said a Commerce Department spokeswoman by email. "There is enough time for Congress to prevent a lapse in appropriations. The Commerce Department is still in the process of updating our plans." The OMB "is working with agencies to take appropriate action" in case of a funding "lapse," said a spokeswoman. "This includes agencies reviewing relevant legal requirements and updating their plans for executing an orderly shutdown, as outlined in the guidance OMB issued last week. This planning is consistent with what was done in previous instances where a potential lapse in appropriations was approaching." The FCC seems to be taking a page from its 2011 playbook and is likely to be mostly shut down, said Curtis.

The FTC's plans from 2011 would have exempted as many as 280 employees, or 23 percent of the total, "to protect life and property through the prosecution of enforcement actions," said that agency (http://1.usa.gov/190Kqw). Because of fees paid by those seeking transaction approval under the Hart-Scott-Rodino Act, the agency is at least partly funded by such money, said a veteran antitrust lawyer. If
the act's pre-merger notification process were disrupted during any shutdown, "that would be a big impact on anyone who practices in the mergers and acquisitions area, and on any" company conducting M&A, he said. An agency spokesman had no comment.

The main way the FCC has been affected by sequestration is in having to drastically cut back employee travel, said agency officials. Staff sometimes participate in conferences from afar using videoconferencing technology such as Skype, and in potentially spending less on contracts, they said. Furloughs haven't happened, said agency officials. That's a key difference for agencies that like the FCC, Patent Office and FTC are at least partly funded by user fees, said a budget expert. "They are clearly less affected by constraints than agencies that are not directly getting user fees," said Ron White, director-regulatory policy at the Center for Effective Government, which seeks government transparency. The sequester has been much easier on those agencies because "they have the other source of income" besides appropriations, he said. "Agencies, even with user fees, that require an appropriation via Congress for funds would in fact be affected except for exempt personnel" during any shutdown, said White.

OMB and the Office of Personnel Management told agencies to have supervisors "informally communicate with employees" about whether they're likely to have to stay home or can come to work during a shutdown, said NTEU President Colleen Kelley in a written statement Thursday. "This process is expected to take place in the next 24 to 36 hours." Agency shutdown plans likely will be posted online by OMB and on agencies' websites by Friday afternoon, she said. — Jonathan Make (jmake@warren-news.com), John Hendel, Monty Tayloe

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LPFM Window Approaches as Government Faces Fourth Day of Shutdown

Applicants Already Affected

LPFM Supporters Worried About Looming LPFM Filing Window Amid Government Shutdown

Blocked access to the FCC’s website and databases due to the government shutdown is already having an effect on low-power FM hopefuls, LPFM advocates and attorneys said. A canceled webinar that was scheduled earlier this week and a lack of tools that are otherwise available on the agency website are raising concerns among some applicants as they try to polish their applications, they said.

Applicants are having difficulty accessing their applications on the Consolidated Database System (CDBS) website, said Todd O’Boyle, a program director at Common Cause’s Media and Democracy Reform initiative. "Several of these applications face problems," he said, "so hopefully the commission can extend the window or make some accommodation for applicants that are shut out right now."

If the shutdown continues for long, the window will be imperiled, said David Oxenford, a full-power and translator radio attorney at Wilkinson Barker. Applicants have no access to FCC databases, including the CDBS LPFM finder tool that allows them to see where stations might fit, he said. And "they can’t even start to fill in their applications, as the application filing database is off-line," he said.

The delay's impact depends on the length of the shutdown, said Matt Wood, Free Press policy director. "It will depend on whether the shutdown ends a week before the window's supposed to open on Oct. 15, right before Oct. 15, or at some point well after that important date." Even if the commission would like the window to open as planned, it remains restricted under the shutdown, he said: "I trust that the FCC
staff has a lot of the groundwork in place to go ahead right now — but no matter how good their plans are, the [Media] bureau won't be able to carry them out if they're locked out of the building."

Even if the shutdown doesn't continue through the filing window, the FCC’s efforts toward LPFM implementation will be slowed down, said Tracy Rosenberg, Media Alliance executive director. There will be some applicants who don’t have help from engineers, attorneys and others with FCC experience, she said. For those applicants, "anything that interferes with the ability to get prompt assistance from the FCC is going to result in applicant discouragement and in mistakes in applications," she said. The Media Bureau has acknowledged that the Local Community Radio Act means community organizations that are not used to dealing with the FCC "in the way that larger media institutions have folks on staff who know the ropes," she said. "There are folks inside the bureau who have been thinking about the things they can do to maximize accessibility and communication," she said. "The work that they’re doing in one way or another is going to be delayed by the shutdown."

