



**November 2008**

## **Catch 22**

**Comments invited on revised forms . . .  
But where are the revised forms to comment on?**

*Davina Sashkin*  
*sashkin@fhhlaw.com*  
*703-812-0458*

In its ballyhooed *Diversity Order* last December the FCC adopted measures designed to promote more diverse participation in broadcast industry. In the past such efforts might have been expressly designed to favor minority- or women-owned entities, but intervening decisions of the Supreme Court have made such race/gender-based governmental favoritism difficult, if not impossible, for the FCC to embrace. Accordingly, the *Diversity Order* uses the broader substitute concept of “eligible entities” (EEs) – small businesses that meet certain criteria generally believed to be indicative of new and diverse entrants. (It is, of course, no accident that such entrants may be predominantly minorities and/or females.)

The *Diversity Order* was sprawling, spanning all sorts of areas within, and without, the FCC’s conventional jurisdiction. While some of the rule and policy changes technically became effective months ago, others did not because they involve changes to FCC forms, changes which require the blessing of the Office of Management and Budget (OMB). (See, e.g., the March and August, 2008 *Memos to Clients*.) The water was further muddied by the fact that the measures adopted did not automatically come with revised forms or instructions making clear how one is supposed to qualify as an EE and what information, exactly, the Commission expects an applicant to supply in support of a claim of EE-ship.

So we were all excited on November 6, when a notice in the Federal Register indicated that the FCC is gearing up to send its proposed forms over to OMB for review. In connection with that process, the Federal Register notice invited public comment about the FCC’s proposed form changes. Hot-cha, we figured, at long last we might get a gander at something a bit more concrete.

Bad news. The FCC’s notice consists only of terse, and not especially illuminating, summary descriptions of the proposed changes to the Commission’s forms. While the Commission has set a January 5, 2009, deadline for public comments on the changes, the Federal Register notice has not clarified much. Instead, it merely notes that the FCC has

proposed to modify a number of forms (and their respective instructions) to include: (a) a definition of “eligible entity” (as applied to the existing Equity Debt Plus standard for attributable interests); and (b) a question asking whether the applicant is claiming EE status. In addition, some of the forms will now include a question requiring certification of compliance with the new anti-discrimination rules (*see* the related article in the August, 2008 *Memo to Clients*), as well as a question regarding divestiture of “non-compliant, grandfathered cluster[s] of radio licenses” where a station is being assigned to an eligible entity.

The problem is: ***none of the proposed forms are provided in the notice***, and thus only abstract descriptions about what the forms will say are available for review and comment. In fact, according to FCC staff, they don’t have to make the actual proposed forms public until ***after*** the deadline for public comment on the forms. So the FCC has solicited comments about form changes which it is not disclosing to the public and which it won’t disclose to the public until after the deadline for comments has passed. Stop us when this starts making sense.

The forms which the FCC is proposing to change are: 301 (new broadcast construction permit), 303-S (broadcast renewal), 314 (consent to assignment of broadcast license), 315 (consent to transfer of control of broadcast licensee), 345 (consent to assignment/transfer of FM or TV translator or LPTV station).

If you are so daring as to want to enter the funhouse, we would be happy to assist you in submitting comments to FCC. Note that we expect that there will be a further opportunity to comment on all this once the FCC finally submits its proposals to OMB, since we understand that OMB itself will solicit comments. Ideally, that opportunity will be more meaningful than the one the FCC has put on the table.