The Thursday webinar was intended to be a Q-and-A period (CD Sept 23 p16). It would have been very useful, said Sanjay Jolly, policy director for Prometheus Radio Project. "Because these are local organizations, these are not the most policy-literate applicants." However, the webinar probably wasn’t absolutely necessary, he said. "If you don’t have your act together now, you’ll be very hard pressed to get your act together within two weeks of the window." Most applicants likely are prepared by now, Wood said. But "the shutdown and loss of the webinar clearly are disruptive," he said. "The purpose of community radio is to empower new communities and voices, so the loss of these opportunities to learn about the application process is just another unfortunate side effect of the current stalemate."
The webinar was critical because a lot of groups remain on the fence, said Rosenberg. "The availability of resources like that is a really important part of the process for groups deciding to go forward rather than, at the last minute, concluding that they don't have the resources and knowledge and experience as much as they like the idea," she said. It was scheduled for a reason and applicants may need to address remaining issues, said O'Boyle. For many applicants, "this is the final polish stage and they want to make sure their applications are really top-quality," he said. "This is a really critical time to make sure that whatever outstanding changes or revisions need to be made do get made."

The media policy professionals said they expect the commission to figure out a solution. If the shutdown greatly interferes with the FCC's ability to respond to applicants, there should be an error correction period or an extension, Rosenberg said. "It's not 100 percent realistic that every community group in the country can file a flawless LPFM application the first time out," she said. "All in all, it would not surprise me if the window is extended," Oxenford said.

Setting up an automated window could be a possibility, said Jolly. But it's unclear how confident the bureau is that it can do so without any significant personnel on hand to deal with complications, he said. Given the Oct. 17 debt ceiling deadline, "folks are pretty confident that the FCC will be back in line before then," Jolly added. The Media Bureau couldn't be reached for comment. — Kamala Lane (klane@warren-news.com)
Shutdown Effect on Law Firms Will Only Get Worse as Time Goes On, Lawyers Say

The partial federal government shutdown, in its fourth day Friday, is raising varying levels of anxiety among members of the communications bar. The shutdown's effects rippled through the Washington area last week, giving most federal workers an unexpected, possibly unpaid, vacation, and raising some fundamental questions for those whose business is dealing with the government.

Further adding to problems lawyers face, the FCC unexpectedly took almost all filings and other documents offline for the duration of the shutdown, a much more draconian response than many federal agencies (CD Oct 3 p2).

The lawyers we interviewed cited a number of variables, including whether most clients are on retainer, which is more common for those who do legislative work than regulatory work. Most regulatory work is done on an hourly basis, with no set monthly payment.

“A couple of weeks you can make up, there’s three months to go in the year, but it starts to hit your bottom line if it goes longer than that,” said a wireless industry lawyer. “You won’t be able to make it up.” A lengthy shutdown would hurt, a broadcast lawyer said. “I don’t think anyone would feel it right away, but you can’t access the FCC website, you can’t file things,” the lawyer said.

Workshops get postponed. It certainly will have an impact on the legal and consultant community, no doubt about that.”

Other lawyers already are feeling the impact. “From my perspective, the shutdown has had an immediate and adverse impact,” said Scott Harris, managing partner at Wilkinson Barker. “We and our clients work with the commission and other government agencies every day — and dozens of meetings and filings have already been postponed. Perhaps even worse, the ongoing preparation for critical international meetings has come to a halt. The bottom line is that there is no sector of the economy that moves more quickly than the communications and technology sector and the government shutdown has already thrown sand in the gears.”
Some "workarounds" are possible if the FCC website stays down, said longtime wireless lawyer Mitchell Lazarus of Fletcher, Heald whose firm subscribes to various services that offer documents online, though they don’t have all the information normally available. “I agree that having the webpages inaccessible is a hindrance,” he told us Friday. Lazarus warned of a looming problem — that all filings that fall due during the shutdown will be due the day after the day the government reopens. “We won’t get access to the information we need to prepare some of those filings until the day the FCC reopens. We could have a backlog,” he said.

“Our main concern is for the clients who can’t get their renewals and who can’t get their equipment authorizations promptly and if this drags on for a long time it’s going to impact their business significantly,” Lazarus said. For example, he pointed to a client that manufactures handsets, which require FCC approval. “If we don’t get the FCC working again it’s going to impact their rollout of the next generation of handsets,” he said. Until the agency reopens, lawyers also won’t have access to the so-called knowledge database (KDB), with its interpretations of various rules on equipment authorization. “They become a body of common law, in effect,” Lazarus said. “If you have a question about how to test a kind of device, or what standards apply to a particular kind of device, you look it up in the KDB and very often the answer is there, except the KDB is not available.”

Another lawyer compared the shutdown with “a cold, as compared to a bad case of pneumonia.” A shutdown of a couple of days is “mainly an annoyance,” only negligibly affecting billable hours, said Chris Savage, co-chair of the communications practice group at Davis Wright, with the main problem at the moment being an inability to get FCC clarification about the meaning of some of its rulings. For example, just before the shutdown, the Wireline Bureau assessed five wireless Lifeline service providers $14.4 million in notices of apparent liability (CD Oct 2 p1). “It’s not clear at all, from what they released, what methodology they were using to identify the people they think of as duplicates,” Savage told us. In the normal course of business, an attorney would phone bureau staff and ask how they determined the duplicates. “We can’t do that.”

“It’s a pain in the neck, but it’s not doing anything terrible yet,” Savage said. When will it be terrible? “That depends on when’s the first due date,” he said. In the case of the Lifeline fines, responses are due 30 days after the bureau filed its NALs. If the shutdown lasts that long, responses would be due the next business day after the commission opens. If lawyers have to respond without knowing precisely how the FCC made a decision, “that would be a problem,” Savage said.

The 1995-'96 shutdown meant a "huge financial hit" for Bennet & Bennet, which represents small carriers and other clients," said Carri Bennet, and it took several months to recover. "The single biggest thing that helped the most in our recovery back then is that Congress passed the 1996 Telecommunications Act in February of 1996 that created a lot of innovation and competition in the industry and a huge amount of work for consultants and lawyers,” Bennet said, but she doesn't see anything like that this time around. “When we do get back to work, we hope the FCC will try to make up for lost time. We feel for the FCC staff. They work hard and will be asked to work even harder on their return. I hope they are resting up for what comes next.”

The down website and filing systems have an immediate impact on some projects, agreed Peter Shields, managing partner at Wiley Rein, but “we always have ongoing projects that don’t involve any of that,” he said. Wiley’s attorneys are in constant contact with their clients, helping them shape policy positions, working on transactions and assessing possible litigation, he said. To the extent clients can’t deal
with the government, they’ll focus on other priorities, and other aspects of regulatory issues, he said. Still, Shields worries about the impact on clients if the shutdown continues, and if clients want to implement something that involves meeting with the government. But because it’s only a few days in, “we’re not really feeling that yet,” he said. “We’re very diversified.”

But John Nakahata, head of the telecom practice at Wiltshire Grannis, said things will be fine as long as the shutdown doesn’t drag on. “I don’t see even a month-long shutdown as having a significant impact on the work that our firm needs to do,” he said. “For instance, we’ve got to get ready to file comments on various things, E-rate, for example, when the FCC opens, and that means we’ve got to do the work that we were going to be doing anyway during this time period on those types of matters. ... If they were closed for four or five months it would be a different thing, but that’s not going to happen.”

One lawyer told us that her firm will feel less of an impact because it represents enterprise customers, not traditional carriers. “But even end users (and so our workload) is affected by the shut down because: Routine corporate re-structuring or acquisitions require FCC approvals for things like transferring private radio licenses; The FCC’s dispute resolution work and mediation services are used by enterprise customers, for faster action on disputes with their service providers,” said Colleen Boothby of Levine, Blaszak in an email. “Those can’t go anywhere for now; There are huge dollar issues hanging fire in rulemaking dockets — like re-vamping the USF contribution method, fixing special access, clarifying when services are regulated or unregulated — that hit business customers hard until they’re fixed.”

For Alan Tilles, chairman of the telecom department at Shulman Rogers, the problems have already begun. “The impact of the commission being out of business for the time being is extreme for us, because there’s a lot of things that we do on a daily basis with the commission that we can’t be doing right now for our clients.” Tilles represents wireless clients, including radio manufacturers, utilities and transit agencies, and hundreds of public safety agencies. Shulman attorneys use the FCC’s Universal Licensing System (ULS) database “on an hourly basis, literally,” Tilles said. With the website down, they can’t query the ULS to determine expiration dates and license history, or to file applications to acquire licenses. “That’s very significant for a public safety agency that needs to fix a coverage issue, or to expand or upgrade their system,” Tilles said.

A shutdown that lasts a couple of days is an “inconvenience,” Tilles told us. Anything longer could have a “very dramatic, serious impact on business and public safety.” The inability to research and pursue new licenses “keeps the daily business of what we do almost at a standstill,” he said. And every day that passes could increase the risk to public safety, he said. Shulman recently prepared a waiver request for a municipality to move a transmitter site to cover a part of the city that lacks adequate coverage. With the shutdown, that application is on hold — and spotty coverage could turn life threatening. “Every day you roll the dice, when you have a coverage problem, that there will be something there,” Tilles said. “The more days you roll the dice, the greater the likelihood that you’re going to crap out.”

“Any pain inflicted on Washington law firms pales compared to the pain afflicted on many others,” said Pantelis Michalopoulos, head of the telecom, Internet and media practice group at Steptoe & Johnson. To Michalopoulos, the main import of the shutdown is his attorneys’ inability to seek informal guidance from the agencies, bureaus, and by working with the general counsel’s office. Sometimes Steptoe attorneys need to confirm their views on what a certain law or practice is, or they would like to get the agency’s informal view before proceeding, he said. Of course, ex parte meetings to advance their clients’ interests aren’t possible when the agency is shut down, he said. The lack of access to filed comments in the Elec-
tronic Comment Filing System also hinders them. “It’s important to know what people said, in order to give advance and assistance,” he said. “We’ve actually had this precise problem in the last two days.”

Shutting the website didn't need to happen, said one telecom attorney. “In terms of working on existing projects, it’s like having the rug pulled out from under you,” he said. Attorneys have to spend a lot of time looking around for different sources of information, rather than getting it from the FCC’s site. It’s a “universal” sentiment among attorneys, he said. “Was it really necessary for the government to take down websites? Its seems like that’s an affirmative step that makes things less efficient.”

“You’re keeping busy, but in a different way,” said David O’Neill, partner at Rini O’Neill. O’Neill can’t file KidVid reports, or even prepare them beyond rough drafts that are missing a lot of information, he said. Without access to the FCC’s Consolidated Database System, he can’t look up ownership reports, applications, construction permits or license information. Transfer of control applications can be prepared, but not filed. “You can only do so much prep,” he said. O’Neill says he’s fortunate to be working on an asset-purchase agreement now, which will take a few weeks to complete. He’s also working on a few responses that will be due when the commission re-opens. The shutdown isn’t really affecting billables just yet. “It’s a huge inconvenience, but life goes on,” he said. “Talk to me in a month — it may be a different story.”

The pain hasn’t really hit yet, but it could, attorneys told us. Some clients have received special temporary authority permits to operate variances to their licenses. If those expire next week — and the agency is still closed, not accepting filings — what happens then? What about deals that have to get filed in October to close by the end of the year? The longer the shutdown lasts, the tighter their windows for closing deals, and the more uncertainty they face.
“I think we’re all fielding a lot of questions from clients as to what it means and what about my deadline that’s due next week and what about a transaction and what’s going to happen with the shot clock,” said Gerard Waldron, who has a variety of energy and communications clients at Covington & Burling. “There’s lots of uncertainty as to what it means. ... At this point it’s sort of a lot of procedural and technical issues.” Waldron said the FCC’s taking its website down “in the short term” is “as disruptive as anything.”

A wireline lawyer who doesn't represent carriers guesses that “at least the companies selling searchable data bases of FCC regs and decisions, like BNA and Lexis, are happy now — the FCC website is down so they have no competition.” — Howard Buskirk, (hbuskirk@warren-news.com), Matthew S. Schwartz, (mschwartz@warren-news.com)
DOD'S 1755 MHz PLAN gave new hope to efforts to make band available for commercial use, T-Mobile's Steve Sharkey says. (P. 1)

CABLE CONSOLIDATION must be paired with jointly developed services for scale needed to combat rising content costs, Malone says. (P. 2)

AEREO DODGES INJUNCTION following 2nd Circuit win. A circuit split could pave way to Supreme Court. (P. 4)

FCC SMARTPHONE APP that collects anonymized location data raises eyebrows among some privacy advocates. (P. 6)

SUSPEND TERRORISM FINANCING treaty because of NSA spying, European lawmakers tell EC. (P. 7)

FTC STAFF SHORTAGES could hurt economy, say lawyers, industry representatives. (P. 9)

TECH FOCUS, DISBANDMENT urged by many in W3C's DNT working group. (P. 12)

TELECOM NOTES: Shutdown in equipment approvals could be biggest FCC problem tied to shutdown, Hogan says ... Verizon/Vodafone discussions started two years ago. (P. 15)

Delayed FTC Investigations Could Cause Case Dismissals, Hurt Economy, Experts Say

Ongoing FTC litigation might be delayed or dismissed and industries could be permanently altered if the government shutdown drags on beyond a month, said lawyers, advocates and a former FTC chief of staff in interviews this week. The unavailability of the agency's website (CD Oct 2 p8) has already caused a commotion in the app developer community, said an industry representative.

Although FTC's shutdown memo "exempted" from furlough employees prosecuting current litigation and managing current and any incoming merger and acquisition filings, refusals by judges to allow extensions could soon strain FTC resources, lawyers said. If the shutdown eclipses a full month, defendants could start filing motions for case dismissals, said technology and communications lawyer Michael Hazzard of Arent Fox. If the short-staffed Bureau of Competition becomes unable to process a growing docket of M&A filings, various industries could undergo unalterable shifts, said an antitrust lawyer who is a former government official.

The Bureau of Consumer Protection has been staffed to manage its 75 cases currently in federal district courts during the shutdown, said the FTC shutdown memo (http://1.usa.gov/1946pkj). FTC attorneys have applied for stays in many of the cases, including the online marketing fraud case against Jeremy Johnson (http://bit.ly/1c5xeG9). Opinions vary on how lenient judges will be in granting stays. "My expectation is that judges will be very accommodating with these requests," Hazzard said. "For a while."

That "for a while" might only last another few weeks, Hazzard estimated. Judges overseeing FTC litigation are more likely
to grant a continuance or stay with an upper limit, such as “not to exceed 30 days,” Hazzard said. While month-long delays are not uncommon in federal litigation, if judges have "something coming up pretty soon and they’ve cleared out their calendars to have a trial,” it can be hard to reschedule on their packed docket, he said. The federal judge in the Johnson Case, Miranda Du, denied FTC’s petition for a stay (http://bit.ly/17jkLHe), citing that exact reason. There are a number of experts scheduled for questioning this month, and a delay of a few weeks could extend the case several months, wrote Du. "Further delay would work to prejudice the defendants, as well as consumers whose interest the FTC seeks to protect" (http://bit.ly/19xjahK).

The FTC also has an obligation to pursue its case, Du said. If other judges choose to grant FTC stays of longer than a month, a defendant’s counsel could file a motion to have a case dismissed on grounds the FTC is failing to pursue its case, Hazzard said. Think of it “in terms of prejudice,” he said. The defendant can argue, “Gosh, they just want to keep us under the weight of their thumb for an indefinite period, and we have no authority to defend ourselves,” Hazzard said. If that argument leads to cases being dismissed, “I think the right answer is to have that be a consequence of the shutdown,” he said. The public should see that people get “let off the hook because the government isn’t giving the FTC money to prosecute their cases,” he added.

But the FTC is unlikely to let cases slide, said Maryanne Kane, an antitrust lawyer at O’Melveny & Myers and former chief of staff to two FTC chairmen during President George W. Bush’s administration. “If they aren't given extensions, then they’re working” said Kane, who was with FTC during the last government shutdown, in 1995-'96. Though Kane has been receiving email bouncebacks from “key people” at the agency, saying they can’t respond until the government reopens, the agency has designated 96 of the Bureau of Consumer Protection’s 331 employees as necessary to handle the current cases on the docket. By a small margin, that’s the highest percentage of exempted employees in any FTC bureau or office. The shutdown memo stated the the bureau also “typically” has 15 to 25 open investigations close to being filed in federal court, though it’s unlikely any of those will be filed during the shutdown, Kane said.

"If you’ve got a deadline and it would adversely affect the agency, you can’t ignore it,” Kane said. That's why the FTC is still accepting M&A filings, several lawyers said. The agency is statutorily required under the Hart-Scott-Rodino Act to accept merger filings and respond within 30 days. The FTC has staffed its Bureau of Competition with 82 employees to manage the roughly 250 “active matters” on its docket, said the shutdown memo. Those employees have also been handling any new transaction filings, normally about 25 each week, the memo said.

The FTC’s M&A work has the biggest potential effect on the economy, Hazzard said. “They’re very cognizant of the impact they have on business." A completed deal can change product prices, alter staffing patterns, transfer intellectual property rights and dictate research and development decisions, said an antitrust lawyer. So although the Premerger Notification Office's website is down, the office has remained open, fielding calls and accepting filings through the mail or in person, said an office representative. Most premerger filings were already submitted via hard copy, not electronically, said communications transaction lawyer Lew Paper of Pillsbury Winthrop.

The shutdown could still cause M&A investigations to pile up, said several lawyers. A prolonged shutdown could leave returning workers with too little time to fully investigate a deal, creating "a big backlog," Hazzard said. The FTC could handle the glut by filing second requests for each pending deal,
said a former antitrust official. A second request requires companies to submit additional information, pausing the transaction and giving the agency time to complete its investigation.

Nothing prohibits the FTC from opening after-the-fact lawsuits to undo deals consummated before the agency could review the filing, Hazzard said. But that can be difficult, he added. One lawyer compared it to trying to unscramble eggs. Irreversible decisions get made during mergers, Hazzard said: Employees get laid off, intellectual property shifts hands. If those decisions hurt competition in an industry, the end result could be a loss to the economy, Hazzard said.

FTC’s website shutdown has already had a tangible effect on some industries, said Association for Competitive Technology Executive Director Morgan Reed. The FTC has staffed itself to handle ongoing litigation and merger filings, but shuttered its rulemaking, data gathering, and information dissemination components. Without access to FTC’s information on complying with the Children’s Online Privacy Protection Act, Reed said application developers ACT works with were unsure how to proceed with various projects in development. ACT helps 5,000 small- and mid-size app developers and information technology firms, often educating them on federal regulation compliance.

Developers flooded a 1,500-person ACT online forum asking where they could find COPPA compliance information after FTC pulled down its website, Reed said. The FTC’s website has the actual COPPA regulations and an additional 180 frequently asked questions to guide app developers. ACT spun off those COPPA-compliance questions into a separate thread. On Thursday of the shutdown’s first week, ACT posted (CD Oct 4 p12) an archived version of FTC’s COPPA-compliance FAQs (http://bit.ly/1a2xj8E). The association was worried app developers were pushing off projects or cancelling plans for new apps until they readily had access to COPPA-compliance information. “We understand the FTC has to be closed, but that doesn’t mean developers stop working,” Reed said. “The developer community needs this guidance to make apps that meet regulatory standards.”

ACT is reassessing its upcoming regulation compliance seminars in light of the shutdown, Reed said. The FTC frequently partners with ACT to conduct around the country webinars, town halls and forums for developers. With that component of the agency shuttered, ACT is receiving more requests for this type of information dissemination without the FTC as a resource or financial crutch, Reed said. “I think we’ll find we may have to answer more questions with, ‘We don't know.'”

Once the FTC reopens, some of the its data may be incomplete, Kane said. During the shutdown, the FTC isn't accepting any public comments or consumer complaints about the myriad issues it oversees, including drug advertising, pricing issues, data security breaches, identity fraud and telemarketing. “Will some of the consumer callers not bother to report their complaints in a couple of weeks? Maybe,” Kane said. “I think some people will find other places ... So [the FTC] may lose data and have incomplete records.” Technology Policy Institute President Thomas Lenard cautioned that the FTC’s self-reported data isn't “tremendously useful” because it lacks systematic collection procedures. Lenard said he doesn't rely on FTC data when researching privacy issues, for example.

The lingering effect on the FTC itself might be lowered morale, Kane said. She recalled FTC’s roomy Washington headquarters during the 1995 shutdown as “like being there the day after Thanksgiving — very quiet and very alone.” Isolated FTC workers are in a position where they are dealing with severely restricted staffing while watching other federal litigating agencies like the SEC remain at full capacity, Kane said. SEC’s appropriations language gives the agency access to any carryover funds at the
end of a fiscal year in the absence of Congressional appropriations, said an SEC spokesman. Kane said she thinks "the biggest frustration for someone who is not working [at the FTC] is that they feel as if their work is not valued as much as they value it." — Cory Bennett (cbennett@warren-news.com)
With Site Shuttered, FCC May Have to Grant Waivers for Missed Filing Deadlines During Shutdown, Lawyers Say

With many filing deadlines already having passed since the partial federal shutdown began Oct. 1, and more looming as the closure enters its third week Tuesday, the FCC potentially faces a land rush of comments the day after the government reopens. Unlike many other government sites, the FCC’s website was shuttered the day the government closed, cutting off access to documents lawyers and others need to prepare filings at the commission, especially reply comments. Several industry officials told us Friday they expect the FCC to grant a blanket waiver for all filings that came due during the closure.

It remained unclear at our deadline when the shutdown will end. The shutdown is the first major one for the FCC in the electronic filing era. The last major closing was 1995-1996 when law firms still sent staff to the FCC to copy paper documents, several former FCC officials said.

“The lack of access to the FCC website and previously filed comments makes it extremely difficult to prepare reply comments in particular,” said Michael Calabrese, director of the New America Foundation's Wireless Future Project. “Everyone has come to rely on ECFS as the repository for all notices and comments. For example, reply comments are due Tuesday on 1755 MHz auction rules, but we cannot see comments filed by the other parties. I expect the FCC to extend all existing deadlines by at least the length of the shutdown period. The commission may also need to either shorten the sunshine period, or delay the October open meeting, since there has been no opportunity for the usual pre-meeting interaction.”

“The commission is well aware of the problem, so I fully expect that there will be some sort of blanket extension period to allow for filings that were due, and to provide time for replies to those filings,”
said public interest lawyer Andrew Schwartzman. "The shutdown of the commission's website has had a paralyzing effect. For years now, there has been no need to collect hard copies of various comments and other filings because they are available on demand via the FCC's web site. Those of us with fewer resources have been especially hard hit, since we cannot afford to subscribe to private services that have at least some of the materials available. Recently, for example, a question came up about a recent commission order. I had to inquire of my friends and colleagues as to whether any of them happened to have downloaded the relevant document. It took me several hours to locate it."

Among the due dates that have passed or are coming up are deadlines on two major transactions. Oppositions to petitions to deny on AT&T/Leap were due Oct. 7. Comments are due Oct. 18 on a public notice on the foreign ownership implications of Verizon’s bid to buy Vodafone’s 45 percent of Verizon Wireless, the biggest telecom deal in history at $130 billion.

A former FCC spectrum official who represents wireless clients including carriers said the shutdown of the website has created problems that could have been avoided if information had been left online. “The fact that the FCC did what it did does sort of create the conditions that would justify granting extensions, especially in notice and comment rulemaking proceedings where the comments were just recently filed, but no longer available on the FCC’s website,” the lawyer said. “It has the potential to delay resolution of transactions, which is never a good thing, because there’s no information about the transactions available now. It has the potential to delay a lot of stuff that doesn’t have to be delayed.”

“I anticipate that there will be a slew of extension requests particularly for reply comments,” said John Nakahata, head of the telecom practice at Wiltshire Grannis. “The inability to access ECFS without notice makes it very hard to write reply comments.”

Angela Giancarlo, a partner at Mayer Brown and former chief of staff to Commissioner Robert McDowell, said she would understand a waiver to extend a deadline for filing reply comments because of the website's shutdown. With respect to initial comments, however, “if the government is open on the filing date, parties should not rely on a receiving a waiver,” Giancarlo said. “Get your work done and file it. ... Any professional would have his or her filing as complete as possible, file it on time, and maybe put a sentence or two in there up front requesting the right to make a supplemental filing in the event of any changed circumstances due to the shutdown.”

“I'm hopeful reason will prevail and they will give a blanket extension for some reasonable amount of time, like a week, for any filings that were due during the shutdown and for any filings that were due a day or two after the shutdown,” said Harold Feld, senior vice president at Public Knowledge. “They may also want to try to figure out how to stagger things so there isn't an overload on the first day or two. Since the commissioners are working, they can be thinking about this and have something ready to go as soon as they return. “ Feld said “ideally” the FCC will put up an alert on its webpage as soon as the government reopens explaining what’s next. “The question is what happens with statutory deadlines, which the commission does not generally have the discretion to move,” he added. “The general rule is that if it is impossible to file because some unpredictable event, like a snow storm shutting everything down ... the obligation fell on the first available day with no discretion to move it.”

“It is indeed difficult to prepare replies if you don't have the initial comments in front of you, and it's rather hit-or-miss in terms of whether you've downloaded those comments,” said Free Press Policy Di-
rector Matt Wood. "I'm sure some practitioners still do that as a rule, or may have done so in advance of
the website shutdown, but I'm sure it's not uniform throughout the communications bar. As for exten-
sions, the FCC famously notes that extension are not routinely granted, but of course the current situation
is anything but routine."

Mitchell Lazarus of Fletcher Heald said in a blog post last week the longer the shutdown goes on,
the worse the chaos when the government reopens. Things will be a mess even if an agreement is reached
immediately and the government reopens Wednesday, Lazarus said (http://bit.ly/17uceBn). "Eleven days’
worth of filings will all come due on Thursday," he said. "Filings that have no due date — new applica-
tions, waiver requests, you name it — will have piled up in people’s offices during the shutdown, and
likewise all come pouring in. But now suppose you file a routine request the next day, Friday. Whatever
the processing time usually is, you can count on it being much longer. Think about it: you are stuck in
line behind eleven days’ worth of other people’s requests on which the FCC has not yet started work. If
the system worked with perfect efficiency, you might expect your request to take eleven days longer than
usual. In practice, we’re betting the added time will be considerably greater."

Oct. 8 was the statutory deadline for the FCC to release new rules for making user interfaces and
program access guides accessible under the 21st Century Communications and Video Accessibility Act
(CVAA). Though missing the deadline puts the commission in violation of a federal law, Constantine
Cannon CE attorney Robert Schwartz said Congress is unlikely to throw the book at the FCC. "They have
a good excuse this time," he said. "Staff had been working tirelessly both internally and with stakeholders
to meet the deadline, but the shutdown stopped them in their tracks," said CEA Vice President Julie Kear-
ney. Oct. 8 also was a deadline for e-readers, and a waiver request remained pending amid the shutdown
even after the rule was to have taken effect. (See separate report in this issue.)

The Oct. 8 deadline for Web browsers on mobile phones to be made accessible for the visually im-
paired — also part of the CVAA — also passed during the shutdown. American Council for the Blind Di-
rector-Advocacy and Public Affairs Eric Bridges said he believes Microsoft, BlackBerry and other manu-
facturers may not be in compliance with the FCC's rule, but there's not much to be done about it. With the
FCC out, "there's not an enforcement body active" to inform about the problem, he said. "We're waiting
for the commission to get back." The ACB may file something about the compliance issues with the rule
when the FCC returns, he said.

Reply comments on TiVo's petition to reinstate some CableCARD rules stripped away by the
courts were due Oct. 9. An NCTA spokesman said the deadline delay doesn't have much effect
on filing comments. "It doesn't really change the policy; when the government reopens we'll push
ahead," he said.

In the Wireline Bureau, replies were due Oct. 7 on a petition by Video Relay Service provider Pur-
ple seeking clarification of a statement in the VRS Reform Order. A footnote in the order said “calls that
are completed using a technology that does not provide both inbound and outbound functionality are not
compensable” from the Telecommunications Relay Service Fund. Purple wanted clarification that the
footnote doesn’t apply when users access IP Captioned Telephone Service (CTS) through Web and wire-
less services. If it did apply, Purple and other IP CTS providers would stop providing IP CTS using Web
and wireless applications because, Purple said, “there is no technology currently available that allows in-
bound IP CTS over Web or wireless technologies to be captioned without some intermediary step.”
Several comments are due this week at the Wireline Bureau. Reply comments are due Wednesday on the NPRM seeking to modernize the E-rate program. The original round of comments drew more than 700 responses. The International Society for Technology in Education said in a notice to its members that it would accept comments from its members who want to file comments while the FCC’s comment filing system is down (CD Oct 7 p10). An ISTE official told us the association of educators has collected more than 100 comments that it plans to file when the FCC reopens.

Comments are due Thursday on the National Exchange Carrier Association’s 2014 modification of the average schedule universal service high-cost loop support formula. On Friday, comments are due on the FNPRM on how to revise the current rate methodology for IP CTS providers.

Nonprofit organizations that want to apply for low-power FM stations are being hindered by the shutdown, which put the Oct. 15-29 filing window on hold. "With the government shutdown, there’s nobody that can put out official information on what’s going to happen," said William Godfrey, an engineering associate at Kessler and Gehman Associates. His clients include schools, churches and American Indian tribes that want to apply for LPFM stations. He's still preparing applications, he said. "All we can do is assume it’s going to open on the 15th even though it’s very unlikely."

Godfrey said he plans to complete the paper application and then transfer the information to the electronic form when the window opens after the shutdown ends, he said. "It seems like the amount of days the government will be shut down will be the number of days the window will probably be delayed," he said.

Despite the expected delay, Godfrey said his engineering team has the information it needs to go forward with successful applications for their clients. Godfrey uses software to determine whether a proposed station location would cause interference to other stations, he said. "That software matches the
FCC’s exactly so when we do our work in house, we know that it’s going to be acceptable with the FCC when it gets turned in." However, blocked access to the FM database is problematic, he said. "Every day FM applications are filed to the FCC and a lot of those applications are for full-service FM [stations], which require protection." Engineers trying to conduct studies no longer have access to that, he said. "Ever since the beginning of the month, we’ve been doing studies based on an older database and that could play a part in this."

Some state broadcast associations are still trying to figure out how they plan to file comments on the problems identified in the first nationwide Emergency Alert System test, said Suzanne Goucher, president of Maine Broadcasters Association. Comments are due Oct. 23 (CD Sept 25 p7). But without access to the public notice, it's difficult, she said. "The state associations will probably file something, but I can’t get my hands on the filing to review it [the public notice] and think about what we might want to say," she said. "What a mess."

The shutdown also affects radio license renewals, Goucher said. "We’re in the middle of a radio license renewal cycle, too, and a lot of the stuff folks need to prepare their license renewal paperwork is on the FCC website." If the shutdown continues up to and through the deadline for filing comments, "I would imagine an order to leave enough of a window for a complete record of filings that they’d probably push the deadline back," she said. The FCC plans to accept filings from these proceedings the day after the agency opens back up. Goucher doubts the agency can handle the expected avalanche of filings then, she said. "Practically speaking, I don’t know how they can hold to that." The commission will have to push some deadlines back, "otherwise their website is going to be taken down," said Goucher.

Other missed deadlines include replies in the public notice on Dish Network’s request for flexibility in its AWS-4 operations, which were due Oct. 10. Analysts and attorneys said the FCC could still act on the petition by Dec. 14, which would prompt Dish to bid nearly $1.6 billion in the Jan. 14 H-block auction (CD Oct 9 p4). Due Oct. 7 were oppositions to deny long-form applications filed by 33 winning bidders for the 3,104 paging licenses sold in FCC Auction 95. — Howard Buskirk, Kamala Lane, Monty Tayloe, Matthew S. Schwartz